



# **Authorities Budget Office**

- *Accountability*
- *Transparency*
- *Integrity*

## **Review of Public Complaint**

### **Niagara Frontier Transit Authority**

**February 17, 2017**

**PC-2017-01**

## **The Complaint**

The Authorities Budget Office (ABO) is empowered by its governing statutes to “initiate formal investigations in response to complaints or appearance of noncompliance by an authority” [Section (6)(2)(d) of Title 2 of Public Authorities Law.]

In November 2016 the ABO received a complaint that was referred from the New York State Office of the Inspector General. The complaint was received from an individual that was a board member of the Niagara Frontier Transportation Authority (NFTA) at the time of the complaint. The complainant alleges that he is being denied access to specific information that he is entitled to as a board member. Specifically, the complainant indicates that he requested information on benefits packages and he requested an audit of self-insurance, which according to the charter is to be reviewed quarterly, and both were denied. The complainant also allegedly asked to review the budget in respect to the worker’s compensation package, which he indicated has not been looked at in 8 to 10 years, and was also denied.

The complainant also indicated that there are public meetings at the NFTA headquarters at which when it becomes overcrowded the public is escorted out of the facility and denied access. The complainant indicated that he believes there should be a location where the public is not denied access commonly.

## **Scope of the Review**

As part of our inquiry, we reviewed the complaint and interviewed the complainant and select NFTA staff and board members. We reviewed select minutes of NFTA’s board and committee meetings from February 2015 through December 2016 and associated board packets and examined NFTA’s records related to FOIL requests, committee charters and attendance at board meetings. Individuals were not placed under oath, no subpoenas were issued, and the information obtained was voluntarily provided and gathered through a review of public records. This report is based on and reflects only the information and documents known to be available and provided to the ABO at the time it was written.

## **Background**

The NFTA board is comprised of 13 members, two of which are to be non-voting. One of the non-voting members is to be recommended for appointment by the primary labor organization representing NFTA employees. Currently this labor organization is the Amalgamated Transit Union (ATU). This appointment is for an 8-year term. The Authority Chair has the discretion to exclude this board member from discussions related to labor organizations or employee investigations, evaluations or discipline. At the time of the complaint, the complainant held this board position, as well as being the president of local

ATU. According to data reported by NFTA, the complainant's board term began June 30, 2008 and ended June 30, 2016.

The complainant was listed by NFTA as a non-voting member of the Audit and Governance Committee and the Human Resource Committee. The Audit Committee Charter indicates that the chair of the board is the chair of the committee, and appoints a minimum of four members to the committee. Committee members serve until successors are appointed. The Charter also states that the Committee will review with management the quarterly Self-Insurance report. The Charter also indicates that members will have unrestricted access to all information.

The Human Resource Committee Charter indicates that the chair of the board appoints a minimum of four members to the committee and also designates the committee chair. Committee members serve until successors are appointed. The Charter indicates that members will have unrestricted access to all information regarding human resource functions, and is to review hiring practices, competency profiles, training policies and compensation structures. The Charter also states that the committee is responsible for reviewing NFTA goals and objectives and compensation relative to the Executive Director, Chief Financial Officer and General Counsel including evaluating their performance in light of those goals and objectives.

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## *Results of Investigation of Complaint*

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**Complaint:** A Freedom of Information Law (FOIL) request for benefit packages was denied.

The complainant submitted a FOIL request as the president of the local ATU on May 26, 2016, requesting a copy of the employment contract that the Executive Director has with the NFTA Chair, NFTA board or any other entity of the NFTA. The NFTA's records indicate that the FOIL request was received on June 2, 2016. Section 89(3) of Public Officers Law addresses the procedures to follow regarding FOIL requests, and states that an acknowledgement of receipt of the request must be made within five business days. This acknowledgement should identify the approximate date that the request shall be granted or denied. The NFTA responded via email on June 10, 2016 that it had received the request and that it would be approved or denied within approximately 20 business days.

On July 11, 2016 the complainant followed up on the FOIL request via email, requesting information on the appeal process if the FOIL request was denied. Later that day the NFTA responded, indicating that the requested record does not exist.

Although the complainant had been notified that the requested record did not exist, on July 27, 2016 the complainant, in his role as an NFTA board member, submitted a request to the board Chair, requesting a copy of the employment contract that the Executive Director has with the NFTA Chair, NFTA board or any other entity of the NFTA.

**Conclusion:** The NFTA responded to the FOIL request on July 11, 2016. This response indicated that the requested record does not exist. This is not a denial of the request, since the NFTA is not required by Public Officers Law to prepare or create documents as a response to a FOIL request if those documents do not previously exist.

**Complaint:** The complainant requested an audit of self-insurance and indicated that the audit should be reviewed quarterly according to the Audit and Governance Committee Charter, but has not been done.

The Committee Charter for the Audit and Governance Committee states that the Committee will review with management the quarterly Self-Insurance report. The Charter does not specify what information is to be included in the self-insurance report. According to the Audit and Governance Committee meeting minutes, the self-insurance report was presented to and discussed by the Committee as part of the January 28, April 28, July 28, and October 27 meetings. We noted that the complainant attended all four of these meetings.

We met with the complainant to obtain a better understanding of the issues identified in the complaint and to obtain additional information. As part of this discussion the

complainant clarified that the issue regarding an audit of self-insurance is that he is concerned that NFTA's health insurance program is not included within the self-insurance report. The complainant indicated that he felt health insurance should be included in this report, since NFTA has been self-insuring its health insurance coverage for a couple of years.

The October 27, 2016 Audit and Governance Committee meeting minutes reflect that the complainant pointed out that NFTA is now self-insured for health insurance, and questioned whether health insurance should therefore be included in the quarterly self-insurance report. The minutes also reflect that the Executive Director indicated that the by-laws would be reviewed to see what was indicated.

We met with the Chair of the Audit and Governance Committee to determine what information is included in the self-insurance report and to ascertain the Committee's purpose in reviewing this report. The Chair indicated that the self-insurance report consists primarily of safety and workers' compensation related issues, and that the Committee views its purpose as reviewing with management the actions being taken by NFTA to reduce the number of accidents and injuries that are occurring at the authority. The Chair indicated that members of the Committee have various backgrounds and are able to bring different perspectives as to how best to improve in this area.

**Conclusion:** There was no request for an audit of self-insurance and such an audit is not required to be done. It appears that the complainant made a suggestion to include additional information in the quarterly review of the self-insurance report. The ABO believes that it is the Audit and Governance Committee's responsibility to determine the extent and content of the information it is provided, and as well as to determine whether revisions to its Charter are necessary.

**Complaint:** Public meetings are held at NFTA headquarters at which, when it becomes overcrowded the public is escorted out of the facility and denied access.

Article 7 of Public Officers Law is commonly known as the Open Meetings Law, and contains provisions regarding the conduct of public meetings. These provisions are generally applicable to the NFTA as a public benefit corporation and require the NFTA to make all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings. [Section 103(d)(1) of Article 7 of Public Officers Law]. Effective March 8, 2017 Open Meetings Law will also require the NFTA to broadcast its meetings to the public in real time and to post the broadcast on its website for a reasonable time after the meeting. [Section 103(f) of Article 7 of Public Officers Law], although we note that the NFTA already complies with this requirement.

The NFTA holds its board and committee meetings in a conference room on the sixth floor of its headquarters. To access this room, individuals must first register at a security desk on the ground floor and obtain a visitor pass. The capacity of the conference room is listed at 54 persons per fire codes.

The NFTA maintains access to archived webcasts of its board meetings for over a year. We reviewed the webcasts of select board meetings to determine an estimate of the number of attendees, and also obtained board meeting attendance records maintained by NFTA. It appears that the number of individuals attending the board meeting as recorded in the attendance records appropriately reflect the number of individuals in attendance, as viewed in the webcasts. The attendance records show that the average attendance for board meetings during 2016 was 30, which is well within the capacity of the conference room. The typical attendance at a board meeting was 25 to 27 individuals. NFTA officials told us that there are a couple individuals that are involved in the webcasting and recording process that are not included in the attendance records. They also indicated that the attendance records may not accurately include all individuals in attendance at the meetings, because some individuals in attendance may have been omitted from the attendance records.

There were two occasions during 2016 (July and October) where the attendance reports indicated the number of individuals approached the capacity of the conference room. The attendance reports indicated 49 people in attendance for the July 2016 meeting, and 48 people in attendance for the October 2016 meeting. The attendance report for the October 2016 meeting also indicates that three members of the public were unable to attend due to room capacity.

**Conclusion:** While individuals may not have been able to attend the NFTA board meeting on one occasion during 2016, based on the typical attendance at board meetings it appears that the NFTA makes reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings. The number of attendees at the October 2016 board meeting appears to be an isolated instance which was not reasonably foreseen.

**Complaint:** Evaluations of executive staff compensation have not been looked at in eight to ten years.

NFTA's Human Resource Committee Charter indicates that the purpose and responsibilities of the Human Resource Committee shall include reviewing NFTA goals and objectives and compensation relative to the Executive Director, Chief Financial Officer, and General Counsel, including evaluating their performance in light of those goals and objectives and such other factors as the Committee deems appropriate.

We met with the Chair of the Human Resource Committee who explained that there is a formal evaluation of the three executive level employees. The performance of the Chief Financial Officer and the General Counsel is prepared by the Executive Director and reviewed by the board Chair. The performance of the Executive Director is prepared by the board Chair. The Chair of the Human Resource Committee also indicated that the performance of the three executive staff is continuously evaluated by board members as part of the presentations and discussions that occur during every board meeting.

The Chair also explained that NFTA generally establishes the various board committees as “committees of the whole”. That is, each individual committee is comprised of the entire NFTA board. The Chair indicated that this policy of including all board members in all discussions and decisions is a more effective way of functioning. He also stated that as a result, topics discussed by the board are not restricted to the responsibilities of specific committees as identified in the committee charters. As an example, he indicated that as part of the general board meetings there are presentations made by NFTA on human resource issues. These issues are not presented solely to the Human Resource Committee, but are shared with the entire board, or discussed as part of other committee meetings.

We determined that performance evaluations of the three executive staff were last completed in 2016, and the process followed appears to reflect the process explained by the Human Resource Committee Chair. While there is no agenda item for the Human Resource Committee meetings in February 2015 or April 2016 that specify the performance of executive staff will be reviewed, it is possible that it was done. For example, the last agenda item for the February 2015 Human Resource Committee meeting was “Board Items” and the last agenda item for the April 2016 Human Resource Committee meeting was “Executive Session”. We noted that, while the complainant attended the April 2016 Human Resource Committee meeting, he left the meeting before it was half over. As such, if there was a discussion on the performance evaluations of the three executive staff, it is likely that he was not present for the discussion.

Section 2824(7) of Public Authorities Law requires public authorities to establish a governance committee and stipulates that the governance committee is responsible for performing self-evaluations of the board. The NFTA board met in executive session as part of its May 26 2016 meeting to complete its self-evaluation. As part of this evaluation, board members noted that the Chair had completed performance evaluations of the executive officers in April 2015. The April 23, 2015 board meeting minutes indicate that the board met in executive session to discuss personnel issues.

Further, the minutes of the May 26, 2016 executive session reflect that board members commented on the performance of the Executive Director, and that the Chair commends the dedication and ability of the Executive Director and Management Team. The complainant was not present for this meeting. It is possible that the performance of the executive staff was discussed with the board during this executive session.

**Conclusion:** There were evaluations of the executive staff completed in 2016. While the ABO cannot determine whether the performance of the executive staff was reviewed by the Human Resource Committee in accordance with the Committee Charter, it is likely that this was done.

**Recommendation:** To improve the transparency and accountability of its operations, the agendas for Human Resource Committee meetings should indicate when the Committee is evaluating executive staff performance in light of NFTA goals and objectives and other factors as the Committee deems appropriate, in accordance with the Committee Charter.