

FOR CONSIDERATION

July 27, 2022

TO: The Board of Trustees
FROM: Thomas Falcone
SUBJECT: Consideration of Approval of Amendments to LIPA's FOIL Regulations

Requested Action

The Board of Trustees (the "Board") of the Long Island Power Authority ("LIPA") is requested to approve updates to its regulations for filing requests under the New York State Freedom of Information Law ("FOIL") and to conform with FOIL's statutory provisions regarding the collection of fees for copying and producing records as permitted by the FOIL statute.

Background

New York's FOIL statute, Article 6 (Sections 84-90) of the Public Officers Law, requires that LIPA promulgate rules pertaining to its procedures for processing FOIL requests from the public. LIPA's current regulations were promulgated in 1994, prior to its acquisition of the transmission and distribution system previously operated by the Long Island Lighting Company and when the Internet and ability to file requests for information electronically was nascent. LIPA Staff is recommending updates to the regulations to: (a) reflect LIPA's current mailing address; (b) identify the current titles of officials responsible for overseeing records access and administrative appeals as well as other non-substantive changes; (c) provide regulatory notice that requests may be filed electronically (a practice that LIPA has used for years); and finally (d) permit charging non-customers modest fees to defray the costs associated with copying voluminous requests for records, such as those filed by commercial entities seeking utility records.

Proposed Modifications

LIPA's FOIL regulations are set forth at Title 21, New York Codes, Rules and Regulations ("NYCRR") Sections 10050.1 through 10050.5. The specific proposed revisions are as follows:

Section 10050.1 would be updated to reflect LIPA's current business headquarters at 333 Earle Ovington Boulevard, Suite 403, Uniondale, NY 11553.

Section 10050.2(a) adds a provision notifying the public that FOIL requests may be submitted by using LIPA's website and New York State's Open FOIL on-line platform, in addition to submitting requests via mail or in person at LIPA's office. An existing requirement for submitting a self-addressed envelope and pre-paid postage when mailing a request for records is deleted. Finally, Section 10050.2(a) would be amended to conform with current LIPA policy designating LIPA's General Counsel as the Records Access Officer and clarifying that the Records Access Officer coordinates with LIPA's service provider in responding to requests submitted under FOIL.

Section 10050.4 relates to fees that LIPA may charge for duplication of records. Currently, the Section only permits LIPA to charge \$0.25 per page for copying paper records that are letter-sized. Almost all FOIL submissions and record disclosures are conducted electronically, nearly eliminating the need to make or charge for paper copies. Furthermore, LIPA customers seeking their own account records, or persons seeking to inspect records, will continue to be able to do so free of charge.

However, LIPA has seen a dramatic increase in FOIL requests from commercial entities such as engineering, surveying, and property development firms seeking utility records. As of this date, LIPA is on pace to process at least 500 FOIL requests in 2022. To defray those additional costs, LIPA proposes adding fee provisions to permit LIPA to collect the “actual cost” of reproducing records, which FOIL defines, and the amended LIPA regulations are as follows:

- i. an amount equal to the hourly salary attributed to the lowest paid employee who has the necessary skill required to prepare a copy of the requested record;
- ii. the actual cost of the storage devices or media provided to the person making the request in complying with such request;
- iii. the actual cost to the Authority of engaging an outside professional service to prepare a copy of a record, but only when the Authority or its service provider’s information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy.

The text above quotes verbatim the permissible “actual cost” fee criteria set forth in FOIL at Section 87(1)(c). The proposed amendment includes those provisions from FOIL that prohibit the collection of fees for the time it takes to search for responsive records or administrative costs associated with processing a request. In conformity with FOIL, the amendment would also require LIPA to provide a requestor notice of an estimated charge if it is believed reproduction will take longer than two hours.

Finally, Section 10050.5(b) would correct the title of LIPA’s administrative appeals officer in cases involving a denial of records and LIPA’s present address where appeals may be filed. LIPA Staff also proposes to delete sub-division (c), which merely restates FOIL’s provision regarding judicial hearing of a denial of records access pursuant to Article 78 of the New York Civil Procedure and Law Rules.

Financial Impacts

There is no financial impact to LIPA associated with the proposed changes, nor to LIPA customers, who largely use FOIL to seek copies of their own account records. LIPA Staff notes that the addition of fee criteria for “actual costs” associated with larger FOIL requests has always been permitted by FOIL, and is in response to significant increases in requests in recent years from commercial entities for records that are not normally provided free of charge, even under FOIL. Even then, as noted above, the fees will only apply in cases where reproduction is extensive, that is, involving more than two hours of labor to complete.

Public Comments

This proposal also seeks to address the concerns raised by various stakeholders relating to the proposed Notice of Proposed Rulemaking originally filed in September 2021. Most notably, LIPA now proposes no changes to the definition of “trade secrets” and will not require an appointment for those looking to make a FOIL request in person. Together with the SAPA notice, LIPA filed a description of concerns received in response to the September 2021 Notice of Proposed Rulemaking, which specifically sets forth those concerns and proposed changes for this rulemaking. LIPA has also provided a [Fact Sheet](#) on the proposed changes.

LIPA held virtual public comment sessions on the proposed changes on June 27, 2022, and solicited written comments. No members of the public commented at the virtual sessions on the FOIL proposals, nor has LIPA received any written comments to date. Transcripts and recordings (audio and video) of the virtual public comment sessions are available upon request by emailing foil@lipower.org.

Recommendation

For the foregoing reasons, I recommend that the Trustees approve the modifications described herein and set forth in the accompanying resolutions.

Attachments

<u>Exhibit “A”</u>	Resolution
<u>Exhibit “B”</u>	Amended Regulations (redline)
<u>Exhibit “C”</u>	Amended Regulations (clean)

APPROVAL OF MODIFICATIONS TO LIPA'S FOIL REGULATIONS

WHEREAS, New York's FOIL statute, Article 6 (Sections 84-90) of the Public Officers Law, requires that LIPA promulgate rules and regulations pertaining to the availability of records and procedures to be followed, including, but not limited to: i. the times and places such records are available; ii. the persons from whom such records may be obtained; and iii. the fees for copies of record as limited by statute. Public Officers Law, section 87(1); and

WHEREAS, this proposal seeks to revise those regulations to make technical corrections regarding the methods by which FOIL requests may be filed, repeal of provisions already mandated and defined by the FOIL statute itself, and finally to amend the criteria by which fees may be collected for copying of records provided to the public by conforming with FOIL's provisions; and

WHEREAS, following the issuance of public notice in the State Register on April 27, 2022, public hearings were held on June 27, 2022, and were accessible to participants by phone and video conference, and the public comment period has since expired.

NOW, THEREFORE, BE IT RESOLVED, that for the reasons set forth herein and in the accompanying Memorandum, the proposed modifications to LIPA's FOIL Regulations are hereby adopted and approved to be effective immediately; and

BE IT FURTHER, RESOLVED, that the Chief Executive Officer and his designees are authorized to carry out all actions deemed necessary or convenient to implement these changes.

Dated: July 27, 2022

21 NYCRR 10050.1

Section 10050.1. Availability of public records

(a) The public records of the Long Island Power Authority (the "Authority", or "LIPA") shall be available in accordance with this Part for inspection and copying upon written or oral request, reasonably describing the record or records sought, during the times provided in this Part at the Authority's main office at 200 Garden City Plaza, Garden City, NY 11530, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553

21 NYCRR 10050.2

Section 10050.2. Procedures regarding access to public records

(a) A request for inspection or copying of a public record of the Authority shall be made to the records access officer of the Authority orally or in ~~writing, and~~ writing and shall contain sufficient information to identify the ~~particular record~~ record sought, including, if possible, information regarding the date, subject matter or other information describing the record sought. Any request shall be made either:

(1) ~~(1)~~ electronically by using Open FOIL New York at <https://www.lipower.org>.

~~(2)~~ (2) in person, Monday through Friday, during regular business hours at the Authority's main office at ~~200 Garden City Plaza, Garden City, NY 11530~~ 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553; or

~~(2)~~ (2) (3) by mailing such request, ~~postage prepaid~~, to the Records Access Officer, Long Island Power Authority, at the aforesaid address.

(b) LIPA's ~~The deputy general~~ General Counsel is designated the Records Access Officer. The ~~R~~ecords ~~a~~ccess ~~o~~fficer, or designee, shall coordinate within the Authority and with the service provider, to the extent that responsive records are held by the service provider on behalf of the Authority, to ensure provide timely responses to requests for public access ~~to records are addressed in a timely manner~~. Designation of a records access officer shall not be construed to prohibit officials who have in the past been authorized to make records or information available, from continuing to do so.

21 NYCRR 10050.4

Section 10050.4. Fees

(a) There shall be no fee charged for:

(1) inspection of records; or

(2) records that are readily available in digital format, capable of being transmitted via electronic mail, and are the requestor's own electric service customer account records.

~~(2) search for records.~~

(b) ~~Persons requesting r~~Records ~~required~~ to be made available in paper format or for records not readily available in digital format, for public inspection will be photocopied by the authority if practicable and the person requesting a copy will be charged a fee of 25 cents per page for copies of such documents not exceeding 9" x 14", or the actual cost of reproducing such records if larger copies are required. or the actual cost of reproducing any other record in accordance with the provisions of paragraph (c). If it is not practicable for the authority to photocopy any such record, it will be copied commercially and the person requesting the copy will be charged a fee equal to the cost of such commercial reproduction.

(c) In determining the actual cost of reproducing a record, the Authority may charge a fee consisting of:

- i. an amount equal to the hourly salary attributed to the lowest paid employee who has the necessary skill required to prepare a copy of the requested record;
- ii. the actual cost of the storage devices or media provided to the person making the request in complying with such request;
- iii. the actual cost to the Authority of engaging an outside professional service to prepare a copy of a record, but only when the Authority or its service provider's information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy.

(d) ~~Fees shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of the Authority's employee's time is needed, or if an outside professional service would be retained to prepare a copy of the record. Upon payment of the fee determined by the authority for copying a record required to be made available for public inspection, the authority shall provide a copy of such record, and the records access officer shall certify to the correctness of such copy if so requested in writing, or, as the case may be, shall certify that the authority does not have possession of such record or that such record cannot be found after diligent search.~~

~~(de)~~ Any fee charged by the Authority pursuant to this Part shall be paid by the person making the request in cash, certified check or bank cashier's check, in the manner prescribed by the Authority at the time such

fee has been ascertained, and in advance of the delivery of copies of any record referred to in this Part.

21 NYCRR 10050.5

Section 10050.5. Appeals

(a) Any person who is denied access to a public record of the Authority by the records access officer of the Authority may, within 30 days of such denial, file an appeal from such denial with the Authority's appeals officer. Appeals pursuant to this subdivision shall be decided by the appeals officer. If an appeal is denied, the reasons therefor shall be explained fully in writing to the person requesting the record within seven business days of the date on which such appeal is received by the appeals officer. The appeals officer will forward to the Committee on Open Government of the Department of State a copy of such appeal and the appeals officer's determination.

(b) The following person shall hear appeals from denials of access to records, under section 89(4)(a) of the Public Officers Law: the Chief Executive Director/Officer, Long Island Power Authority, 200 Garden City Plaza, Garden City333 Earle Ovington Boulevard, Uniondale, NY 1155330.

~~(c) A determination by the appeals officer upholding a denial of access to records shall be subject to court review as provided for in article 78 of the Civil Practice Law and Rules.~~

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21 NYCRR 10050.2

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(1) electronically by using Open FOIL New York at <https://www.lipower.org>.

(2) in person, Monday through Friday, during regular business hours at the Authority’s main office at 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553; or

(3) by mailing such request to the Records Access Officer, Long Island Power Authority, at the aforesaid address.

(b) LIPA’s General Counsel is designated the Records Access Officer. The Records Access Officer, or designee, shall coordinate within the Authority and with the service provider, to the extent that responsive records are held by the service provider on behalf of the Authority, to provide timely responses to requests for public access to records. Designation of a records access officer shall not be construed to prohibit officials who have in the past been authorized to make records or information available, from continuing to do so.

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(a) There shall be no fee charged for:

(1) inspection of records; or

(2) records that are readily available in digital format, capable of being transmitted via electronic mail, and are the requestor's own electric service customer account records.

(b) Persons requesting records to be made available in paper format or for records not readily available in digital format, will be charged a fee of 25 cents per page for copies of such documents not exceeding 9" x 14", or the actual cost of reproducing any other record in accordance with the provisions of paragraph (c).

(c) In determining the actual cost of reproducing a record, the Authority may charge a fee consisting of:

- i. an amount equal to the hourly salary attributed to the lowest paid employee who has the necessary skill required to prepare a copy of the requested record;
- ii. the actual cost of the storage devices or media provided to the person making the request in complying with such request;
- iii. the actual cost to the Authority of engaging an outside professional service to prepare a copy of a record, but only when the Authority or its service provider's information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy.

(d) Fees shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of the Authority's employee's time is needed, or if an outside professional service would be retained to prepare a copy of the record. .

(e) Any fee charged by the Authority pursuant to this Part shall be paid by the person making the request in the manner prescribed by the Authority at the time such fee has been ascertained, and in advance of the delivery of copies of any record referred to in this Part.

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(b) The following person shall hear appeals from denials of access to records, under section 89(4)(a) of the Public Officers Law: the Chief Executive Officer, Long Island Power Authority, 333 Earle Ovington Boulevard, Uniondale, NY 11553.