
**Thomas P. DiNapoli
COMPTROLLER**



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**OFFICE OF THE
NEW YORK STATE COMPTROLLER**

**DIVISION OF STATE
GOVERNMENT ACCOUNTABILITY**

**EMPIRE STATE
DEVELOPMENT
CORPORATION**

**COMPLIANCE WITH
FREEDOM OF
INFORMATION LAW
REQUIREMENTS**

Report 2006-S-110

AUDIT OBJECTIVE

Our objective was to determine whether the Empire State Development Corporation's (ESDC) efforts to manage and monitor Freedom of Information Law (FOIL) requests result in a timely release of information consistent with FOIL requirements.

AUDIT RESULTS - SUMMARY

We found ESDC can improve its management and monitoring of FOIL requests to ensure the timely release of information.

ESDC receives about 100 FOIL requests each year, but does not always reliably record the date when each request is received, such as with a date stamp. This makes it difficult to ensure ESDC complies with legal time frames. When ESDC receives a written request for records from the public under FOIL, it has five business days to grant or deny access, or if more time is needed, to acknowledge the receipt of the request in writing. We found ESDC did not act within the five-day time frame for at least 30 percent of the FOIL requests we examined. Our tests showed at least 21 requests were acknowledged from 1 to 26 days late. Another 32 requests did not have reliable receipt dates recorded, but ESDC's response to many of these appeared late when compared to the dates on the request letters. On average, we concluded ESDC

acknowledged requests seven to eight business days after receipt; at least two days later than FOIL requires.

FOIL specifies the acknowledgment letter must indicate the approximate date when the request will be granted or denied, which in most cases cannot exceed 20 additional business days from the date of the letter. ESDC's acknowledgment letters generally indicated a determination would be made within ten business days. We found that ESDC did not meet the specified time frames for 53 of the 81 cases we reviewed where acknowledgment letters were issued to requesters. In 28 instances, ESDC was late 10 or more days, the longest being 99 days late.

Our report contains five recommendations to ESDC officials to correct the problems identified during our audit. ESDC officials generally agreed with our recommendations and are taking steps to implement changes.

This report, dated August 29, 2007, is available on our website at <http://www.osc.state.ny.us>. Add or update your mailing list address by contacting us at: (518) 474-3271 or Office of the State Comptroller
Division of State Government Accountability
110 State Street, 11th Floor
Albany, NY 12236

BACKGROUND

Empire State Development Corporation (ESDC) is New York State's lead economic development agency. ESDC's mission is to provide the highest level of assistance and service to businesses in order to encourage economic investment and prosperity in New York State. ESDC works closely with businesses to identify creative solutions to problems, generate opportunities for growth, and help businesses achieve their short- and long-term goals.

Article 6 of the New York State Public Officers Law provides for public access to government records. The statute, generally referred to as the Freedom of Information Law (FOIL), applies to any State agency, public authority and local government entity, with the exception of the Judiciary and the State Legislature. Under FOIL, each agency, including public authorities, is required to make all eligible records available for public inspection or copying. Such records include, but are not limited to, reports, statements, opinions, folders, files, microfilms, and computer tapes or discs.

ESDC receives about 100 FOIL requests each year. FOIL specifies time frames for the processing of FOIL requests by agencies when granting or denying access to requested records. However, agencies may develop their own more stringent internal policies and procedures for the processing of FOIL requests. If a denied request is appealed, the agency must send copies of the appeal and subsequent determination to the Committee on Open Government (COOG). Among other things, COOG issues advisory opinions, and makes recommendations to the Legislature, on matters relating to FOIL.

The New York State Archives and Records Administration (SARA) specifies

requirements for FOIL record retention. Generally, all correspondence documenting an agency's FOIL requests is to be maintained for six months after resolution of the request.

AUDIT FINDINGS AND RECOMMENDATIONS

Internal Policies and Procedures

ESDC has internal policies and procedures related to FOIL. We reviewed these policies and procedures and found they do not specify a time frame for making a determination on access to requested records. Rather, they refer to the fact that FOIL specifies time frames for the processing of requests. According to FOIL, such a determination should be made within 20 business days of the date when a letter was sent to the requester acknowledging the request.

We reviewed ESDC's acknowledgment letters for our audit period and found that most of the letters stated such a determination would be made within ten business days. However, some of the letters specified no time frame for the determination. We recommend ESDC specify a time frame for this determination in its policies and procedures and use this time frame in its acknowledgment letters.

(In response to our draft report, ESDC agreed to restate the FOIL timeframes in its internal FOIL policies and procedures, and use those timeframes in its acknowledgment letters.)

Each agency is required to maintain a reasonably detailed current list by subject matter of all records in its possession (subject matter list), whether or not all items are available under FOIL. We found ESDC maintains an updated subject matter list.

*Compliance with FOIL-Specified Time
Frames*

FOIL specifies time frames for the processing of requests by agencies. Compliance is important because delays in responding to FOIL requests equate to a denial of the FOIL request and could result in unnecessary appeal proceedings for the agency. We found the need for improvements in this area.

Acknowledgment Letters

ESDC provided us with a spreadsheet which detailed important dates for each of the 104 FOIL requests received between December 1, 2005 and October 3, 2006. When ESDC receives a written request for records from the public under FOIL, it has five business days to grant or deny access, or if more time is needed, to acknowledge the receipt in writing. Three of these requests had been received so recently that initial action was not yet due at the time of our visit.

We evaluated ESDC's compliance with the 5-day requirement for the other 101 requests by comparing ESDC's date received stamp with the date of the acknowledgment letter on file. In some cases, ESDC failed to date stamp the actual FOIL request upon receipt. We therefore tested the accuracy of the receipt dates listed in ESDC's spreadsheet by comparing them to original documentation for cases where the files had been stamped. We found discrepancies in about one-third of the cases and concluded that the dates were not reliable. Instead, we took a conservative approach and used the date of the request as the received date whenever there was no date stamp evidenced.

Our analysis showed ESDC took an average of eight days to initially act on the requests; three days longer than allowed by the law. More importantly, ESDC was late in initially

acting on 40 percent of the requests with delays ranging from 1 to 65 days beyond the period allowed by FOIL.

ESDC officials disagree with our calculation and our conclusions about the overall accuracy of dates recorded in their spreadsheet. However, even if the 28 requests lacking date stamps were excluded, our analyses would still indicate that ESDC is chronically late in responding to requests. ESDC's averaged 7 business days to initially act on the 73 requests that were date stamped, with 21 requests (30 percent) acted upon from 1 to 26 days late.

ESDC officials stated that in some of the instances acknowledgment letters were not sent timely because the FOIL Officer was on an extended leave of absence. The officials said that another ESDC employee was designated as backup for the FOIL Officer, but like the FOIL Officer, this individual also had many other responsibilities. The officials noted that, in their opinion, there is not enough staff to perform FOIL duties. We note that it is not unreasonable to expect an agency to be able to send a standard acknowledgment letter within five business days of the receipt of a FOIL request.

We also found that one of the requests may not have been acknowledged at all, as there was no documentation in ESDC's files indicating that an acknowledgment letter had been sent. ESDC officials stated that this request was forwarded to another department to be handled. However, the FOIL Officer is responsible for coordinating ESDC's response to all such requests. Accordingly, the FOIL Officer should have followed up to ensure that the matter was handled properly and should have documented the response in the FOIL folder.

(In response to our draft report, ESDC acknowledged that it is responsible for ensuring that the FOIL law is complied with at all times, and will improve its compliance in this area.)

Determination of Accessibility of Information

FOIL specifies the acknowledgment letter must indicate the approximate date when the request will be granted or denied. Where an agency determines to grant a request in whole or in part, disclosure in most instances cannot exceed 20 additional business days, from the date of the acknowledgment letter.

We reviewed the acknowledgment letters and assessed ESDC's timeliness in making a determination on accessibility to the requested records for 85 of the 104 requests ESDC received during our audit period. In four of the requests, we could not assess ESDC's timeliness in making the determination, because the acknowledgment letter for one request was not on file, two requests were too recent to audit, and one request was returned undelivered. We note that the returned letter was mailed to a different address than the one provided by the requester and there was no indication any attempt was made to mail the letter to the correct address.

For 75 of the remaining 81 requests, the acknowledgment letters stated that ESDC would make a determination within 10 business days (for the other 6 requests, ESDC gave no time frame for its determination in the acknowledgment letters). However, we found ESDC failed to meet this time frame in 51 of the 75 requests (66 percent). In these 51 instances, ESDC was between 1 and 99 days late. In 28 instances, ESDC was late by 10 or more days. On average, ESDC took 30 days longer than originally indicated for these 28 requests. In addition, 5 of the 75 requests

with specified time frames did not have documentation in the files to support ESDC providing the requested records. Therefore, we were unable to determine if ESDC met FOIL time frames for providing records for these five requests.

Regarding the 6 requests where ESDC gave no time frame for its determination in the acknowledgment letters, we evaluated ESDC's response time against a 20-day time frame, since FOIL states that the determination should be made within 20 business days of the acknowledgment letter. We found ESDC met this 20-day time frame in 2 requests and failed to meet the time frame in 2 requests (it was late by 1 day and 4 days). In the other two requests, there was no documentation indicating that ESDC took any action after the acknowledgment letters were sent. Thus, we could not determine whether ESDC had made the determination for these two requests.

ESDC officials noted that their performance would be much better if the 20-day standard were applied to all the requests. However, according to the provisions of FOIL, the 20-day standard does not apply if the acknowledgment letter gives a different time frame (as was the case in 75 of ESDC's acknowledgment letters). If the acknowledgment letter states that a determination will be made within ten business days (as was the case in these letters), the determination should be made within that time frame, because that is what the requester has been told to expect.

(In response to our draft report, ESDC indicated they will respond in accordance with the time frame provided in the acknowledgment letter.)

In addition, when the time frames specified in the acknowledgment letters cannot be met,

FOIL requires an agency to correspond in writing with the requester, notifying them of the delays and the anticipated release date of the records. However, ESDC officials were not able to provide us with such written correspondence for any of the 51 late responses.

Denial of FOIL Requests

FOIL permits an agency to deny public access to records under certain circumstances. Of the 101 FOIL requests that we reviewed to which ESDC responded, ESDC denied all or parts of 33 requests. We found that in all instances, the reasons for the denials were in accordance with FOIL requirements.

Processing of Appeals

Under FOIL, any person denied access to records may appeal in writing within 30 days. An agency must then explain in writing the reason for further denial or provide access to the records sought within ten business days of the receipt of the appeal. An agency must also send copies of all appeals and subsequent determinations to COOG.

ESDC reported that 12 of the 33 FOIL denials during our audit period were appealed by the requesters. We evaluated ESDC's compliance with FOIL requirements for these 12 appeals. We found that ESDC's average response time for the appeals was approximately ten days. However, for 1 of the 12 appeals, ESDC responded 23 days after the appeal was received. ESDC officials said this response was late because the appeal letter was inadvertently placed on the FOIL Officer's desk while he was on leave.

We also reviewed COOG's files to determine whether ESDC had sent copies of the 12 appeals to COOG, as required. We found that

only 5 of the 12 appeals were on file with COOG.

Recommendations

1. Ensure that all FOIL requests are date stamped upon receipt.
2. Specify, in the policies and procedures related to FOIL, a time frame for making a determination on access to requested records and use this time frame in acknowledgment letters.
3. Acknowledge and respond to FOIL requests within the time frames required by law, and allocate sufficient resources to enable compliance with these time frames.
4. Correspond in writing to the requester when FOIL requests cannot be fulfilled within specified time frames, explaining why and providing a new time frame.
5. Ensure that responses to appeals are made within FOIL-specified time frames and all appeals are filed with COOG.
6. Recommendation deleted.

AUDIT SCOPE AND METHODOLOGY

We conducted our performance audit in conformance with generally accepted government auditing standards. We audited the efforts by 22 selected public authorities to manage and monitor FOIL requests. This report includes details of our audit of 1 of these 22 authorities, ESDC, and covers the period December 1, 2005 through October 3, 2006. A complete listing of all 22 reports is included in Exhibit A.

To accomplish our objective at ESDC, we examined ESDC's FOIL request files and internal policies and procedures. We also

interviewed ESDC officials. ESDC reported it received 104 FOIL requests during our audit period. We reviewed 101 of them. Three requests were not included in our review, because they had recently been received and no action was due on them at the time of our audit. We reviewed ESDC's appeal decisions and evaluated the timeliness of communication of the appeal decisions with the requester and COOG. We also compared ESDC appeal files at COOG to the appeals on file at ESDC.

Our evaluation of the number of business days between the receipt and acknowledgment of FOIL requests was calculated using ESDC's date received stamp through the date of the acknowledgment letter on file. When no received date stamp was on the request, we used the date of the request as the received date. ESDC did provide an internal FOIL database listing dates FOIL requests were received. However, we were unable to use the database because of discrepancies between dates in the database and dates of the correspondence in the files.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational

independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent audits of program performance.

AUTHORITY

The audit was performed pursuant to the State Comptroller's authority as set forth in Article X, Section 5 of the State Constitution and Section 2803 of the Public Authorities Law.

REPORTING REQUIREMENTS

Draft copies of this report were provided to ESDC officials for their review and comment. Their comments were considered in preparing this report, and are included as Appendix A. Appendix B contains State Comptroller comments which address certain matters included in ESDC's response.

Within 90 days of the final release of this report, as required by Section 170 of the Executive Law, the Chairman of the Empire State Development Corporation shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons therefor.

CONTRIBUTORS TO THE REPORT

Major contributors to this report include Frank Houston, John Buyce, Chris Rush, Lisa Rooney, Kelly Engel, Sarah Purcell, and Dana Newhouse.



EXHIBIT A

Reports on Public Authority Compliance with FOIL Requirements

<u>Report Number</u>	<u>Public Authority</u>
2006-S-107	New York State Thruway Authority
2006-S-108	Long Island Power Authority
2006-S-109	MTA/New York City Transit
2006-S-110	Empire State Development Corporation
2007-S-33	Battery Park City Authority
2007-S-34	New York State Bridge Authority
2007-S-35	Central New York Regional Transportation Authority
2007-S-36	Convention Center Operating Corporation, NYC
2007-S-37	Development Authority of the North Country
2007-S-38	Dormitory Authority of the State of New York
2007-S-39	Environmental Facilities Corporation
2007-S-40	Housing Finance Agency
2007-S-41	Hudson River/Black River Regulating District
2007-S-42	New York Power Authority
2007-S-43	Niagara Frontier Transportation Authority
2007-S-44	Ogdensburg Bridge and Port Authority
2007-S-45	Olympic Regional Development Authority
2007-S-46	Port of Oswego Authority
2007-S-47	Rochester-Genesee Regional Transportation Authority
2007-S-48	Roosevelt Island Operating Corporation
2007-S-49	Thousand Islands Bridge Authority
2007-S-50	MTA/Bridges and Tunnels

APPENDIX A - AUDITEE RESPONSE



Anita W. Laremont
Senior Vice President - Legal
and General Counsel

July 11, 2007

Frank J. Houston
Audit Director
Office of the State Comptroller
Division of State Government Accountability
123 William Street - 21st Floor
New York, NY 10038

Re: Audit 2006-S-110

Dear Mr. Houston:

ESDC is in receipt of the Office of the State Comptroller's Draft Report 2006-S-110 ("Report") related to its 2006 review of ESDC's compliance with FOIL requirements. ESDC review of the Report resulted in the attached comments. Please do not hesitate to call me if you have any questions about the enclosed.

Sincerely yours,

A handwritten signature in cursive script that reads "Anita W. Laremont".

Cc: Patrick Foye - ESDC Chairman Designate
Avi Schick - ESDC President Designate

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**EMPIRE STATE DEVELOPMENT CORPORATION'S
RESPONSE TO OSC DRAFT AUDIT REPORT
2006-S-110
COMPLIANCE WITH FREEDOM OF INFORMATION
LAW REQUIREMENTS**

The following constitutes the Empire State Development Corporation (ESD) response to the Office of the State Comptroller's (OSC) draft audit of ESD's Compliance with Freedom of Information Law (FOIL) Requirements (2006-S-110) (the "Report").

Summary

ESDC recognizes its obligation to comply with FOIL requirements, and believes it has done a *good job in doing so, particularly in light of the fact that it receives approximately one FOIL request every other day*. Many of these requests are vast in scope. These requests involve the coordination of numerous ESDC departments, regional offices and subsidiaries, and are handled by a small staff responsible for a number of other matters. Given these circumstances, ESDC has been efficient and responsive in answering FOIL requests and is generally in compliance with the intent and spirit of FOIL. Most importantly, ESDC notes that OSC acknowledges that its review determined that all denials of documents under FOIL were in accordance with FOIL requirements, which ESDC believes to be the most significant aspect of FOIL.

ESDC recognizes that OSC identified instances where record keeping was insufficient to document compliance with FOIL timeframes, and that certain responses were outside the FOIL time frames. While staff explained that an extended leave by the FOIL Officer resulted in these issues, and that since that individual's return, FOIL has been fully complied with in a timely fashion, ESDC will ensure that adequate resources are dedicated to FOIL so that these issues do not reoccur.

Internal Policies and Procedures

ESDC disagrees with the Report's finding that ESDC's internal FOIL policies and procedures "do not specify a time frame for making a determination on access to requested records." ESDC's existing policies and procedures state that "[a]ll FOIL requests shall be responded to in accordance with the manner prescribed by FOIL", and that "FOIL specifies time frames for the processing of requests by agencies." Indeed, the Comptroller's Office stated on December 8, 2006 that "ESDC provided us with internal policies and procedures related to FOIL. Our review found that they were equivalent to FOIL." In order to avoid the circumstance where ESDC's acknowledgement letter specifies a different (shorter) time frame for determinations than the FOIL law, ESDC agrees to restate the FOIL timeframes in its internal FOIL policies and procedures, and use those timeframes in its acknowledgement letters.

ESDC maintains that the manual entry of a date should be accepted as an accurate depiction of when a request was received. OSC's use of the date of a request as the date on which a request

* Comment 1

* See State Comptroller's Comments, page 13

was received in the absence of a date stamp is both arbitrary, and almost certainly universally erroneous, in that most requests are mailed – sometimes many days after the date on the request, and received by ESDC several days later.

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Comment
2

Compliance with FOIL-Specified Time Frames

Acknowledgment Letters

Where no ESDC date stamp was on the request, OSC incorrectly calculates the number of business days between receipt and acknowledgement of the FOIL by using the date of the FOIL request. Use of the date of the request fails to take into account delivery time or the fact that dates on requests often do not match the date that they were sent.

*
Comment
2

Moreover, every folder provided to the auditors indicated the date of receipt of the FOIL request by ESDC. This date is written prominently on the jacket of every file by the FOIL Officer's assistant when the folder is created upon receipt of the request. In the absence of date-stamping, this date should be used as the date of receipt.

The Report states that there were discrepancies found between dates of receipt listed in an ESDC spreadsheet (prepared by the FOIL officer's assistant and not the FOIL officer as stated in the Report) and the "original documentation for cases where the files had been stamped." ESDC does not agree. The dates provided on the files and spreadsheet are virtually identical. Additionally, an analysis of unstamped letters and file and spreadsheet dates attests to the accuracy of ESDC's response time and files.

*
Comment
3

ESDC agrees that it took more time than the law permits to respond to a number of requests, even though we disagree with the precise numbers. We explained that a large part of the delay was due to the FOIL Officer being on an extended leave of absence during the audit period. The individual responsible for filling in did not adequately fulfill FOIL functions during this period. ESDC's review of its FOIL records for an extended period indicates that had OSC selected an audit period that did not encompass the FOIL Officer's absence, the results would have demonstrated much better compliance. Nevertheless, ESDC acknowledges that it is responsible for ensuring that the FOIL law is complied with at all times, and will therefore improve its oversight of compliance with this function in the future.

Determination of Accessibility of Information

ESDC agrees that where its acknowledgement letter states that the response will be provided within ten (10) days instead of the statutorily-required twenty (20) days, we must adhere to the ten (10) day standard. Prospectively, we will ensure that we respond in accordance with the time frames provided in the acknowledgement letter.

Processing of Appeals

The draft audit asserts one of the files lacked documentation of the resolution of an appeal. There appears to be a misunderstanding of that file's contents. Records in the file indicate that an

* See State Comptroller's Comments, page 13

appeal could not be answered as the requestor appealed before ESDC made its final determination with respect to the request. Nonetheless, the requestor was informed by the Appeals Officer of all communications, denials, reasons for denials and invited the requestor to appeal ESDC's final determination. No such appeal was received. This is all documented in the file.

*
Comment
4

Recommendation 1

ESDC agrees to endeavor to ensure that all FOIL requests are date stamped upon receipt, but recognizes that there will be occasional human error in this regard, which may result in the manual entry of the date received on a file.

Recommendation 2

ESDC will specify in its policies and procedures the time frame for making FOIL determinations.

Recommendation 3

ESDC agrees to respond to FOIL requests in a timely fashion, and will ensure that sufficient resources are allocated to FOIL activities.

Recommendation 4

ESDC will ensure that it communicates with requesters in writing when FOIL requests cannot be fulfilled within specified time frames.

Recommendation 5

ESDC will ensure that all FOIL appeals are made in a timely fashion, and filed with the Committee on Open Government.

Recommendation 6

ESDC agrees to maintain all correspondence documenting FOIL requests for at least six months after resolution of the request.

*
Comment
4

* See State Comptroller's Comments, page 13

APPENDIX B - STATE COMPTROLLER'S COMMENTS

1. We revised our report, as appropriate, to reflect this information.
2. As indicated in the body of the report, we took a conservative approach and used the date of the request as the received date whenever there was no date stamp evidenced, because our tests found the manual entries to be unreliable. Even with the 28 requests lacking date stamps excluded from our analyses, we found ESDC to be chronically late in responding to requests.
3. We tested the accuracy of the dates listed in ESDC's spreadsheet by comparing them to original documentation in the files and found discrepancies in about one-third of the cases. Based upon this review, we concluded that the spreadsheet dates were not reliable.
4. We revised the body of our report and deleted the corresponding Recommendation 6 based upon additional documentation provided by ESDC.