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BY CERTIFIED MAIL/RRR: 7001-0320-0004-5457-4941

December 26, 2003

W. Brooks DeBow, Deputy Counsel to Governor Pataki
Executive Chamber, The Capitol
Albany, New York 12224

RE: **"FOIL APPEAL 2003-3"**: CJA's December 6, 2002 and January 9, 2003 F.O.I.L. Requests, Renewing and Supplementing CJA's March 30, 1999 and March 30, 2001 F.O.I.L. Requests Pertaining to the Governor's Judicial Screening Committees for the Lower State Courts, as well as CJA's Request for the Financial Statement of Albert Rosenblatt in Connection with his Appointment to the New York Court of Appeals

Dear Deputy Counsel DeBow:

This responds to your December 19, 2003 letter relating to our December 6, 2003 appeal which you have denominated "FOIL Appeal 2003-3".

We take exception to your claim that our appeal is "not entirely clear" – and herein highlight various misleading aspects of your December 19, 2003 letter¹, in addition to responding to your specific inquiries.

As to what you have delineated as the first ground of our appeal, which you have upheld (at p. 2): Enclosed herewith is a check for \$16.50 to cover the cost of duplicating the 66 additional pages "that Mr. Ustin apparently mistakenly neglected" to provide in response to our F.O.I.L. request for judicial screening committee reports *prior to April 5, 1999*.

¹ Over and beyond what is hereinafter set forth, the second paragraph of your letter is repetitive as to its "(v)(a)" – which is repeated in the subsequent sentence, "In addition... (4)". Additionally, as to its "(v)(b)", we did not request a copy of the Governor's letter "appointing Paul Schechtman as Chairman of the State Ethics Commission" (emphasis added). Rather, as correctly reflected in "In addition... (5)", we requested "a copy of the Governor's letter appointing Paul Schechtman to the Ethics Commission..." [See Mr. Ustin's November 6, 2003 letter (p. 2, #6), quoted at p. 4 of our December 6, 2003 appeal].

As to what you have delineated as the second ground of our appeal, which you have denied (at p. 2): It is *untrue* that our F.O.I.L. request does not entitle us to judicial screening committee reports later than March 30, 2003. Page 3 of our December 6, 2002 letter – expressly identified by our December 6, 2003 appeal (at p. 2) -- could not have been clearer in stating:

“Finally, please deem this letter a supplement to CJA’s March 30, 1999 F.O.I.L. request so as to extend the span of dates pertinent to the documents therein sought to run to the date of your substantive response – hopefully soon forthcoming. Thus, for instance, the request therein ‘to inspect the ‘written reports’ of ALL the Governor’s judicial appointees to the lower state courts, from the inception of his administration in 1995 to the present’ *should be deemed to run to the date of your substantive response.*” (italics added)

Since Mr. Ustin’s November 6, 2003 letter was the first “substantive response”, we are entitled to all committee reports to November 6, 2003.

As to what you have delineated as the third ground of our appeal, which you have denied (at pp. 2-3): It is *untrue* that we are seeking information, we are seeking production. Mr. Ustin, however, did not produce the requested “current” Uniform Rules of the Judicial Screening Committee. Instead, he referenced Uniform Rules that had been produced 2-1/2 years, without any statement that these are still “current”. Consequently, we are entitled to production of any superseding “current” Rules as may be in the Executive Chamber’s possession.

Moreover, as pointed out by our December 6, 2003 appeal (at p. 2), the production of the Uniform Rules 2-1/2 years ago did not include the appendix thereto, consisting of blank questionnaire forms which candidates are required to complete. With regard to our entitlement to those blank questionnaires – as well as to any blank questionnaires used by the temporary judicial screening committee -- you have combined our two requests into the sixth ground of our appeal (at p. 3), wherein you concur with Mr. Ustin “that the questionnaires may be properly withheld from disclosure”.

We take issue with this concurrence – which you accomplish by concealing that our requests are for *blank* questionnaire and by failing to confront our arguments on appeal based thereon, which you do not even identify, *to wit*:

“...As to [Mr. Ustin’s] citation to Executive Order[s] #10 [and #11] for the confidentiality of “all communications...with respect to a candidate’s qualifications”, this is inapposite to CJA’s request for blank questionnaire forms which have nothing to do with any specific “candidate’s qualifications”. For the same reason, his citation to Baumgarten v. Koch, 97 Misc.2d 449 (New

York Co., 1978) is inapposite because the blank questionnaire forms are not evaluative documents as to which the committees is performing its “purely advisory function”. These blank questionnaire forms are public documents, distributed to prospective applicants to complete. Prospective applicants are members of the public – and, certainly, a member of the public cannot determine whether he will be able to successfully complete the application process without first reviewing the blank questionnaire and other requirements set forth in the application package.” (at p. 3, underlining in original).

That you “nonetheless” have chosen to grant us access to “a blank JSC questionnaire” is, we believe, a concession of our entitlement thereto for the reasons our appeal set forth – a fact which, to avoid setting a precedent that would benefit future F.O.I.L. requesters of this and similar documents, you seek to conceal.

It is our position that just as the judicial screening committees’ blank questionnaire forms are distributed free of charge to potential applicants, we, too, are entitled to a copy free of charge. However, should you adhere to your view that, unlike potential applicants, we must pay \$12.50 to secure a copy of its 50 pages, we enclose a check in that amount.

Finally, please clarify why your December 19, 2003 letter does not identify that you are according us access to the blank questionnaires of the temporary judicial screening committee, in addition to the blank questionnaires of the judicial screening committees.

As to what you have delineated as the fourth ground of our appeal, which you have upheld (at p. 3): In response to your inquiry, we adhere to our request for “all records” showing “the cost to the taxpayers of the Governor’s judicial screening committees”, including costs for ‘paid staff’ and ‘reimbursement of any necessary expenses’”, spanning from the inception of the temporary judicial screening committee. Since you indicate that this “could take considerable time and further staff time and resources to complete”, please begin with the earliest year, 1995, and advise us as soon as that year’s records are available for inspection. Meantime, please advise when we may make an appointment to inspect the records for 2002 that Mr. Ustin secured for us.

As to what you have delineated as the fifth ground of our appeal (p. 3): you have clarified that Mr. Ustin has confirmed that “a thorough review was undertaken” for the notifications made by the chairpersons of the permanent judicial screening committees to the chairman of temporary committee that the permanent committees were “fully operational” and for the Governor’s letters appointing Paul Schechtman to the chairmanship of the State Ethics Commission and of the State Judicial Screening Committee. However, you have not clarified,

as our appeal expressly requested (at p. 4), that, apart from the two one-page documents proffered by Mr. Ustin, “no other responsive documents are in the ‘possession’ of the Governor’s office”.

As to your final certifications (at p. 3) that “after thorough review of [your] records...[the Governor’s office] does not possess or maintain” requested documents, you have *omitted* from your itemization of our requested documents:

“all notices during the Governor’s tenure...reflecting the...solicitation of candidates to fill judicial vacancies [as required by Section VII of the ‘Uniform Rules for Governor Pataki’s State Judicial Screening Committees’] – including advertisements” – this being the additional request from CJA’s January 9, 2003 letter.” (CJA’s December 6, 2003 appeal, at p. 3).

Please, therefore provide a certification as to this category of requested documents.

Lastly, please specify that the various certifications in your December 19, 2003 letter accord with the interpretation of “possession”, cited by our December 6, 2003 appeal as set forth in the Committee on Open Government’s advisory opinion #10796 [“Record, Physical Custody of”].

Thank you.

Yours for a quality judiciary,

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

Enclosures

cc: Committee on Open Government