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**OFFICE OF THE
NEW YORK STATE COMPTROLLER**

**DIVISION OF STATE
GOVERNMENT ACCOUNTABILITY**

**NEW YORK CONVENTION
CENTER OPERATING
CORPORATION**

**COMPLIANCE WITH
FREEDOM OF
INFORMATION LAW
REQUIREMENTS**

Report 2007-S-36

AUDIT OBJECTIVE

Our objective was to determine whether the New York Convention Center Operating Corporation's (CCOC) efforts to manage and monitor Freedom of Information Law (FOIL) requests result in the timely release of information consistent with FOIL requirements.

AUDIT RESULTS - SUMMARY

CCOC needs to improve its management and monitoring of FOIL requests. We found that CCOC did not follow FOIL requirements for 30 percent of 27 information requests it received during our audit period. As a result, some requests were not resolved for almost two months or more, and there is some doubt whether two requests were ever resolved at all.

FOIL specifies a timetable on how requests are to be processed and how an agency should respond when granting or denying access to requested information. FOIL requires an agency either grant, deny or acknowledge the receipt of a written request for a record in writing, within five business days. We found that CCOC did not meet the five-day time frame for 8 of the 27 requests received during our audit period. On average, we found that CCOC initially acted on FOIL requests 13 days after receipt; eight days later than FOIL requires.

FOIL also specifies the acknowledgement letter must indicate an approximate date, within 20 days of the letter, when a determination will be made. We found CCOC generally provided the requested information at the same time as it first acted on each request. As a result, most requests were resolved within ten days. However, in four cases, the resolution did not occur until more than 50 days after the request was

received. In addition, officials were unable to demonstrate when, or even if, two of the requests had been resolved.

Our report includes five recommendations directed toward improving CCOC's compliance with FOIL. CCOC officials agreed with our recommendations and are taking steps to implement changes.

This report, dated July 16, 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

CCOC was established in 1979 as a public benefit corporation to operate and maintain the Jacob K. Javits Convention Center in New York City. CCOC derives its revenue from rental and event service fees, as well as from revenue contracts for advertising and concessions operating at the Convention Center.

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.

CCOC received 27 FOIL requests during our audit period, January 1, 2005 through September 13, 2006. 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, FOIL specifies 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. In addition, 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

Under FOIL, agencies are required to make all eligible records available for public inspection or copying and to promulgate rules and regulations including: the times and places such records are available; the persons from whom such records may be obtained; and the fees for copies of records which generally may not exceed 25 cents per page. We found CCOC developed its own written policies and procedures, which are consistent with, and in some cases more stringent than, the provisions set forth in the FOIL statute.

In addition, FOIL requires agencies maintain a reasonably detailed current list by subject matter (subject matter list) of all records in the possession of the agency, whether or not they are available under FOIL. This list is to

be provided to the public upon request. We found CCOC does not maintain a subject matter list. CCOC officials were not aware that FOIL requires them to establish and maintain a subject matter list and, in response to our findings, have agreed to create one.

Compliance with FOIL-Specified Time Frames

FOIL specifies time frames for processing requests received by agencies. Compliance is important because delays in responding to FOIL requests equate to a denial of the request and could result in unnecessary appeal proceedings for the agency. We found that, although most requesters received the information they asked for within ten business days, CCOC did not initially acknowledge FOIL requests timely, as required.

When CCOC 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. CCOC's internal policy also requires that an acknowledgement letter be provided within five business days of receipt of a FOIL request. We reviewed the 27 requests CCOC received during our audit period and found it took CCOC an average of 13 business days to initially act on the requests. Eight of the 27 requests (30 percent) exceeded the five-day requirement, with one acknowledgement as late as 69 days after receipt.

FOIL specifies the acknowledgement 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 acknowledgement letter (CCOC's internal policy is 10 business days). Where an agency is unable to provide the requested

records within 20 additional business days, the agency must provide a written explanation and a date certain within which the records will be provided. We found CCOC generally provided the requested information at the same time as it first acted on a request. As a result, two-thirds of the requests we reviewed were resolved within ten days. However, in four cases, this resolution did not occur until more than 50 days after the request was received.

CCOC does not have a tracking system to monitor the status of its responses to FOIL requests. As a result, officials were unaware that complete documentation supporting CCOC's responses to two requests were missing and officials were unable to determine when, or even if, these requests had been resolved. The FOIL officer told us the requests had each been forwarded to specific departments within CCOC for response. However, the officer had not received copies of the responses and had not followed up to ensure the issues were resolved.

SARA specifies that documentation supporting the disposition of each FOIL request be maintained on file for at least six months after the request is resolved. One of the two requests discussed above was received by CCOC in June 2006 and could not have been resolved more than six months prior to our site visit. Therefore, documentation supporting the disposition of this FOIL request should have been on file.

(In responding to our draft report, CCOC officials agreed to take several corrective actions, including providing acknowledgement letters within five business days of the receipt of a FOIL request and creating a tracking system database to be maintained by CCOC's Legal Department. Officials also noted that two of the eight instances of late responses related to requests

for information about contract awards that had not yet been made, thereby precluding CCOC from providing information immediately and increasing the average response time. In such cases, FOIL would simply require CCOC to acknowledge the request timely, providing a future date when a determination would be made on the accessibility of the information.)

Denial of FOIL Requests

FOIL permits an agency to deny public access to records under certain circumstances. Any person denied access to records may appeal in writing within 30 days. Within ten business days of the receipt of the appeal, CCOC must explain in writing the reason for further denial or provide access to the records sought. CCOC must also send copies of all appeals and subsequent determinations to COOG. We found that CCOC did not explicitly deny any requests during our audit period. However, delays in responding to FOIL requests equate to a denial of the request.

For one of the 27 requests we reviewed, the individual requesting information filed an appeal with CCOC based on the lack of a timely response. CCOC did provide the information to the requester within ten days of the appeal. However, in the end, the information was not provided until 55 business days after CCOC's receipt of the initial request.

We reviewed appeal records on file at COOG and found that a copy of the above appeal was not on file, as required. CCOC officials explained that they did not forward the appeal information because they considered the case simply as a second request for information previously requested. However, FOIL specifically states that a request which is not acknowledged within five days of receipt is deemed to be a denial. Furthermore, the

second contact from the requester clearly specified it was an appeal of the results of the previous request.

Recommendations

1. Develop and maintain a current list by subject matter of all records in the possession of CCOC to be distributed to the public upon request.
2. Acknowledge and respond to FOIL requests within the time frames required by law. If circumstances do not allow for the resolution of a FOIL request within five days of receipt, communicate with the requester in writing to provide a date, within 20 days, when a determination on the accessibility of the records will be made.
3. Maintain a log of all FOIL requests and related communications with requesters and monitor this activity to ensure compliance with required timeframes.
4. Maintain all correspondence relating to FOIL requests for at least six months following resolution.
5. Ensure that all appeal decisions and related correspondence are submitted to the Committee on Open Government as required by FOIL.

AUDIT SCOPE AND METHODOLOGY

We conducted our performance audit in compliance 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 CCOC, one of these 22 authorities, and covers the period January 1, 2005 through September 13,

2006. A complete listing of all 22 reports is included as Exhibit A.

To accomplish our objective, we reviewed CCOC's internal policies and procedures pertinent to FOIL to assess compliance with the law. In addition, we met with CCOC officials to confirm and enhance our understanding of the organization's FOIL request process. We also reviewed all 27 FOIL requests CCOC reported receiving during our audit period, reviewed the steps CCOC took to process these requests, and evaluated their timeliness. In addition, we extensively reviewed each selected FOIL request, including the subject matter of the request, and the dates when each was prepared, received, acknowledged and resolved. We also reviewed files at COOG to ensure that the authority properly reported appeal activity consistent with FOIL.

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 the matters discussed in this report were provided to CCOC officials for their review and comments. Their comments were considered in preparing this report and are attached as Appendix A.

Within 90 days of the final release of this report, as required by Section 170 of the

Executive Law, the President of the New York Convention Center Operating 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 the recommendations were not implemented, the reasons therefor.

CONTRIBUTORS TO THE REPORT

Major contributors to this report include Frank Houston, John Buyce, Christine Rush, Myron Goldmeer, Lisa Rooney, David Louie, Rick Podagrosi, Kelly Engel and Jean-Renel Estime.

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 Authority
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

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June 20, 2007

Frank J. Houston
Audit Director
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Division of State Government Accountability
123 Williams Street – 21st Floor
New York, NY 10038

Re: Audit No. 2007-S-36

Dear Mr. Houston:

Enclosed please find the New York Convention Center Operating Corporation's response to Draft Audit Report 2007-S-36.

Very truly yours,



Gerald T. McQueen
President and Chief Executive Officer

RESPONSE TO DRAFT AUDIT REPORT 2007-S-36

The following is the New York Convention Center Operating Corporation's (CCOC) response to the Draft Audit Report 2007-S-36 of the Office of the State Comptroller (OSC) with respect to CCOC's handling of Freedom of Information Law (FOIL) requests.

With respect to the required maintenance of a subject matter list, CCOC is aware of the requirement and is in the process of retaining the services of a consultant to conduct an inventory of its paper and electronic records and to assist CCOC in creating such a list.

With respect to two of the responses that exceeded the five business day requirement, please note the following:

- [REDACTED] request dated 3/23/06 was for information regarding anticipated contract awards that were not actually made until 5/8/06.
- [REDACTED] request dated 1/18/06 was for information regarding a contract award that was not actually made until 2/10/06.

CCOC submits that OSC's finding that it took CCOC an "average of 13 business days" to respond to FOIL requests is misleading. The average in this case is affected by four instances (including the two described above) of unusually long delays. These outliers distort the "average" and obscure the fact that CCOC responded to more than two thirds of the requests it received in five business days or less.

CCOC has no comment on the other findings contained in the preliminary report and is in agreement with all of the recommendations. CCOC has already taken the following measures to improve its compliance with FOIL:

- Circulated a memorandum (to be reissued every six months) to all departments requiring that all FOIL requests be date stamped (unless received by e-mail) and forwarded immediately to the Legal Department. A copy of the memorandum is attached.
- Created a database to be maintained by the Legal Department, where all FOIL requests are entered, their progress tracked, and electronic reminders issued to the FOIL Access Officer (General Counsel) and her assistant on the fourth business day following receipt.
- Created a form notice to be placed in purchasing agent's file to remind the purchasing agent of pending requests for contract award information.

In addition, CCOC acknowledges its obligation to provide acknowledgement letters within five business days in the event it is unable to provide a substantive response to the request, and its obligation to ensure that appeal decisions are submitted to the Committee on Open Government.