

# Department of Transportation

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## Compliance With Freedom of Information Law Requirements

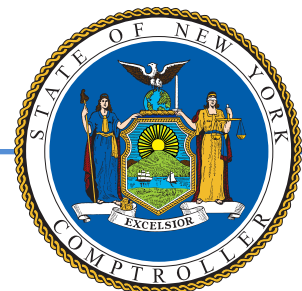
Report 2020-S-12 | September 2023

OFFICE OF THE NEW YORK STATE COMPTROLLER

Thomas P. DiNapoli, State Comptroller

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Division of State Government Accountability



# Audit Highlights

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## Objectives

To determine if the Department of Transportation (DOT) has policies, procedures, and processes in place to fulfill its responsibilities under the Freedom of Information Law (FOIL), and if DOT is in compliance with its responsibilities under FOIL. The audit covered FOIL requests received by DOT for the period January 2018 through July 2021 and FOIL appeals received by DOT for the period January 2018 through September 2021.

## About the Program

DOT's mission is to ensure its customers – those who live, work, and travel in New York – have a safe, efficient, balanced, and environmentally sound transportation system. It has a main office located in Albany and 11 regional offices throughout the State. 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 State Legislature. Under FOIL, DOT is required to make all eligible records available for public inspection or copying. Within 5 business days of receiving a FOIL request, DOT must 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. Additionally, within 10 business days of receipt of an appeal, DOT must grant access to the records sought or fully explain the reasons for further denial in writing.

## Key Findings

- DOT did not respond within the statutory time frame for 34 of the 194 sampled FOIL requests. This included 19 FOIL requests where DOT did not grant, deny, or acknowledge receipt of the request within 5 business days. For another FOIL request, DOT could not show it provided the requested information.
- DOT was not in compliance with the statutory requirement to provide an appeal to Committee on Open Government (COOG) upon receipt for any of the 49 appeals we sampled. DOT officials stated that it is their practice to send the appeal to COOG when the determination is made.
- DOT's regional offices did not always follow the FOIL procedures for handling FOIL requests. We found three regional offices typically did not use the DOT acknowledgment template letter. Instead, they used informal emails which did not provide the requestor with a reference number.

Furthermore, the audit was obstructed by, among other things, requiring that all meetings be attended by legal and non-legal supervisory staff from the main office and not providing all requested information.<sup>1</sup> For example, while one DOT regional office on its own provided its FOIL procedures manual, three other regions would not. The main office did not provide the listing of FOIL request topics deemed sensitive that the regional offices were required to forward to the main office for review, as they claimed they were protected by attorney–client privilege. We therefore cannot state with reasonable certainty that all information necessary to meet our audit objectives was provided.

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<sup>1</sup> Auditors are required by generally accepted government auditing standards to disclose in their report any circumstances that impact the reliability of the evidence they are relying on, whether the obstruction is deliberate by an auditee or due to other circumstances.

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## Key Recommendations

- Acknowledge and respond to FOIL requests and appeals within the time frames required by law. Grant or deny access to FOIL requests within 5 business days, or if more time is needed, acknowledge 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.
- Forward all appeals to COOG upon receipt, as required by FOIL.
- Provide formal training for main office and regional office employees involved in processing FOIL requests.



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

September 29, 2023

Marie Therese Dominguez, Esq.  
Commissioner  
Department of Transportation  
50 Wolf Road  
Albany, NY 12232

Dear Commissioner Dominguez:

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 entitled *Compliance With Freedom of Information Law Requirements*. This audit was performed pursuant to the State Comptroller's authority under Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance 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

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<b>Term</b>	<b>Description</b>	<b>Identifier</b>
DOT	Department of Transportation	<i>Auditee</i>
CCM	Common Correspondence Management Enterprise	<i>Database</i>
COOG	Committee on Open Government	<i>Key Term</i>
Date certain	A legally binding date on or by which a certain action must occur	<i>Key Term</i>
FOIL	Freedom of Information Law	<i>Law</i>
ITS	Office of Information Technology Services	<i>Agency</i>
NYCRR	New York Codes, Rules and Regulations	<i>Key Term</i>
RAO	Records Access Officer	<i>Key Term</i>

# Background

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The Department of Transportation's (DOT) mission is to ensure its customers – those who live, work, and travel in New York – have a safe, efficient, balanced, and environmentally sound transportation system. DOT is responsible for coordinating and developing a comprehensive transportation policy for the State; coordinating and assisting in the development and operation of transportation facilities and services for highways, railroads, mass transit systems, ports, waterways, and aviation facilities; and formulating and keeping current a long-range, comprehensive statewide master plan for the balanced development of public and private commuter and general transportation facilities. DOT's main office is located in Albany, and it has 11 regional offices throughout the State.

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 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 disks.

FOIL requires agencies to grant access to records, deny access in writing, or acknowledge the receipt of a request within 5 business days. When an acknowledgment is given, it must include an approximate date that is reasonable under the circumstances, indicating when a determination on the request to access records will be made. If an agency determines to grant a request but cannot fulfill the request within 20 business days from the date of the acknowledgment letter, the requestor must be provided with a written explanation and a date certain, within a reasonable period, when the request will be granted in whole or in part. Additionally, agencies may develop their own more stringent internal procedures for processing FOIL requests.

DOT accepts FOIL requests via email, mail, or fax or online through a portal located on the Open FOIL NY website. According to regulations issued by DOT, FOIL requests can also be submitted in person at the DOT main office and regional offices. DOT reported receiving 15,738 FOIL requests between January 1, 2018 and July 22, 2021. FOIL requests – the majority of which DOT receives online – are reviewed by DOT's main office FOIL Officer, and routine requests are forwarded to the appropriate regional office. Each regional office has at least one regional Records Access Officer (RAO), who is the designated official responsible for coordinating responses to FOIL requests. If the main office FOIL Officer receives a FOIL request that is determined to be significant (e.g., related to open litigation), the request is handled at DOT's main office. All correspondence and information related to FOIL requests must be filed in DOT's Common Correspondence Management Enterprise system (CCM), which is supported by the Office of Information Technology Services (ITS).

If a FOIL request is denied, a requestor has the right to appeal. There are two types of appeals: an appeal from a constructive denial, which occurs when a requestor believes an agency has taken more than a reasonable time to respond to a request,

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or an express denial, when an agency responds to a requestor that a requested record will be withheld in part or in full. Within 10 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. In general, the court may assess attorneys' fees and other litigation costs against the agency for any failure to respond to a request or appeal within the statutory time frame. DOT reported receiving 110 FOIL appeals between January 1, 2018 and September 24, 2021.

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.



# Audit Findings and Recommendations

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DOT deviated from the FOIL requirements for all requests it processed. It did not send any appeals to COOG upon receipt, as required. DOT has internal procedures in place to govern the processing of FOIL requests and appeals of denied requests; however, we found weaknesses in DOT's monitoring over the FOIL process and a lack of adherence to its internal procedures at three of its regional offices.

## Compliance With FOIL Requirements

When DOT receives a request for records under FOIL, it has 5 business days to grant or deny access, or if more time is needed, to acknowledge receipt of the request in writing. Compliance is important because delays in responding to FOIL requests could equate to denials of the requests and can result in unnecessary FOIL appeals proceedings and an assessment of attorneys' fees against the agency. When an acknowledgment is given, it must include an approximate date that is reasonable under the circumstances, indicating when a determination on the request to access records will be made. If the agency determines to grant a request but cannot fulfill the request within 20 business days from the date of the acknowledgment letter, the main office FOIL Officer or regional RAO must provide a written explanation and a date certain, within a reasonable period, when the request will be granted in whole or in part.

We selected a statistical sample of 194 FOIL requests from the 15,738 FOIL requests DOT received from January 1, 2018 to July 22, 2021 to evaluate DOT's compliance under FOIL. Our statistical sample included FOIL requests received by the main office and 10 different regional offices. We found that DOT deviated from the law and/or its own internal procedures for 34 FOIL requests. Among the instances of deviation were the following:

- 19 FOIL requests for which DOT did not grant, deny, or acknowledge the request within 5 business days.
- 13 FOIL requests for which DOT did not provide an extension letter when it did not respond by the date provided in the acknowledgment letter.
- 1 FOIL request for which DOT was unable to provide documentation to show whether it ever provided the requested information.
- 1 FOIL request for which DOT did not provide the requested information by the deadline specified in the extension letter.

Based on the results of our statistical sample, we are 95% confident that DOT deviated from the law or its own procedures for at least 1,965 of the 15,738 FOIL requests received during the audit period.

The deviations from FOIL and/or DOT's FOIL policies were partially due to DOT's main office not adequately monitoring FOIL requests assigned to the regional offices; nor does the main office regularly use CCM to monitor the regional offices' handling of FOIL requests. ITS officials stated that DOT main office officials only requested one CCM report from ITS related to FOIL during the audit scope period. Further,

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DOT's procedures do not provide guidance about the handling of certain situations, such as estimating the date certain in cases when additional time is required. Additionally, lack of effective communication over the FOIL program has caused regional offices to use their own methods of operations, resulting in inconsistencies in the handling of FOIL requests. Moreover, when program areas, rather than an RAO, fulfill a request, there is risk that exempt information may be released to the public (e.g., confidential information).

## Monitoring and Oversight of FOIL Program

### Internal 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. DOT procedures name the main office FOIL Officer as the employee designated for ensuring compliance with FOIL, and RAOs are the designated officials who have the duty of coordinating responses to FOIL requests at DOT's 11 regional offices. According to DOT procedures, all correspondence with FOIL requestors and all information pertaining to the request are to be entered into CCM by the main office FOIL Officer or regional RAO handling the request. The main office FOIL Officer or regional RAO prepares and sends a written acknowledgment and then forwards the request to the relevant program area, and program staff then gather all documents available and send those documents back to the main office FOIL Officer or regional RAO for review and determination about which records can be released according to the law, with guidance from DOT's Division of Legal Affairs, if needed. Moreover, DOT procedures state that staff in the program areas are not to respond directly to a requestor.

We visited DOT's 11 regional offices to interview the RAOs and gain an understanding of the FOIL processes and procedures utilized at each regional office. This audit was obstructed by, among other things, requiring that all meetings be attended by legal and non-legal supervisory staff from the main office and not providing all requested information. For example, one DOT regional office provided auditors access to its written procedures during a site visit until the main office supervisory staff abruptly instructed the regional office staff to remove the procedures. Further, three additional regional offices were asked to provide written procedures to the audit team but would not do so under direction from DOT's main office, which stated the procedures were covered by attorney–client privilege. The main office would not provide the listing of FOIL requests deemed sensitive that the regional offices were required to forward to the main office for review, as they claimed they were also covered by attorney–client privilege. Regardless of the circumstances, these obstructions impacted the reliability of audit evidence and thus are being disclosed. We found that three regional offices typically do not use DOT's acknowledgment letter template. Instead, they respond via informal emails, in which case the requestor does not receive a reference number that can be used for follow-up questions or appeals. These same regional offices also did not routinely

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use CCM to record FOIL request information, as required. Instead, they only update CCM after a response is completed, meaning the requestor does not receive a reference number, and the main office FOIL Officer cannot monitor these requests. Moreover, only one regional office routinely uses CCM to generate reports to monitor upcoming due dates for open FOIL requests. Main office officials also stated they do not use CCM to run reports to monitor open FOIL requests. Further, the amount of training the RAOs received varied among the regional offices. Some RAOs did not receive any training, others received only CCM software training, while others received varied levels of on-the-job training from their predecessor. RAOs also stated that if an item was on a list of FOIL requests deemed sensitive, the regional offices were required to forward it to the main office for review. DOT declined to provide this list to auditors.

At the onset of the COVID-19 pandemic in March 2020, DOT temporarily altered its FOIL procedures by changing the standard time frame in its acknowledgment letters from 20 business days to 45 calendar days, citing delays due to the pandemic and the shift to remote working. However, during our visits, we found three regional offices did not extend the time frames in the acknowledgment letters, and one regional office used 25 business days in its response, which deviated from DOT's internal guidance. In July 2021, DOT issued further guidance to the regional offices stating all language regarding the COVID-19 pandemic should be removed from FOIL correspondence; however, the extended time frame for acknowledgment letters should not change. Once again, we found that regional offices treated this guidance differently: of the eight regions that used the pandemic language, five stopped using the extended time frame, and three continued to use the extended time frame in correspondence with requestors, with one using a variety of different time frames in its correspondences.

FOIL requires that agencies maintain a reasonably detailed list by subject matter of all records in its possession. Each agency is to post the current list on its website, including a link to the COOG website, and update the list annually. Moreover, DOT is authorized by New York State Transportation Law to set forth rules and regulations in relation to the discharge of the Commissioner's functions, powers, and duties as well as those of DOT. Changing rules and regulations is covered by the State Administrative Procedures Act and is the responsibility of each agency. Although DOT internal procedures outline responsibilities for maintaining the subject matter list, our review of the DOT website found that DOT has not updated its subject matter list since February 2016. New York Codes, Rules and Regulations (NYCRR) requires each agency to designate locations where records are available for public inspection and copying. However, DOT's regulations have not been updated to reflect the current locations where FOIL requests can be made for the main office and four of the regional offices. By not making these updates, DOT may not be giving the public access to all records in its possession. Additionally, requestors using the locations DOT provided for the main office and four regional offices to complete FOIL requests might experience delays if they attempt to deliver their requests to addresses that have not been updated.

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## Controls Over FOIL Data

Each FOIL request is given a unique sequential reference number in CCM, which provides assurance that all recorded events are in the data set. We analyzed the reference numbers for the 15,738 FOIL requests received by DOT during the audit period and found 164 missing sequential reference numbers. During our regional office visits, we requested the RAOs search CCM for the missing reference numbers pertaining to their region; in all 164 cases, there was no information recorded in CCM. We consulted DOT and ITS officials, who acknowledged that gaps in reference numbers exist and explained that, if an authorized user is incorrectly using CCM (e.g., they do not fill in all the mandatory fields), the system may assign a reference number, but no information is saved and the user is prompted to input the data again, creating a new reference number. DOT officials stated that since the system gives an error message to the user, the user knows to reenter the FOIL request and, therefore, DOT asserts that the data set is complete. However, DOT and ITS officials could not provide an audit log for CCM explaining the gaps in the sequential reference numbers. Therefore, the exact cause for the gaps cannot be determined, and it is possible DOT's FOIL data is incomplete. In addition, DOT and ITS officials were unaware of potential control issues with missing reference numbers in CCM.

Moreover, ITS' Standard for Security Logging requires that logs record data so that systems and networks can be properly monitored to maintain use for authorized purposes and an awareness of the operating environment, including detecting indications of security problems. This standard applies to all information technology equipment owned and/or operated by, or on behalf of, New York State. The standard applies to audit logs that track user authentication attempts and user actions, and specifies that events, such as those indicating success or failure of an event, as well as the date and time of an event must be logged for all systems. While the CCM system may have reported an error to the user in certain instances, there is no record of the error within the system, as required by the ITS standard. The missing reference numbers within CCM and the absence of an audit log or similar report create a lack of assurance that DOT has responded to all FOIL requests.

## Appeals Process

### Compliance With FOIL

According to the law, a denied FOIL request may be appealed within 30 days of receipt of the written notice of denial. An agency's failure to respond within the time frames for FOIL requests may be viewed as a constructive denial, which may also be appealed. Within 10 business days of receipt of an appeal, DOT must grant access to the records sought or fully explain the reasons for further denial in writing. FOIL requires DOT to transmit copies of all appeals to COOG upon receipt and the determination shall also be shared with COOG.

DOT reported receiving 110 appeals from January 1, 2018 through September 24, 2021. We reviewed a judgmental sample of 49 appeals to determine if they were

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handled in accordance with FOIL. We found that DOT took more than 10 business days to respond to the appellant for four of the 49 appeals sampled and did not comply with the statutory requirement by not sending any of the 49 appeals to COOG upon receipt. DOT officials informed us that they only send appeals to COOG once the determination for the appeal has been made.

In addition, we found 15 appeals where DOT responded to the appellant stating they were not able to appeal because DOT had yet to respond to the initial FOIL request. Our review of the 15 appeals found DOT responded to the initial FOIL requests with multiple extension letters. In each case, the requestor stated, in writing, that multiple extensions met the definition of a constructive denial. DOT disagreed and cited various case law as examples where courts have upheld the use of multiple extensions for FOIL requests.

Of these 15 appeals, DOT responded to five of the FOIL requests prior to sending the appeal determination. However, for nine of the appeals, DOT did not provide a response to the initial FOIL request until after the appeal determination was sent – taking an additional 11 to 829 calendar days to provide a response to the FOIL request, with a median response time of 232 calendar days. For the remaining appeal, DOT did not provide sufficient documentation to determine when the FOIL response was sent to the requestor.

Compliance with FOIL-specified time frames is important because a delay in responding to a FOIL appeal may be viewed as a denial of the appeal, and an appellant who is further denied may bring a proceeding for review of such denial pursuant to Article 78 of the Civil Practice Law and Rules. An Article 78 proceeding is handled in court and will take the time of the appellant, DOT, and the Attorney General's office. In addition to the time spent preparing for and in court, the court may, in general, assess attorneys' fees and other litigation costs reasonably incurred by a person whose case has prevailed and the court finds that the agency had no reasonable basis for denying access.

## Segregation of Duties

The appeals officer, chief executive officer, or governing body or designated representative shall review records and determine appeals under FOIL. The FOIL Appeals Officer, as the designated representative of the governing body, cannot be the same as the RAO. During one of our initial audit meetings, DOT officials stated that an assistant counsel oversees the FOIL program. During the FOIL request process, we were informed that the assistant counsel may review records for proper exemptions and redactions prior to their release to a FOIL requestor, and DOT's procedures state that the FOIL Officer consults with the Division of Legal Affairs regarding interpretation of the law and application of DOT's FOIL policy, as necessary. However, we found the same assistant counsel is also the FOIL Appeals Officer. The FOIL Appeals Officer's involvement early in the FOIL request process creates a potential conflict of interest and a lack of segregation of duties as there is a risk that the FOIL Appeals Officer is reviewing his/her own decisions.

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## Recommendations

1. Acknowledge and respond to FOIL requests and appeals within the time frames required by law. Grant or deny access to FOIL requests within 5 business days, or if more time is needed, acknowledge 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.
2. Monitor the processing of FOIL requests to ensure it is consistent throughout the agency and develop guidance how to calculate or estimate the date certain accurately when additional time is required.
3. Provide formal training for main office and regional office employees involved in processing FOIL requests.
4. Update the subject matter list to meet the requirements of FOIL and update NYCRR to reflect current addresses for DOT's main and regional offices.
5. Work with ITS to develop audit logs for CCM to account for all FOIL requests received.
6. Forward all appeals to COOG upon receipt, as required by FOIL.
7. Segregate duties related to processing FOIL requests and reviewing and responding to FOIL appeals.

# Audit Scope, Objectives, and Methodology

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The objectives of our audit were to determine if DOT has policies, procedures, and processes in place to fulfill its responsibilities under FOIL, and if DOT is in compliance with its responsibilities under FOIL. The audit covered FOIL requests received by DOT for the period January 2018 through July 2021 and FOIL appeals received by DOT for the period January 2018 through September 2021.

To accomplish our objectives, we obtained information about DOT's processes for handling FOIL requests and assessed the adequacy of internal controls related to our audit objectives. We interviewed DOT officials at the main office and at each regional office. We also contacted ITS officials who provide support for CCM to discuss the 164 missing reference numbers. We reviewed relevant laws, regulations, DOT procedures pertinent to FOIL, and relevant COOG opinions. In addition, DOT provided case law regarding appeals.

We selected a statistical sample of 194 FOIL requests from the population of 15,738 FOIL requests DOT received between January 1, 2018 through July 22, 2021 to evaluate compliance under FOIL. To select our sample, we determined our precision to be  $\pm 7\%$  with a 95% confidence level and a 50% rate of error. Our statistical sample was designed to project to the population.

In addition to the sample of FOIL requests, based on the number of days it took DOT to respond to the appeal and additional factors such as the number of appeals made, we selected a judgmental sample of 49 of the 110 appeals provided by DOT for the period January 1, 2018 to September 24, 2021. We reviewed the documents to determine if the appeals were handled in compliance with FOIL. This sample was not designed to be projected to the population.

The audit was obstructed by, among other things, DOT not providing all requested information (e.g., DOT's regional FOIL procedures manual and the listing of FOIL requests deemed sensitive that the regional offices were required to forward to the main office for review) and requiring that all meetings be attended by legal and non-legal supervisory staff from the main office. We therefore cannot state with reasonable certainty that all information necessary to meet our audit objectives was provided.

# Statutory Requirements

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## Authority

The audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance 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. These duties could be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our professional judgment, these duties do not affect our ability to conduct this independent audit of DOT's compliance with FOIL requirements.

## Reporting Requirements

We provided a draft copy of this report to DOT 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. DOT officials did not agree with our findings and conclusions. They replied that FOIL is a legal process and claimed that, as such, it is covered by client-attorney privilege. As a result, it was appropriate for them to deny access to records and limited access to staff. However, DOT's position is contrary to the intent of FOIL which is to make information available and not limit it by invoking privileges that do not help attain that objective. Moreover, we note that DOT manages to downplay its failure to follow requirements such as updating the subject matter list to meet FOIL requirements as well as not forwarding appeals to COOG upon receipt. DOT couches its response when agreeing with the recommendations with words such as "agrees, in part" or "acknowledges this recommendation," which allows DOT to avoid having to take any action to improve its FOIL process. We urge DOT to revisit its position by implementing the recommendations designed to improve the FOIL process and responses to requesters. Our State Comptroller's Comments addressing certain DOT remarks are embedded within DOT's response.

Within 180 days after final release of this report, as required by Section 170 of the Executive Law, the Commissioner of the Department of Transportation 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 and State Comptroller's Comments

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KATHY HOCHUL  
Governor  
MARIE THERESE DOMINGUEZ  
Commissioner

July 29, 2022

Carmen Maldonado, Audit Director  
Office of the State Comptroller  
Division of State Government Accountability  
110 State Street – 11<sup>th</sup> Floor  
Albany, NY 12236-0001

Re: Audit Draft Report – 2020-S-12, Issued 06/29/2022

Dear Ms. Maldonado:

The New York State Department of Transportation (NYSDOT) has reviewed the Office of State Comptroller (OSC) draft report 2010-S-12 titled Compliance With Freedom of Information Law Requirements (the "Report"). NYSDOT was pleased to learn that with nearly 16,000 Freedom of Information Law (FOIL) requests reviewed as part of its audit, encompassing a time period of over two and a half years covering January 1, 2018 through July 22, 2021 – including the many months impacted by COVID – OSC did not identify a single instance where a FOIL request failed to receive a response from NYSDOT.<sup>1</sup>

**State Comptroller's Comment** – The audit concluded that an email with no other information is insufficient to support the requester was provided a full response. DOT officials were advised of this fact in our preliminary findings issued February 8, 2022. Instead of providing the documents it claims were sent to the requester, they repeated the same answer. DOT's position does not override the auditors' conclusion. Moreover, OSC was unable to conclude that the FOIL data provided was complete.

During that time, NYSDOT responded to FOIL requests covering issues from daily work reports and certified payrolls on our contracts to school bus registration records, road condition data to toxicology reports, and airport leases to records relating to musicians playing in the New York City subway. Requests come from journalists, unions, contractors, attorneys, and all varieties of New Yorkers interested in what NYSDOT does. In many cases, NYSDOT proactively provides frequently requested information on its website, whether it is information about planned or on-going projects, construction record plans and appropriation maps, or numerous reports covering bridge and road conditions. Pursuant to the Governor's 2021 transparency initiative, NYSDOT has expanded these efforts and made extensive amounts of information available online. The

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<sup>1</sup> The Report asserts that for one 2020 FOIL request NYSDOT "was unable to provide documentation to show whether it ever provided the requested information." However, NYSDOT provided OSC auditors with an email showing the documents that were transmitted to the requestor. Moreover, there is no requirement that an agency retain FOIL responses. That NYSDOT does so exceeds FOIL requirements.

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initiative includes NYSDOT transitioning to a new FOIL management system known as GovQA, which will further enhance NYSDOT's ability to manage and respond to FOIL requests. Additionally, whenever possible, records are provided electronically, either via email or other transfer method, at no cost. In the vast majority of FOIL responses provided, there is no charge to the requester. Other requests may require specialized searches and reviews of records, in some instances requiring an employee to devote more than a month exclusively to a single request. In sum, NYSDOT provides a broad spectrum and immense quantity of records to thousands and thousands of interested parties every year. NYSDOT will use the information provided in the Report to continue to improve the FOIL process.

**State Comptroller's Comment** – To meet transparency, DOT needs to do more than place basic documents online. For example, the practice of sending multiple vague responses to requesters may not be viewed as transparent.

While pleased that the audit confirmed that NYSDOT responded to every FOIL request, NYSDOT needs to address threshold issues with respect to the background and audit findings sections of the draft report. In addition, NYSDOT disagrees with several of the audit findings.

**State Comptroller's Comment** – The audit concluded that an email with no other information is insufficient to support the requester was provided a full response. DOT officials were advised of this fact in our preliminary findings issued February 8, 2022. Instead of providing the documents it claims were sent to the requester, they repeated the same answer. DOT's position does not override the auditors' conclusion. Moreover, OSC was unable to conclude that the FOIL data provided was complete.

As an initial matter, NYSDOT fully complies with the requirement of FOIL, namely to make records available to the public. Further NYSDOT disagrees with OSC's definition of "non-compliance," noting that among other issues, OSC does not differentiate between assertions of departures from NYSDOT procedures and assertions of departures from FOIL.

**State Comptroller's Comment** – The report is clear in its description of the nature of DOT's lack of compliance with FOIL and its internal procedures.

Additionally, OSC reviewed NYSDOT's FOIL process, which is a legal process directed and supervised by attorneys, but did not include any lawyers on the OSC audit team. OSC asserts incorrectly that NYSDOT "obstructed the audit by, among other things, requiring that all meetings be attended by supervisory staff from main office and not providing all requested information." The supervisory staff at issue were NYSDOT lawyers, who's responsibility as NYSDOT legal staff was to ensure that NYSDOT's attorney-client privilege was preserved as part of the review of this legal process. Throughout the many interviews with Main Office FOIL personnel and FOIL officers in all eleven NYSDOT Regional Offices, NYSDOT's attorneys objected minimally, and only when the attorney-client privilege was clearly implicated. NYSDOT indicated during the first meeting that this would be the approach. Although OSC's Report makes repeated mentions of the claimed obstruction, the Report makes clear that OSC auditors received the documents discussed.

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Moreover, although the Report claims that NYSDOT would not provide a list of sensitive FOIL topics – a list generated by NYSDOT lawyers and clearly covered by the attorney-client privilege – the Report fails to mention that NYSDOT attorneys provided a non-privileged summary of that list to OSC Auditors. Furthermore, OSC obtained sufficient access to that list to include NYSDOT attorney-client privileged information in the Report.<sup>2</sup>

NYSDOT outlined to OSC that compliance with FOIL is a legal process requiring regular consultation with NYSDOT attorneys and other staff within the Division of Legal Services. Therefore, NYSDOT attorneys were legally required to participate in the audit process to monitor compliance with attorney-client privilege. NYSDOT in no way “obstructed the audit.” OSC staff understood that unfettered access to NYSDOT’s legal process and opinions would have been a violation of NYSDOT attorney’s ethic obligations. OSC’s claim that the ordinary practice of law by NYSDOT attorneys is “obstruction” is unfortunate and unfounded.

Further, the parties disagree as to whether OSC had the legal authority to conduct the audit of NYSDOT’s FOIL process. While OSC has broad authority regarding supervision of the State’s fiscal concerns, OSC’s authority is not without limit. The New York Court of Appeals determined that OSC “cannot perform the administrative duties of another state agency; and it cannot oversee activities that, while financial in nature, have no impact on the state fisc.” NYSDOT decided to cooperate with OSC on the audit, welcoming the opportunity to improve its processes and better serve the public.

**State Comptroller’s Comment** – We revised our report and removed the sentence that DOT considers sensitive.

RESPONSE TO RECOMMENDATIONS:

**OSC Recommendation (1):** *Acknowledge and respond to FOIL requests and appeals within the time frames required by law. Grant or deny access to FOIL requests within 5 business days, or if more time is needed, acknowledge 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.*

Response: NYSDOT agrees, in part, with this recommendation. FOIL requires an agency to respond to or acknowledge a FOIL request within five days, and NYSDOT will work to eliminate instances where we took longer than five days to acknowledge a request.

However, there is no specific time limit set forth in FOIL to respond to a request. Courts have held that “an agency must respond to a written request for records within a reasonable time and “there is no specific time period in which the agency must grant access to the records” *Matter of Save Monroe Ave. v. New York State Dep’t of Transp.*, 197 AD3d 808, 809 (3d Dept. 2021) (quoting *Matter of Data Tree, LLC v Romaine*, 9 NY3d

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<sup>2</sup> NYSDOT hereby requests that the last sentence of the first paragraph to end on page 10 of the Report be redacted.

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454, 465 [2007]). In addition, there is no prohibition against an agency utilizing multiple extensions when necessary – even if the underlying reasoning is repeated – in order to respond to a FOIL request. *Matter of Save Monroe Ave.*, 197 AD3d at 809-10 (holding that NYSDOT’s use of multiple extensions “was certainly reasonable.”) The legal conclusions of OSC’s audit team that multiple extensions, when needed, are not based on familiarity with New York law.

Furthermore, specifying a set time for a response, typically before the full scope of records implicated can be determined, would not quicken response times. NYSDOT always responds as soon as possible to a FOIL request, even if the response deadline is in the future. Each FOIL request is unique, and therefore setting a date, even with the best of intentions, will not enhance the ability of the agency to gather and review records and provide a timely subsequent determination and response to the FOIL request.

**State Comptroller’s Comment** – While there is no specific time limit set forth in FOIL to respond to a request, providing more detailed information to the requestor would make the process more transparent.

**OSC Recommendation (2):** *Monitor the processing of FOIL requests to ensure it is consistent throughout the agency and develop guidance how to calculate or estimate the date certain accurately when additional time is required*

Response: NYSDOT agrees with the portion of this recommendation to monitor processing of FOIL requests to ensure consistency through the agency but reiterates that neither FOIL nor any court decision sets a specific time limit to respond to a FOIL request.

**OSC Recommendation (3):** *Provide formal training for main office and regional office employees involved in processing FOIL requests.*

Response: NYSDOT acknowledges this recommendation. While the Main Office FOIL team, including attorneys, regularly answer questions from Regional Record Access Officers related to FOIL, NYSDOT recognizes that additional and regularly scheduled trainings, along with additional monitoring of Regional FOIL progress, will enhance NYSDOT’s FOIL procedures, and has proceeded to enhance trainings and ensure they are provided to all FOIL employees on a regular and reoccurring basis.

**OSC Recommendation (4):** *Update the subject matter list to meet the requirements of FOIL and update NYCRR to reflect current addresses for DOT’s main and regional offices.*

Response: NYSDOT agrees with this recommendation and is in the process of review and implementation.

**OSC Recommendation (5):** *Work with ITS to develop audit logs for CCM to account for all FOIL requests received.*

Response: NYSDOT acknowledges the recommendation that we consult with ITS (the

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New York State Office of Information Technology Services) on this issue. NYSDOT does not maintain or program the CCM software. The CCM software is used by NYSDOT to track correspondence and FOILs.

As previously noted, NYSDOT is in the process of switching to a new FOIL/records management system known as GovQA. NYSDOT anticipates that the new system will give NYSDOT additional FOIL response management tools and continue to improve the agency's FOIL process. As CCM will no longer be utilized for FOIL, this specific recommendation will be inapplicable. NYSDOT will however take steps to utilize GovQA's reporting and logging functionality for FOIL.

**OSC Recommendation (6):** *Forward all appeals to COOG upon receipt, as required by FOIL.*

Response: NYSDOT has implemented this recommendation.

**OSC Recommendation (7):** *Segregate duties related to processing FOIL requests and reviewing and responding to FOIL appeals.*

Response: NYSDOT agrees with this recommendation and has always administered its FOIL program with appeal duties segregated. OSC inaccurately describes NYSDOT's management process. The assistant counsel supervising the FOIL program may generally discuss the applicability of exemptions, including attorney-client privilege. The assistant counsel does not, typically work on individual FOIL responses; that work is handled by another NYSDOT attorney. The assistant counsel, acting as the appeal officer, does not review his own legal judgments. Accordingly, NYSDOT agrees with this recommendation to the extent that it underscores the importance of segregating appeal review from the initial FOIL response process, but disagrees with the conclusion that there was a potential conflict of interest.

**State Comptroller's Comment** – DOT couches its response when agreeing with the recommendations with words such as “agrees, in part” or “acknowledges this recommendation” but ultimately disagrees. We urge DOT to revisit its position by implementing the recommendations designed to improve the FOIL process and responses to requesters.

If you have any questions, please contact Kevin Kissane, Audit Liaison at 518-457-8867.

Sincerely,

*Grace E. Boss*

Grace Boss  
Assistant Commissioner  
Administrative Services Division

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