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BY FAX: 518-486-9652 (3 pages)

BY CERTIFIED MAIL/RR: 7001-0320-0004-7860-0404

December 5, 2003

W. Brooks DeBow, Deputy Counsel to Governor Pataki
Executive Chamber, The Capitol
Albany, New York 12247

RE: CJA's January 14, 2003 and January 16, 2003 Requests, Including Pursuant to F.O.I.L. and Judiciary Law §63.4, for Publicly-Available Materials Pertaining to Governor Pataki's Appointment of Court of Claims Presiding Judge Susan P. Read to the New York Court of Appeals

Dear Deputy Counsel DeBow:

Pursuant to Public Officers Law §89.4, the Center for Judicial Accountability, Inc. (CJA) timely appeals from the November 5, 2003 letter of Mark R. Ustin – the Governor's Records Access Officer and one of his Assistant Counsel – purportedly responding to our January 14, 2003 and January 16, 2003 letters. These two letters, addressed to the attention of the Governor's then Counsel, James McGuire, sought documents, as well as information, germane to the Governor's appointment of Susan P. Read to the New York Court of Appeals, then awaiting confirmation by the State Senate. For this reason, by letter dated January 20, 2003, we requested response "BY FAX (914-428-4994) and WITHOUT DELAY" – alerting Mr. McGuire of the fact that the Senate Judiciary Committee had "precipitously and without proper notice" scheduled the confirmation hearing for January 22, 2003.

Response from Mr. McGuire was not forthcoming – and, by letter dated January 27, 2003, Mr. Ustin acknowledged his receipt of our January 14, 2003 and January 16, 2003 requests, stating that "further response" would be forthcoming "by approximately February 27, 2003". Thereafter, receiving no response from Mr. Ustin, substantive or otherwise, we sent him an April 16, 2003 letter asking that he advise us as to "the status" of these requests.

It is only now that Mr. Ustin has responded. Without stating that a "diligent search: has been made of "documents or records which are kept by the Executive Chamber", his November 5, 2003 letter, postmarked in an envelope bearing a "Nov 07 03" date, states: "I have determined

that this office possesses three (3) pages of documents that are responsive to your requests". No representation is made that this is the extent of the responsive documents in the "possession" of the Governor's office.

As to the "three (3) pages of documents" produced by Mr. Ustin's November 5, 2003 letter, they are not responsive to CJA's January 14, 2003 letter for:

"any publicly-available materials pertaining to Governor Pataki's appointment of Court of Claims Presiding Judge Susan P. Read to the Court of Appeals...includ[ing] evaluations and supporting materials received from the bar associations for these seven candidates."

Indeed, Mr. Ustin produces nothing in response to that letter – not even the "financial statement that Judge Read was required to submit as part of her application for the Court of Appeals", notwithstanding the mandatory language of Judiciary Law §63.4, which the January 14, 2003 letter quoted:

"...The governor shall make available to the public the financial statement filed by the person appointed to fill a vacancy."

It is only to CJA's January 16, 2003 letter that these "three (3) pages of documents" relate. They consist of:

(1) a 1-page undated chart of the staff of the Governor's Counsel's office – from which we are able to discern that there was a single position of Deputy Counsel between a single position of the Governor's Counsel and a single position of First Assistant Counsel – and that, at some unspecified period, these were filled by Ms. Read, Michael Finnegan, and James McGuire, respectively.

(2) a 2-page document entitled "Employee Appointment Records", whose entries span from "01/09/95" to "03/05/98" and identify the job titles of "ASNT COUNSEL GOV", "FIRST ASSNT CENSEL GOV", and then again "ASSNT COUNSEL GOV".

Because no explanatory or interpretive information is provided as to these "three (3) pages of documents", it is not possible to ascertain the requested "precise dates" of Ms. Read's tenure as "Deputy Counsel" – to which, according to her "Employee Appointment Records", she does not even appear to have been appointed.

As identified by CJA's January 16, 2003 letter, the precise dates of Ms. Read's tenure as Deputy Counsel are "*basic information*", as likewise her duties in that position. Yet Mr. Ustin also does not furnish any documents constituting the requested "job description" for Deputy Counsel – the position you NOW occupy. Nor does he identify the existence of requested "work product" documents of Ms. Read that would be available for inspection and copying.

Pursuant to Public Officers Law §89.4, you have ten business days from receipt of this appeal to "fully explain in writing...the reasons for further denial or [to] provide access to the record sought." Such statutory provision further requires you to "immediately forward to the committee on open government a copy of [this] appeal when received...and the ensuing determination thereon."

In the event you should claim what Mr. Ustin has not, *to wit*, that the requested records are not in the Governor's "possession" and cannot be found after diligent search, please certify same pursuant to Public Officers Law §89.3, bearing in mind the Committee on Open Government's advisory opinion #10796 ["Record, Physical Custody of"] interpreting "possession".

To assist the Committee on Open Government in discharge of the supervisory oversight contemplated by Public Officers Law §89.4, we will promptly transmit to it copies of the hereinabove referred-to underlying documents.

Yours for a quality judiciary,



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