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TO: N.Y.S. Senator Richard Dollinger
N.Y.S. Senator Franz Leichter

FROM: Elena Ruth Sassower, Coordinator

RE: O'Rourke's waiver

DATE: February 6, 1998

This memorandum is written to assist you in upholding the public's rights and the rule of law from the flagrant misrepresentations of Chief Administrative Judge Jonathan Lippman in his January 29th letter to you. Such letter, responding to your January 27th letter to him, was designed to mislead you into believing that his approval to employ Court of Claims Judge Andrew O'Rourke as a "retired person" under §211 of the Retirement and Social Security Law was a "*pro forma* ministerial act". Administrative Judge Lippman thereby sought to cover up the fact that the Office of Court Administration (OCA) had unlawfully approved Mr. O'Rourke to collect an $80,000 government pension on top of his $113,000 judicial salary.

As head of the OCA, Judge Lippman felt confident that you would trust him at his word, *without* further scrutiny. That is precisely what happened. Believing, as Judge Lippman wanted you to believe, that the fault was with the law -- and not with him -- you announced your intention to introduce legislation to change the law. Your February 4, 1998 press release states:

> "The Senators said legislation is necessary...after Chief Administrative Judge Jonathan Lippman told the Senators that he did not have the authority to deny the payment of O'Rourke's pension under the current statute. Judge Lippman stated that 'it is not within the purview of the court system to look beyond the determination of the Governor.' and that any determination made by his office on this matter was merely 'pro forma'."

As hereinbelow demonstrated, Judge Lippman's January 29th letter -- on which your February 4th press release relies -- is a deliberate deceit upon you and, through you, on the People of the State of New York. Based thereon, the Center for Judicial Accountability, Inc. (CJA) requests that you seek an investigation of Judge Lippman for official misconduct and that you join in CJA's request, set forth in its January 30, 1998 letters to Judge Lippman, for Mr. O'Rourke's waiver to be reconsidered and rescinded -- based on §211 -- and for an investigation of his legal staff for similarly misrepresenting §211.

Beginning sequentially, Judge Lippman acknowledges that your January 27th letter sought a copy of Mr. O'Rourke's application "for employment as a retired public employee pursuant to section 211 of the Retirement and Social Security Law". Indeed, your letter did *not* seek Judge Lippman's interpretation of §211 or even information about the approval of Mr. O'Rourke's application -- which had not been announced and, perhaps, not then granted. Describing an application under §211 as taking the form of a "request setting forth the nature of the position and the justification for hiring that employee", Judge Lippman denies you access, stating:

> "We are not at liberty to disclose the actual request to employ, as it contains biographical information of a personal nature (home address, social security number, etc.) that would be protected from disclosure under the Freedom of Information Act."

Such basis for denying access is insupportable for two reasons. Firstly, your right of access to Mr. O'Rourke's application does *not* derive from the Freedom of Information Law, but from § 211 itself. The *express* language of §211(6) could not be more unequivocal:

> "Any request for approval of the employment of a retired person under this section, including the reasons stated thereof, and the findings and determination on such request *shall be a public record open for inspection...*" (emphasis added)

The effect of such absolute statutory right of access is that the Freedom of Information Law does *not* apply. This is clear from the Freedom of Information Law itself, which is Article 6 of the Public Officers Law:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records." (§89, ¶6)

Secondly, the basis upon which Judge Lippman claims that the Freedom of Information Law precludes disclosure, to wit, "biographical information of a personal nature", is -- likewise -- insupportable since §89, ¶2(a) of the Freedom of Information Law *expressly* provides that "identifying details" that would constitute an invasion of privacy may be deleted[1]. Obviously, Mr. O'Rourke's social security number and address could be easily blacked out from a publicly-disclosed copy of his application.

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[1] §89, ¶2(a) of the Freedom of Information Law states: "The committee on open government may promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy. In the absence of such guidelines, an agency may delete identifying details when it makes records available." Robert Freeman, Executive Director of the Committee on Open Government, readily and professionally responds to inquiries as to the application and interpretation of the Freedom of Information Law. His telephone number is 518-474-2518.

In lieu of providing you with the application, Judge Lippman's letter describes it. Yet, his description does *not* track the *express* procedural requirements of §211 and raises questions as to whether they have, in fact been complied with. Thus, §211(2)(b) *expressly* requires that the application be by "written request of the prospective employer of such retired person". Judge Lippman's letter does *not* state that Mr. O'Rourke's application was made by his "prospective employer". His phraseology is very non-committal: "a request on behalf of Mr. O'Rourke was received". Likewise, §211(2)(b) *expressly* requires that the "request shall state detailed reasons therefor related to the standards set forth". These standards are identified by that very subdivision -- §211(2)(b)(1)-(4) -- to include that the applicant is: "duly qualified", that "there is a need for his services in such position", that "there are not readily available for recruitment persons qualified to perform the duties of such position", and that "the employment is in the best interests of the government service". Yet, Judge Lippman's letter does *not* identify these specific criteria or show how the written request has embodied these "standards". Quite the contrary. From the two examples from Mr. O'Rourke's application which Judge Lippman quotes, it is obvious that either or both the application form and completed response fail to comply with anything remotely resembling the statutory standards, entitling Mr. O'Rourke to be re-employed in government service as a "retired person".

Thus, Judge Lippman refers to a "heading" -- presumably from an application form -- entitled "Description of duties and minimum qualifications". However, "minimum qualifications" would *not* satisfy the statutory criteria of §211(2)(b)(1)-(4). These criteria make plain that the re-employment of a retired government employee is, in essence, a drafting of that specific person back into government service, because of his unique and superior qualifications. Even still, Judge Lippman's letter does *not* quote a response as to Mr. O'Rourke's "minimum qualifications", but only that "Mr. O'Rourke will perform all the duties of a Judge of the Court of Claims" -- which duties are not specified.

As to the second heading, cited by Judge Lippman, "Justification for hiring retiree", which does *not* make inquiry into the requisite statutory "standards" to be met under §211(2)(b)(1)-(4), the response quoted by his letter purports that Mr. O'Rourke is exempted from the inquiry:

> "[Judge O'Rourke] was appointed by the Governor to the Court of Claims. It is not within the purview of the court system to look beyond the determination by the Governor"

Judge Lippman defends such exemption as being "compelled by the requirements of RSSL 211". However, from his three-sentence argument that follows, the only thing "compelled" is that Judge Lippman's argument is a hoax. Whereas his first sentence begins by correctly acknowledging that under §211 his approval is whether to employ an individual as a "retired person", pursuant to "certain statutory criteria", his next two sentences delete the determinative qualifier "retired person" so as to transform the issue into what it is not: whether Judge Lippman can deny a Court of Claims judge employment. Indeed, in his third sentence, Judge Lippman affirmatively misrepresents that "the

exercise of discretion by the Chief Administrator in section §211 relates solely to the decision to employ". This could not be more untrue. Under §211, the Chief Administrator's discretion relates to whether the appointed judge is to be employed in government service *with the status of "retired person", able to collect a pension on top of a judicial salary.* Likewise, Judge Lippman's invocation of Article VI, §9 of the New York State Constitution has *nothing* whatever to do with the issue of whether an appointed judge is eligible for employment as a "retired person"[2] -- which is *precisely* what §211 is about.

It is only by deliberately expunging the "retired person" issue from his "employment" argument -- and by affirmatively misrepresenting §211 -- that Judge Lippman is able to claim that "the Chief Administrator's statutorily-required section 211 'approval' is but a *pro forma* ministerial act". The clear language of section §211, requiring that the Chief Administrator's approval[3] be based on "finding(s), on evidence" relative to enunciated standards, further demonstrates that he is *not* charged with making a *pro forma* decision, but one which accords with the defined statutory criteria.

CONCLUSION

By his January 29, 1998 letter, Chief Administrative Judge Lippman has knowingly and deliberately misrepresented and twisted the law to conceal his non-compliance with the *express* provisions of §211 of the Retirement and Social Security Law, which do *not* remotely support the "approval" of Mr. O'Rourke's employment as a "retired person". It is up to you to respond to this affront to the State Senate so as to vindicate the public's rights.

cc: *See* next page

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[2] Article VI, §9 of the New York State Constitution reads: "The court of claims is continued. It shall consist of the eight judges now authorized by law, but the legislature may increase such number and may reduce such number to six or seven. The judges shall be appointed by the governor by and with the advice and consent of the senate and their terms of office shall be nine years. The court shall have jurisdiction to hear and determine claims against the state or by the state against the claimant or between conflicting claimants as the legislature may provide."

[3] Judge Lippman's letter identifies that he himself did not make the approval decision, but, rather Ann T. Pfau, the Deputy Chief Administrator for Management Support, as his "designee". Under §211(2)(a)(7), it is the Chief Administrator who is charged with the duty of making the approval decision. Although §211(8) authorizes adoption of "appropriate regulations, procedures and forms for implementation of the provisions" of §211, Judge Lippman does not indicate that such designation is pursuant thereto.

cc: Administrative Judge Jonathan Lippman
Chief Judge Judith Kaye
Michael Cardozo, President, Association of the Bar of the City of New York
Joshua Pruzansky, President, New York State Bar Association
Blair Horner, Legislative Director, NYPIRG
Rachel Leon, Executive Director, Common Cause
Robert Freeman, Executive Director, New York State Committee on Open Government
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