

Capital District Transportation Authority

Compliance With Freedom of Information Law Requirements

Report 2019-S-70 | October 2020

OFFICE OF THE NEW YORK STATE COMPTROLLER
Thomas P. DiNapoli, State Comptroller

Division of State Government Accountability



Audit Highlights

Objectives

To determine if the Capital District Transportation Authority (CDTA) and its subsidiaries have policies, procedures, and processes in place to fulfill CDTA's responsibilities under the Freedom of Information Law (FOIL), and to determine if CDTA is in compliance with its responsibilities under FOIL. The audit covered the period from January 1, 2017 through January 23, 2020.

About the Program

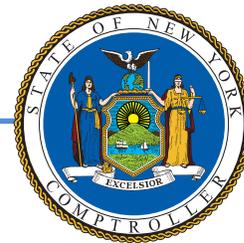
CDTA was created in 1970 by the New York State Legislature. Today, CDTA is the premier mobility provider in the Capital Region, providing regular route bus service, shuttle systems, and paratransit services. Article 6 of the New York State Public Officers Law provides for public access to government records. The statute, generally referred to as FOIL, applies to any State agency, public authority, and local government entity, with the exception of the judiciary and the State Legislature. Under FOIL, agencies, including public authorities, are required to make all eligible records available for public inspection or copying. Agencies are further required to promulgate rules and regulations pertaining to the availability of records and procedures to be followed, including the fees for copies of records. Within five days of receiving the FOIL request, FOIL requires agencies to make the requested records available, deny the request in writing, or furnish a written acknowledgment of the request that states the approximate date when such request will be granted or denied.

Key Findings

- CDTA's policy is consistent with the provisions set forth in the FOIL statute. However, we found CDTA does not have formal internal procedures for processing FOIL requests, which has resulted in inconsistent practices regarding the timeliness of CDTA's responses to FOIL requests.
- CDTA did not respond within the statutory time frame for 26 of the 111 FOIL requests it received during the audit period, and completely missed responding to two. We found one request that was not acknowledged by CDTA for 100 business days. Further, due to incomplete information, we could not determine the timeliness for ten FOIL requests.
- CDTA does not have a formal method for tracking FOIL requests. Officials indicated there have been instances of FOIL requests being initially overlooked, resulting in a late response from CDTA.

Key Recommendations

- Develop and implement internal procedures to ensure FOIL requests and appeals are processed consistently.
- Provide formal training for employees involved in processing FOIL requests and appeals.
- Acknowledge and respond to FOIL requests within the time frames required by law. Grant or deny access to FOIL requests within five business days, or if more time is needed, acknowledge the receipt of the request in writing, indicating both the reason for the inability to grant the request within 20 business days and the approximate date when the request will be granted or denied.
- Maintain a log of all FOIL requests and related communications with requestors, and monitor this activity to ensure compliance with required time frames.



**Office of the New York State Comptroller
Division of State Government Accountability**

October 16, 2020

Mr. Jayme Lahut
Chairman
Capital District Transportation Authority
110 Watervliet Avenue
Albany, NY 12206

Dear Chairman Lahut:

The Office of the State Comptroller is committed to helping State agencies, public authorities, and local government agencies manage their resources efficiently and effectively. By so doing, it provides accountability for the tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities, and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit titled *Compliance With Freedom of Information Law Requirements*. This audit was performed pursuant to the State Comptroller's authority under Article X, Section 5 of the State Constitution and Section 2803 of the Public Authorities Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

Division of State Government Accountability

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Glossary of Terms

Term	Description	Identifier
Agency	Any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office, or other governmental entity performing a governmental or proprietary function for the State or any one or more municipalities thereof	<i>Key Term</i>
CDTA	Capital District Transportation Authority	<i>Auditee</i>
COOG	Committee on Open Government	<i>Key Term</i>
FOIL	Freedom of Information Law	<i>Law</i>
Policy	CDTA FOIL policy	<i>Key Term</i>
Record	Includes, but is not limited to, agency reports, statements, opinions, folders, files, microfilms, and computer tapes or discs	<i>Key Term</i>
SARA	New York State Archives and Records Administration	<i>Key Term</i>

Background

The Capital District Transportation Authority (CDTA) was created in 1970 by the New York State Legislature, as a public benefit corporation, to provide regional transportation services by rail, bus, water, and air. Today's CDTA is the premier mobility provider in the Capital Region, providing regular route bus service, shuttle systems, and paratransit services. CDTA subsidiaries own and operate the Rensselaer Rail and Saratoga Springs Train Stations. CDTA also operates the Northway Xpress commuter service between Saratoga County and downtown Albany. As of February 3, 2020, 640 people work at CDTA to deliver a transit system that serves more than 800,000 people who live and work in the region, transporting more than 55,000 customers each weekday.

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.

CDTA reported receiving 111 FOIL requests during our audit period, January 1, 2017 through January 23, 2020. FOIL specifies time frames for granting or denying access to requested records. Specifically, FOIL requires agencies to grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days. When an acknowledgment is given, it must include an approximate date that is reasonable under the circumstances and not more than 20 business days after the date of acknowledgment, indicating when a determination on the request to access records will be made. Additionally, agencies may develop their own more stringent internal policies and procedures for processing FOIL requests. If a denied request is appealed, FOIL requires the agency to send copies of the appeal and subsequent determination to the Committee on Open Government (COOG). Among its duties, COOG issues advisory opinions and makes recommendations to the Legislature on matters relating to FOIL. Within ten business days of receipt of an appeal, the agency must grant access to the records sought or fully explain the reasons for further denial in writing. Attorneys' fees and other litigation costs may be assessed against the agency for any failure to respond to a request or appeal within the statutory time frame. 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

In general, CDTA has an internal policy in place to govern its processing of FOIL requests, and this policy also governs FOIL requests for CDTA's subsidiaries. However, we found CDTA needs to improve its management and monitoring of FOIL requests. Moreover, our review of reported FOIL requests received for the audit scope period found CDTA did not comply with FOIL requirements for all requests it processed.

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 regarding 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. CDTA is responsible for processing FOIL requests for its subsidiaries, Rensselaer Rail and Saratoga Springs Train Stations. We found CDTA has a policy governing FOIL requests, which is consistent with the provisions set forth in the FOIL statute. However, we determined CDTA does not always follow consistent practices when charging fees for records. Our review of CDTA's FOIL requests found 37 requests were fulfilled by CDTA using either hard-copy documentation or CDs; however, CDTA only charged requestors in 13 of these instances. The Records Access Officer stated fees are not charged if records are provided via email; however, in cases where hard-copy documentation or CDs are required, the officer uses judgment about when to charge requestors. For example, if a requestor consistently submits FOIL requests, CDTA will charge for the records. CDTA uses its discretion when determining whether or not to charge a requestor; however, the Records Access Officer acknowledged that she did not receive training prior to assuming these FOIL request responsibilities.

In addition, FOIL requires agencies to maintain a reasonably detailed current subject matter list of all records in the agency's possession, whether or not they are available under FOIL. This list is to be provided to the public upon request, and the list is required to contain the date of its most recent update. We found CDTA maintains a subject matter list, which is available for the public on CDTA's website. However, we determined that the date of the most recent update for the subject matter list is not conspicuously indicated on the list, as required under FOIL. When asked why the date of the most recent update was not included on the subject matter list, officials stated they were unsure. Officials further attributed the missing information to employee turnover. This lack of information means the public who seek to utilize FOIL cannot be reasonably assured that they have the most up-to-date information regarding CDTA's records. Additionally, FOIL requires certain agencies that maintain websites to ensure that they provide for the online submission of FOIL requests. At the onset of our audit, we found CDTA's website did not allow for the online submission of FOIL requests. The CDTA website indicated requests could be sent via mail or fax. When the lack of a means for online submission of requests was brought to CDTA's attention, officials stated there used to be an email address specifically for FOIL requests, and this address was located on the CDTA website; however, officials were unsure why the email address was no longer listed. Officials indicated

employee turnover was most likely the reason the email address was inadvertently removed from the website. The lack of an option to submit FOIL requests online may hinder the public's ability to request records. Since this was brought to the attention of CDTA, the website has been updated to include an option for the public to submit FOIL requests via email.

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 denials of the requests and could result in unnecessary FOIL appeal proceedings and an assessment of attorneys' fees against the agency. When CDTA 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. CDTA's internal policy also requires that an acknowledgment letter be provided within five business days of receipt of a FOIL request. We found that CDTA did not acknowledge two FOIL requests. Additionally, CDTA did not initially acknowledge all FOIL requests within the required time frame of five business days. We were able to determine the timeliness of 101 of the 111 FOIL requests reportedly received by CDTA during the audit period; documentation was partially missing for ten of the FOIL requests we reviewed. Of these 101 FOIL requests, we found it took CDTA more than five business days to initially respond to 26 (26 percent), with one acknowledgment occurring as late as 100 days after CDTA received the initial request.

Additionally, FOIL specifies that if a request is initially acknowledged and not immediately fulfilled, the acknowledgment letter must indicate the approximate date when the request will be granted or denied, which must be reasonable under the circumstances of the request. Where an agency is unable to provide the requested records within 20 business days from the date of the acknowledgment letter, the agency must provide a written explanation and a date certain when the request will be granted in whole or in part. Moreover, 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. We found CDTA generally provided the requested information or denied the request at the same time as it first acted on a request. This was the case for 91 FOIL requests we reviewed. Further, our review found 16 requests were initially acknowledged by CDTA, and the acknowledgment included the requisite date when records would be provided or indicated that the requestor needed to provide additional information in order for CDTA to adequately fulfill the request. Lastly, there were two requests CDTA never acknowledged. One request was transferred to CDTA's legal department because it involved ongoing litigation with the authority, and, due to missing information, we were unable to determine CDTA's compliance with the other request. However, this request was received by CDTA in 2017, and according to SARA, CDTA was not required to keep the supporting documentation.

CDTA does not have a tracking system to monitor the status of its responses to

FOIL requests. As a result, officials were unaware that CDTA had not acknowledged two FOIL requests. Additionally, the lack of a formal tracking system hindered our ability to determine the entire population of FOIL requests CDTA received for the audit scope period. Although we reviewed documentation for all 111 FOIL requests reported by CDTA, we could not be reasonably assured that the provided documentation accounted for all FOIL requests CDTA received during the audit period.

Denial of FOIL Requests

FOIL permits an agency to deny public access to records that fall under various statutory exemptions. For example, FOIL exempts from disclosure records that, if disclosed, would impair present or imminent contract awards. Similarly, records that, if disclosed, would constitute an unwarranted invasion of personal privacy are exempt from FOIL. Any person denied access to records may appeal in writing within 30 days. Within ten business days of the receipt of the appeal, CDTA must explain in writing the reason for further denial or provide access to the records sought. CDTA must also send copies of all appeals and subsequent determinations to COOG. We found that CDTA denied or partially denied 27 requests during the audit period. For all denied requests, CDTA's response letter to the requestor included the reason for denial. During the audit period, CDTA received at least four appeals of denied FOIL requests. For one of the appeals, CDTA responded within ten days of its receipt and immediately notified COOG of the appeal. However, for the three additional reported appeals, CDTA did not inform COOG, nor did CDTA respond within ten days, as required. We spoke with CDTA's FOIL Appeals Officer, who was not aware that CDTA was required to notify COOG of the appeals they receive. The official further acknowledged that CDTA needs to better manage its appeals process to ensure compliance with FOIL. Going forward, the FOIL Appeals Officer indicated he would inform COOG of any appeals received.

Recommendations

1. Develop and implement procedures to ensure FOIL requests and appeals are processed consistently.
2. Provide formal training for employees involved in processing FOIL requests and appeals.
3. Update the subject matter list to meet the requirements of FOIL.
4. Update CDTA's website to include online submission of FOIL requests.
5. Acknowledge and respond to FOIL requests within the time frames required by law. Grant or deny access to FOIL requests within five business days, or if more time is needed, acknowledge the receipt of the request in writing, indicating both the reason for the inability to grant the request within 20 business days and the approximate date when the request will be granted or denied.

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6. Maintain a log of all FOIL requests and related communications with requestors, and monitor this activity to ensure compliance with required time frames.

Audit Scope, Objectives, and Methodology

The objectives of our audit were to determine if CDTA and its subsidiaries have policies, procedures, and processes in place to fulfill CDTA's responsibilities under FOIL, and to determine if CDTA is in compliance with its responsibilities under FOIL. The audit covered the period January 1, 2017 through January 23, 2020.

To accomplish our objectives, we reviewed relevant laws, regulations, and CDTA procedures pertinent to FOIL to assess compliance with the law. In addition, we met with CDTA officials to confirm and enhance our understanding of the organization's FOIL request process. We became familiar with, and assessed the adequacy of, CDTA's internal controls as they relate to its performance and our audit objectives. We also reviewed all 111 FOIL requests CDTA reportedly received during our audit period, reviewed the steps CDTA 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 the four FOIL appeals CDTA received during the scope period to ensure the authority properly reported appeal activity consistent with FOIL.

Statutory Requirements

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.

We conducted our performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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.

Reporting Requirements

A draft copy of this report was provided to CDTA officials for their review and formal comment. Their comments were considered in preparing this final report and are attached in their entirety at the end of it.

Within 180 days after final release of this report, as required by Section 170 of the Executive Law, the Chairman of the Capital District Transportation Authority 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 why.

Agency Comments



July 20, 2020

Carmen Maldonado, Audit Director
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Division of State Government Accountability
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Dear Ms. Maldonado:

I am responding to your June 22, 2020 audit letter regarding CDTA compliance with Freedom of Information Law (FOIL) requirements. Our staff appreciated the opportunity to work with OSC auditors to review our policies and procedures relative to FOIL. Based on the audit recommendations, we have developed formal procedures regarding FOIL, how we process requests, who is responsible for processing requests, and the time frame in which to do so. We are also training the principal staff responsible for FOIL requests and the back-up staff who may need to fill-in and/or provide additional assistance with FOIL.

A log for all FOIL requests has been created along with a requirement that we respond to all requests within 5 business days. If more time is required to gather or assemble data/information, the request will be granted within 20 days (unless extraordinary circumstances require the date to be pushed out; and the person to whom we are responding is notified). We believe the establishment of a log and formal tracking system will ensure consistency, compliance with required time frames, and completeness in our responses to people looking for information under FOIL.

We are grateful to your audit staff, both on site and in your office, for their professionalism and helpful attitude throughout the audit. Please let us know if you there is anything else, we can do regarding this matter.

Cordially,

Jayne B. Lahut

Jayne B. Lahut
Chairman

Copy: Carm Basile, CEO

Jayne B. Lahut
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Schenectady County

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