

CENTER for JUDICIAL ACCOUNTABILITY, INC.

Post Office Box 3002
Southampton, New York 11969

Tel. (631) 377-3583

E-Mail: cja@judgewatch.org
Website: www.judgewatch.org

Elena Sassower, Director

BY FAX: 518-486-2715 (10 pages)

BY E-MAIL: FOIL@ag.ny.gov

December 1, 2011

Joshua Pepper, Records Access Officer/Assistant Attorney General
New York State Attorney General
The Capitol
Albany, New York 12224-0341

- RE: (1) DEFICIENCIES IN YOUR RESPONSE TO FOIL REQUEST #110450:
CJA's July 19, 2011 letter: "RE: ... FOIL & Project Sunlight Requests for Posting of the Record of the Judicial Compensation Lawsuits on the Attorney General's Website – &/or Providing the Record to the Center for Judicial Accountability for Posting on its Website"
- (2) NEW FOIL/PROJECT SUNLIGHT REQUEST:
All publicly-available documents bearing upon: "the inexplicable failure of the Attorney General's Office and the Dolan firm to have moved to reargue the palpably deficient February 23, 2010 decision before the Court of Appeals or to have filed a petition for a writ of certiorari with the U.S. Supreme Court, where the consequences were so violative of the New York Constitution and so potentially catastrophic to New York taxpayers – and where the dissent of Judge Smith would have dismissed all claims" (CJA's July 19, 2011 letter, at p. 8, underlining in the original).

Dear Records Access Officer Pepper:

This follows up your September 26, 2011 letter responding to the FOIL request presented by our July 19, 2011 letter, which you designated FOIL Request #110450. For your convenience, a copy of your letter is annexed.

Although you acknowledge the two-fold nature of the request:

"Posting of the Record of the Judicial Compensation Lawsuits on the Attorney General's Website – &/or Providing the Record to the Center for Judicial Accountability for Posting on its Website",

you do not respond to the first request that the record be posted on the Attorney General's website, other than to implicitly deny it by furnishing us with what you identify as:

“a compact disc (CD) containing documents numbered 110450-1 through 110450-2781 that respond to [our] request”,

presumably so that we can post the “documents” therein on our website.

Inasmuch as your September 26, 2011 letter recognizes the public significance of the lawsuit record by not only quoting from our letter's RE: clause summarizing our FOIL request, but by quoting extensively from pages 8-9, setting forth powerful reasons for the record to be posted, including as embodied by the Attorney General's own Project Sunlight initiative, please explain why the Attorney General is not posting the record on his website. Indeed, apart from providing a role-model example of transparency in government as relates to the Attorney General's office, such would be an appropriate updating of the webpage for the Attorney General's Division of Appeals & Opinions – seemingly the only webpage of the Attorney General's website offering any example of its litigation workproduct – and these being for four cases under Attorney General Cuomo – one at the New York Court of Appeals, one in the Second Circuit Court of Appeals, one at the U.S. Supreme Court, and one in the Ninth Circuit Court of Appeals, as to which only single briefs of the Attorney General's office are posted, except as to the Supreme Court case, which additionally posts the U.S. Solicitor General's brief, the opposition brief, and the Attorney General's reply brief.

As for the compact disc you have provided us, you do not identify anything about the 2,781 “documents” it contains. Nor do you state that these constitute the full record of the cases furnished – or even that the furnished cases are all there are.

Please be advised that the 2,781 “documents” are 2,781 pages – and these pages are from documents of three judicial compensation lawsuits – with the record of none of these complete. Nor are these all the judicial compensation cases. There are at least three additional lawsuits, of which you have supplied no records.

The three judicial compensation lawsuits whose records are NOT on the compact disc are:

- *JUDITH S. KAYE, in her official capacity as Chief Judge of the State of New York, Chief Judge and THE NEW YORK STATE UNIFIED COURT SYSTEM v. SHELDON SILVER, in his official capacity as Speaker of the New York State Assembly, THE NEW YORK STATE ASSEMBLY, JOSEPH BRUNO, in his official capacity as Temporary President of the New York State Senate, THE NEW YORK STATE SENATE, DAVID A. PATERSON, in his official capacity as Governor of the State of New York, and THE STATE OF NEW YORK* – (filed in Supreme Court, New York Co: #08-400763) – one of the three judicial compensation lawsuits that the Court of Appeals decided by its February 23, 2010 decision – and as to

which the Court of Appeals, stated, in “anticipat[ing]” that the Legislature and Governor would “consider, in good faith, judicial salary increases on the merits”:

“The Legislature might find the record compiled in the Chief Judge case to be helpful” (at p. 32. underlining added);

- *EMILY PINES, DAVID DEMAREST, JEFFREY D. LEBOWITZ, STEPHEN FERRADINO, RALPH A. BONIELLO, III v. STATE OF NEW YORK*– (filed in Supreme Court/Mineola, Nassau Co: #10-13518) – wherein Nassau Supreme Court Justice Karen V. Murphy held, in a February 9 2011 decision, that the state is “obligated” to pay judges a retroactive pay raise to April 2009. Attorney General Schneiderman filed a notice of appeal on March 17, 2011 and perfected the appeal on November 16, 2011 (Appellate Division, Second Department #2011-2821);
- *In the Matter of EDWARD A. MARON, ARTHUR SCHACK, and JOSEPH A. DEMARO, Individually and on behalf of all Judges and Justices of the Unified Court System who served or are serving during the period of the statute of limitations period v. State of New York*–AG wherein, on January 12, 2011, the plaintiffs, filed their claim in the Court of Claims (#119352 - Judge Francis Collins), which Attorney General Schneiderman answered on February 24, 2011 and as to which the parties signed a stipulation of discontinuance on May 12, 2011.

As for the three lawsuits whose partial records are on the compact disc, they are:

- *HON. SUSAN LARABEE, HON. MICHAEL NENNO, HON. PATRICIA NUNEZ, and HON. GEOFFREY WRIGHT v. ELIOT SPITZER, as Governor of the State of New York, NEW YORK STATE SENATE, NEW YORK STATE ASSEMBLY, and STATE OF NEW YORK* (filed in Supreme Court, New York Co: #07-112301). The missing documents include the Court of Appeal briefs. This case is currently the subject of a renewal motion by the plaintiff-judges for “back-pay monetary relief”. It is before Manhattan Supreme Court Justice Richard Braun and Attorney General Schneiderman is representing the defendants. The motion record is not sequentially furnished on the compact disc, but scattered throughout, as may be seen from the below inventory;
- *ARLENE R. SILVERMAN, Acting Justice, New York State Supreme Court v. Sheldon Silver, in his official capacity as Speaker of the New York State Assembly, THE NEW YORK STATE ASSEMBLY, DEAN G. SKELOS, in his official capacity as Temporary President of the New York State Senate, THE NEW YORK STATE SENATE, DAVID A. PATERSON, in his official capacity as Governor of the State of New York, THOMAS P. DiNAPOLI, in his official capacity as Comptroller of the State of New York, and THE STATE OF NEW YORK* (filed in Supreme Court, New York Co: #08-117058). It is before Manhattan Supreme Court Justice Saliann Scarpula and Attorney General Schneiderman is representing the defendants

- *EDWARD A. MARON, ARTHUR SCHACK, and JOSEPH A. DeMARO v. SHELDON SILVER, as Speaker of the NYS Assembly, NEW YORK STATE ASSEMBLY, JOSEPH BRUNO, as the Temporary President of the New York State Senate, NEW YORK STATE SENATE, ELIOT SPITZER, as Governor of the State of New York, THOMAS DiNAPOLI, as the Comptroller of the State of New York, and The OFFICE OF COURT ADMINISTRATION (Article 78 proceeding, filed in Supreme Court, Nassau Co: #06-021984; transferred by stipulation of parties to Albany). The missing documents include the Court of Appeals briefs.*

Here is a rough inventory of what you have furnished on the compact disc, often in wildly a-chronological order, with repetitions of documents:

<u>PAGES</u>	<u>DOCUMENT</u>
1-28:	<i>Larabee: Attorney General Cuomo's <u>December 7, 2007</u> (corrected) reply memo of law for defendants in support of their motion for change of venue & to dismiss</i>
29-33:	<i>Larabee: Attorney General Cuomo's <u>February 26, 2008</u> verified answer for defendants, signed and verified by Assistant Attorney General Joel Graber</i>
34-61:	<i>Larabee: Attorney General Cuomo's <u>April 29, 2008</u> memo of law for defendants in opposition to plaintiffs' motion for summary judgment on separation of powers claim</i>
62-80:	<i>Larabee: Assistant Attorney General Graber's <u>April 29, 2008</u> affirmation in opposition to plaintiffs' summary judgment motion on separation of powers claim, with exhibits</i>
81-105:	<i>Larabee: plaintiffs' verified complaint, signed by Thomas Bezanson, Esq., with <u>September 11, 2007</u> verification by plaintiff-judge Nunez</i>
106-142:	<i>Larabee: plaintiffs' <u>April 3, 2008</u> memo of law in support of their motion for summary judgment on separation of powers claim</i>
143-214:	<i>Larabee: Attorney General Cuomo's <u>October 30, 2007</u> notice of motion for defendants to dismiss plaintiffs' complaint for failure to state a cause of action, with Asst. AG Graber's affirmation in support of motion to transfer action & dismiss for failure to state a cause of action, appending exhibits</i>
215-246:	<i>Larabee: Attorney General Cuomo's <u>October 30, 2007</u> memorandum of law for defendants in support of defendants' motion for change of venue & to dismiss plaintiffs' complaint (Asst AG Graber)</i>

- 247-312: *Larabee*: transcript of May 29, 2008 oral argument before NY Supreme Court Justice Edward Lehner on plaintiffs' motion for summary judgment on separation of powers claim
- 313-340: *Larabee*: Attorney General Cuomo's December 7, 2007 (corrected) reply memo of law for defendants in support of defendants' motion for change of venue and to dismiss (Asst AG Graber)
- 341-345: *Larabee*: Attorney General Cuomo's February 26, 2008 verified answer for defendants, signed & verified by Asst AG Graber
- 346-396: *Larabee*: Assistant Attorney General Graber's May 24, 2011 opposing affirmation to plaintiffs' renewal motion for "back-pay monetary relief", with exhibits**
- 397-436: *Larabee*: Attorney General Scheiderman's May 24, 2011 memorandum of law in opposition to plaintiffs' motion to renew for "back-pay monetary relief"**
- 437-2012: bookmarked only as "FOIL 110450 A&O Albany", consisting of:
437: NY Ct of Appeals: Record on Appeal for *Maron v. Silver*
1055: NY Ct of Appeals: Record on Appeal (Vol. I) for *Larabee*
1513: NY Ct of Appeals: Record on Appeal (Vol. II) for *Larabee*
1811: NY Ct of Appeals: Supplemental Joint Record on Appeal for *Larabee*
1827: NY Ct of Appeals: Supplemental Joint Record on Appeal for *Larabee*
- 2013-2040: *Larabee*: Attorney General Cuomo's April 29, 2008 memorandum of law in opposition to plaintiffs' motion for summary judgment on separation of powers issue
- 2041-2059: *Larabee*: Assistant Attorney General Graber's April 29, 2008 affirmation in opposition to plaintiffs' summary judgment motion on separation of powers issue
- 2060-2084: *Larabee*: plaintiffs' verified complaint, signed by Bezanson, with September 11, 2007 verification by plaintiff-judge Nunez
- 2085-2121: *Larabee*: plaintiffs' April 3, 2008 memorandum of law in support of their motion for summary judgment on separation of powers claim
- 2122-2475: *Larabee*: plaintiffs' April 3, 2008 notice of motion for summary judgment on their separation of powers claim, with Bezanson affirmation, appending exhibits

- 2476-2496: *Larabee: plaintiffs' March 23, 2011 memo of law in support of motion for leave to renew for "back-pay monetary relief" (signed by Bezanson & George Bundy Smith)*
- 2497-2499: *Larabee: plaintiffs' March 23, 2011 notice of motion for leave to renew for "back-pay monetary relief" (signed by Bezanson & George Bundy Smith)*
- 2500-2521: ***Larabee: proposed amici curiae's May 18, 2011 motion for leave to file brief in support of renewal for "back-pay monetary relief" by Joseph L. Forstadt for Association of Justices of Supreme Court of the State of New York, Supreme Court Justices Association of the City of New York, Inc., and New York State Association of City Court judges***
- 2522-2593: *Larabee: Attorney General Cuomo's October 30, 2007 notice of motion for defendants to dismiss plaintiffs' complaint for failure to state cause of action, with affirmation of Assistant AG Graber to transfer action and dismiss the complaint, appending exhibits*
- 2594-2625: *Larabee: Attorney General Cuomo's October 30, 2007 memorandum of law in support of defendants' motion to change venue & dismiss the complaint (Asst AG Graber)*
- 2626-2638: ***Larabee: plaintiffs' June 16, 2011 reply memorandum of law in further support of plaintiffs' motion for leave to renew for "back-pay monetary relief" (signed by Bezanson & George Bundy Smith)***
- 2639-2650: ***Larabee: Thomas Bezanson's June 16, 2011 reply affirmation in further support of plaintiffs' motion for leave to renew for "back-pay monetary relief"***
- 2651- 2657: *Silverman: Pro se plaintiff's August 3, 2011 notice of motion for summary judgment & affidavit*
- 2658-2663: *Silverman: Pro se plaintiff's August 3, 2011 memorandum of law*
- 2664-2701: *Silverman: Attorney General Schneiderman's May 14, 2011 motion for Defendants to dismiss complaint for failure to state cause of action (Asst AG Graber)*
- 2702-2707: *Silverman: Pro se plaintiff's June 24, 2009 amended complaint*
- 2708-2715: *Silverman: Pro se plaintiff's December 22, 2008 summons & complaint*

2716-2781: *Larabee*: transcript of May 29, 2008 oral argument before NY Supreme Court Justice Lehner on plaintiffs' motion for summary judgment on separation of powers claim .

If Attorney General Schneiderman will not post on his website the complete records of the foregoing six lawsuits in proper chronological fashion, we request a compact disc with the full chronological records of these lawsuits so that we may post them on our website.

Obviously, the records of the lawsuits that have gone up on appeal can be most readily furnished – and in chronological fashion – by their records on appeal and all the appellate briefs – as you incompletely did by “documents” 437-2012, which you unhelpfully bookmarked only as “FOIL 110450 A&O Albany”. As these contained the two-volume Record on Appeal and Supplemental Joint Record on Appeal for *Larabee*, it would appear that the only purpose served by your additionally furnishing the same *Larabee* documents, in a-chronological fashion on the compact disc, was to make it more difficult for us to locate the record of the renewal motion that had been scheduled for an October 20, 2011 oral argument in Supreme Court/New York County, to which our July 19, 2011 letter expressly referred in stating:

“... if independent, scholarly assessment determines that the public has been compromised or inadequately represented by the defense of the Legislature and Governor provided by the Attorney General and Dolan firm, such would be grounds for a motion in the current proceedings for separate representation of the public's interests. Certainly, CJA would seek to intervene to protect the public's rights – and Mr. Graber and I discussed this in connection with proceedings in Supreme Court/New York County scheduled for an October 20, 2011 oral argument.” (at p. 9).

That oral argument is now scheduled for February 23, 2012.

As my repeated attempts to discuss the *Larabee* case and other pending judicial compensation cases with the Attorney General's office have been unsuccessful because Mr. Graber, his supervisor Deputy Bureau Chief Lisa Dell, and her supervisor, Bureau Chief June Duffy, have not returned any of the many phone messages I have left for them over the past six weeks, I take this opportunity to initiate a new FOIL request: for any publicly-available documents bearing upon what our July 19, 2011 letter identified as:

“the inexplicable failure of the Attorney General's Office and the Dolan firm to have moved to reargue the palpably deficient February 23, 2010 decision before the Court of Appeals or to have filed a petition for a writ of certiorari with the U.S. Supreme Court, where the consequences were so violative of the New York Constitution and so potentially catastrophic to New York taxpayers – and where the dissent of Judge

Pursuant to FOIL [Public Officers Law §89.3(a)], your response is required “within five business days” of your receipt of this request. To expedite our receipt of same, kindly e-mail me at elena@judgewatch.org.

Thank you.

Yours for a quality judiciary,

A handwritten signature in black ink, appearing to read "Elena Sassower". The signature is fluid and cursive, with a long horizontal stroke at the end.

ELENA SASSOWER, Director

Center for Judicial Accountability, Inc. (CJA)

Enclosure: September 26, 2011 FOIL response

cc: Attorney General Eric T. Schneiderman
Bureau Chief June Duffy
Deputy Bureau Chief Lisa Dell
Assistant Attorney General Joel Graber



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

JOSHUA PEPPER
RECORDS ACCESS OFFICER
ASSISTANT ATTORNEY GENERAL

September 26, 2011

Elena Sassower, Esq.
Center for Judicial Accountability, Inc.
P.O. Box 3002
Southampton, NY 11969

RE: Freedom of Information Law (FOIL) Request # 110450

Dear Ms. Sassower:

This letter responds to your correspondence dated July 19, 2011, which, pursuant to FOIL, requested the following:

“[R]e: FOIL & Project Sunlight Requests: Posting of the Record of the Judicial Compensation Lawsuits on the Attorney General’s Website, &/or Providing the Record to the Center for Judicial Accountability for Posting on its Website

Tellingly, neither the OCA, the other judicial parties to the judicial compensation lawsuits, the judicial associations, the bar associations, nor any other advocate of judicial pay increases has posted the record of the judicial compensation lawsuits on a publicly-accessible website so that the public - and scholars - might independently evaluate the course of those proceedings and the legitimacy of the decisions.

Tellingly, too, although New York boasts more than 160,000 lawyers - more than any other state - and 15 law schools, including some of our nation’s most prestigious, they have not generated even one law review article or analytic critique of the February 23, 2010 Court of Appeals decision - at least none that we have found.

To rectify this - and to determine whether the public interest was adequately represented in the judicial compensation lawsuits, as, for instance, by the inexplicable failure of the Attorney General’s Office and the Dolan firm to have

moved to reargue the palpably deficient February 23, 2010 decision before the Court of Appeals and/or to have filed a petition for a writ of certiorari with the U.S. Supreme Court, where the consequences were so violative of the New York Constitution and so potentially catastrophic to New York taxpayers - and where the dissent of Judge Smith would have dismissed all claims - we request that you post the record of the judicial compensation lawsuits on your Attorney General's website or, alternatively, that you provide us with the record, in pdf format, so that we may post it on ours.

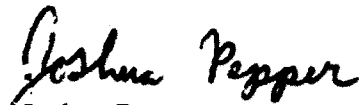
To secure such access, we hereby invoke the Freedom of Information Law [F.O.I.L.: Public Officers Law, Article VI] as well as your Project Sunlight initiative of your Public Integrity Unit, whose goal - according to your website - is:

'to promote [the people's] right to know and to monitor governmental decision-making....to increase the government's transparency and accountability to [the people]. As James Madison, the Founding Father of the Bill of Rights observed, 'Knowledge will forever govern ignorance; and people who mean to be their own governors must arm themselves with the power which knowledge gives.'
(<http://www.sunlightny.com/sn11/app/index.jsp>)."'

Enclosed is a compact disc (CD) containing documents numbered 110450-1 through 110450-2781 that respond to your request.

This FOIL request is now closed.

Sincerely,



Joshua Pepper
Assistant Attorney General

Enclosure