

CENTER for JUDICIAL ACCOUNTABILITY, INC.

P.O. Box 69, Gedney Station
White Plains, New York 10605-0069

Tel. (914) 421-1200
Fax (914) 428-4994

E-Mail: judgewatch@aol.com
Web site: www.judgewatch.org

Elena Ruth Sassower, Coordinator

BY FAX: 212-262-5152 (4 pages)
CERTIFIED MAIL/RRR: 7099-3400-0001-2734-2304

October 11, 2000

New York State Commission on Judicial Nomination
666 Fifth Avenue, 28th Floor
New York, New York 10103-0084

ATT: Stuart A. Summit, Counsel

RE: (1) CJA's request, pursuant to Judiciary Law §63.3 and F.O.I.L., for copies of the Commission's prior reports of "well-qualified" candidates for the Court of Appeals, transmitted to the Governor pursuant to Judiciary Law §63.3;

(2) CJA's request for a copy of the Commission's promulgated rules and regulations governing records access under F.O.I.L., required by Public Officers Law §87.1, as well as for a copy of its "subject matter list", required by Public Officers Law §87.3(c)

Dear Mr. Summit:

Thank you for your prompt response to CJA's October 6th letter which, invoking public access rights under Judiciary Law §63.3, requested a copy of the Commission's report of the qualifications of the seven candidates most recently recommended to the Governor as "well qualified" for appointment to the Court of Appeals.

On its face, the Commission's October 4, 2000 "Report" which you supplied is NON-CONFORMING with Judiciary Law §63.3, the statute under which it purports to be rendered.

Judiciary Law §63.3 *expressly* states that the report:

"shall include the commission's findings relating to the character, temperament, professional aptitude, experience, qualifications and fitness for office of each candidate who is recommended to the governor" (emphases added).

This requirement was pointed out to you *more than a year and a half ago* in CJA's March 12, 1999 letter, which detailed the respects in which the Commission's then most recent November 12, 1998 "Report" was NON-CONFORMING with Judiciary Law §63.3¹. The October 4, 2000 "Report" is NON-CONFORMING in these same respects, *to wit*,

"The 'Report' contains no such 'findings' as to 'each candidate'. Instead, there is only a bald conclusory statement that, 'in the collective judgment of the Commission', all seven candidates are 'well qualified' according to those criteria. As to these, the 'Report' claims they 'are considered the best qualified of those who filed applications...'

Although the 'Report' states that 'the Commission caused an investigation to be conducted of the large number of applicants it determined to interview' no information is provided as to either the total number of applicants or the number interviewed. Nor is there any information as to the manner in which the Commission conducted its 'investigations'² to establish the qualifications of the applicants, let alone the specifics of its investigations of the seven 'best qualified' candidates. The only 'particulars' provided by this boiler-plate, completely uninformative 'Report' is by an attached 'summary of the careers of the recommended candidates' – a distillation of resume-type biographic information, without qualitative assessment." (CJA's March 12, 1999 letter, at p. 2)

Our March 12, 1999 letter observed that our evaluation of the Commission's November 12, 1998 "Report" was hampered by your failure to provide us copies of prior Commission reports, transmitted to the Governor pursuant to Judiciary Law §63.3 over the Commission's twenty-year history. As these had been *expressly* requested "for comparison and other research purposes", our March 12, 1999 letter suggested that your failure to produce them was to conceal that the

¹ The Commission's Rule, 22 NYCRR §7100.8, "Report to the Governor", reinforces that the "report shall be in conformance with section 63(3) of the Judiciary Law".

² "To ensure the thoroughness and reliability of the Commission's evaluations, the Judiciary Law confers upon the Commission the power to: (1) '...administer oaths or affirmations, subpoena witnesses and compel their attendance, examine them under oath or affirmation and require the production of any books, records, documents or other evidence that it may deem relevant or material to its evaluation of candidates', Judiciary Law §64.2; (2) 'require from any court, department, division, or board, bureau, commission, or other agency of the state or political subdivision thereof or any public authority such assistance, information, and data, as will enable it properly to evaluate the qualifications of candidates...', and, specifically, the Commission on Judicial Conduct, Judiciary Law §64.3; (3) '...interview any person concerning the qualifications of any candidate', Judiciary Law §64.4. This is reiterated by the Commission's Rule, 22 NYCRR §7100.6, 'Investigation of Candidates'."

Commission's November 12, 1998 report was ALSO NON-CONFORMING with these prior reports.

Obviously, if the November 12, 1998 "Report" is NON-CONFORMING with the prior reports, so, too, is the identically-patterned October 4, 2000 "Report". Consequently, by this letter, CJA reiterates its request for copies of ALL Commission reports transmitted to the Governor pursuant to Judiciary Law §63.3, prior to its November 12, 1998 "Report". This request, like the request in CJA's March 12, 1999 letter, is pursuant to Judiciary Law §63.3, making such reports public "at the time [they are] submitted to the governor" AND, additionally, Article 6 of the Public Officers Law: the Freedom of Information Law [F.O.I.L.]. Pursuant to F.O.I.L., you are obliged to respond within five business days (Public Officers Law §89.3).

As you know, F.O.I.L.'s time requirement for response was brought to you attention in CJA's March 12, 1999 letter -- to which we received NO response -- as, likewise, in CJA's subsequent communications -- to which we also received NO response. These subsequent communications consist of: (1) CJA's March 26, 1999 ethics complaint against the Commission on Judicial Nomination, filed with the New York State Ethics Commission³; (2) CJA's May 3, 1999 letter to you; and (3) CJA's September 15, 1999 ethics complaint, filed with the New York State Ethics Commission, constituting a supplement to CJA's March 26, 1999 ethics complaint⁴.

That the Freedom of Information Law applies to the Commission is reflected by CJA's May 3, 1999 letter. Its first sentence refers to an April 26, 1999 letter to CJA from the Executive Director of the New York State Committee on Open Government, Robert Freeman -- to which you are an indicated recipient. By that April 26, 1999 letter, Mr. Freeman identified that he had spoken with you following CJA's request that he confirm that the Commission is subject to F.O.I.L. and that it has promulgated rules and regulations relating thereto⁵. According to Mr. Freeman's April 26, 1999 letter, recounted in CJA's May 3, 1999 letter, you informed him that "the Commission is taking all necessary steps to comply with the Freedom of Information Law, including the promulgation of procedural rules and regulations."

Although CJA's May 3, 1999 letter to you requested a copy of those procedural rules and regulations once the Commission had belatedly promulgated them -- and likewise, a copy of the "subject matter list" which F.O.I.L. requires a covered agency to compile of all records in its

³ See pages 22-24 therein.

⁴ See page 4 therein.

⁵ See Public Officers Law §87.1

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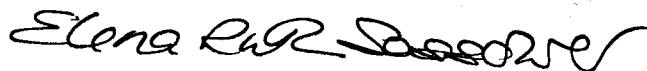
possession⁶ – we have received neither. This was highlighted by CJA's September 15, 1999 supplemental ethics complaint (at p. 4).

We understand from Mr. Freeman that he also has not received from you copies of the Commission's promulgated rules and regulations or the "subject matter list". Therefore, CJA requests that you identify what "steps", *if any*, the Commission took "to comply with the Freedom of Information Law" in the *year and half* since you so assured Mr. Freeman – and to finally provide us with copies of the promulgated rules and regulations for records access, the "subject matter list" and the 20 years' worth of Commission reports pursuant to Judiciary Law §63.3.

Pursuant to Public Officers Law §89.4(a), denial of access to a record is appealable "to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body", who has "ten business days" to "fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought". Consequently, if you do not intend to provide us with the requested documents, pursuant to our rights under the Freedom of Information Law, CJA requests that you immediately transmit this letter – and CJA's referred-to past correspondence – to the members of the Commission as our appeal from your denial thereof. Under Public Officers Law §89.4(a), the Commission is required to "immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon".

In light of the chain of events which the Commission's October 4, 2000 "Report" initiates: bar association review, gubernatorial appointment, and Senate confirmation – all in short order -- we request that you and the Commission give this letter a priority response.

Yours for a quality judiciary,



ELENA RUTH SASSOWER, Coordinator
Center for Judicial Accountability, Inc. (CJA)

cc: Robert Freeman, Executive Director
Committee on Open Government

⁶ See Public Officers Law §87.3(c)

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RESULT	OK
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 Thurst A. Summit, Counsel

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