

CENTER for JUDICIAL ACCOUNTABILITY, INC.

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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 April 16, 2003 F.O.I.L. Request Pertaining to the Governor's "Federal Appointments Screening Committee"/Federal Judicial Screening Committee

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 – responding to our April 16, 2003 F.O.I.L. request for production of nine itemized categories of documents pertaining to the Governor's "Federal Appointments Screening Committee"/Federal Judicial Screening Committee.

Mr. Ustin's November 5, 2003 letter produces only a single document, the Governor's February 28, 2002 press release -- already in our possession. Indeed, a copy of that press release, entitled "Governor Announces Federal Judicial Screening Committee", was enclosed with our April 16, 2003 F.O.I.L. request, as well as expressly referred to therein.

Mr. Ustin's superfluous production of the February 28, 2002 press release is in response to our itemized category #2 for: "any documents reflecting the Governor's appointments of the Committee's Chairman and its members, including the dates thereof". Conspicuously, Mr. Ustin does not purport that, after "thorough review" he has determined that the Governor's office does not possess OTHER records responsive to #2. Indeed, presumably there are letters of appointment from the Governor to the Chairman and each of the Committee members.

By contrast, Mr. Ustin purports in response to all other itemized categories, except for #5: "After a thorough review of our records, I have determined that this office does not possess any documents responsive to this request". As any functioning Federal Appointments/Judicial Screening Committee -- whether or not established by an Executive Order comparable to

Executive Orders #10 and #11¹ -- would generate, receive, and maintain the documents sought by our April 16, 2003 letter, CJA requests that you certify Mr. Ustin's claim that the Governor's office is not in "possession" of the requested documents, even "after diligent search", 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".

Finally, as to our itemized category #5, requesting

"copies, in blank, of any and all questionnaire forms which the Committee has required candidates for federal judgeships and for positions of U.S. Attorney and U.S. Marshall to complete" (emphasis added),

Mr. Ustin's response that "FOIL does not require the disclosure of the questionnaire insofar as the committee at issue performs a purely advisory function" – for which he cites "Baumgarten v. Koch, 97 Misc. 2d 449 (New York Co., 1978)", introduced by "See"², is in knowing bad faith. CJA is NOT seeking confidential, evaluative documents pertaining to any applicant – as was the case in Baumgarten v. Koch. Rather, as itemized category #5 makes explicit, our request is for the blank questionnaire forms which prospective applicants are required to complete. Prospective applicants are members of the public – and the blank questionnaires are plainly public documents by reason thereof. Assuredly, a member of the public cannot assess whether he cannot successfully complete the application process without first reviewing the blank questionnaire and other requirements set forth in the application package.

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."

¹ As you know, Executive Orders #10 and #11 pertain to the Governor's permanent and temporary judicial screening committees for the lower state courts.

² According to The Blue Book: A Uniform System of Citation (Harvard Law Review Association, 17th edition, 2000), "see" before a legal citation means that there is "an inferential step between the authority cited and the proposition it supports". In other words, "the proposition is not directly stated by the cited authority" (at pp. 22-23).

Finally, 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

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

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