

rec'd 12/23/03



STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

GEORGE E. PATAKI
GOVERNOR

RICHARD PLATKIN
COUNSEL TO THE GOVERNOR

December 19, 2003

Elena Ruth Sassower
Coordinator
Center for Judicial Accountability, Inc.
P.O. Box 69
Gedney Station
White Plains, New York 10605-0069

Dear Ms. Sassower:

RE: FOIL Appeal 2003-3 (FOIL Appeal Request Dated December 6, 2003 and Received on December 8, 2003)

Dear Ms. Sassower:

I am in receipt of your letter (attached), received on or about December 8, 2003, in which you appeal from a November 6, 2003 determination of the Records Access Officer for the Executive Chamber (also attached) that granted you access to eight hundred sixty-seven (867) pages of responsive documents, and denied you access to Judicial Screening Committee (JSC) questionnaires on the grounds that the Freedom of Information Law (FOIL) does not require the disclosure of such documents insofar as the JSC performs a purely advisory function, citing Baumgarten v. Koch, 97 Misc.2d 449 (New York Co. Sup. Ct. 1978).

Although it is not entirely clear from your letter, you apparently appeal the November 6, 2003 determination on the grounds that: (i) JSC written reports prior to April 5, 1999 were not made available; (ii) JSC written reports after March 30, 2003 were not made available despite your FOIL Request for JSC written reports to the "present date"; (iii) the determination did not indicate whether the Uniform Rules of the JSC were current; (iv) contrary to your FOIL Request, Mr. Ustin did not grant you access to all records that showed the costs of the JSCs dating back to 1995; (v) no claim was made that "a thorough review of [Executive Chamber] records" was undertaken for: (a) the written notifications made by chairpersons of the JSCs to the Temporary JSC that the

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JSCs were "fully operational", and (b) copies of the letters of the Governor appointing Paul Shechtman as Chairman of the State Ethics Commission and the State JSC; and (vi) the questionnaires of the JSC and the Temporary JSC should have been made available, notwithstanding Executive Order Nos. 10 and 11 and the case of Baumgarten v. Koch [citation *supra*]. In addition, you had asked that I certify that the Executive Chamber does not possess the following documents after a diligent search had been made: (1) the financial statement of Judge Albert Rosenblatt; (2) written rules and procedures, if any, of the Temporary JSC; (3) records showing whether and when the county screening committees became operational, including the names of the persons designated to each of the 62 county JSCs by the chief executive officer of each county; (4) written notification from the chairpersons of the permanent JSCs to the chairman of the Temporary JSC that permanent JSCs are fully operation; and (5) a copy of the Governor's letter appointing Paul Shechtman to the Ethics Commission and as Chair to the State JSC (other than the one-page document identified in Mr. Ustin's FOIL Determination as being responsive to your FOIL Request).

As for the first ground of your appeal, namely that Mr. Ustin failed to make JSC reports prior to April 3, 1999 available to you, Mr. Ustin apparently mistakenly neglected to make an additional sixty-six (66) pages of documents that are responsive to your request available to you. Therefore, I am making these documents available to you pursuant to Public Officers Law § 87 (2). Under the Public Officers Law, you have the right to inspect and make photocopies of these documents at a cost of twenty five cents (\$0.25) per page. If you would otherwise prefer, this office can photocopy all of the documents to which you were granted access and forward them to you at a cost of sixteen dollars and fifty cents (\$16.50) by check payable to the Executive Chamber.

As for the second ground of your appeal, namely that JSC written reports issued after March 30, 2003 were not made available despite your FOIL Request for JSC written reports to the "present date", I have determined that Mr. Ustin did not err in granting you access only to reports issued on or before March 30, 2003. Your initial FOIL Request, dated March 30, 2001 (which was supplemented by a subsequent FOIL Request on December 6, 2002) requested such documents from the "March 30 1999 date to this date" [March 30, 2001] (emphasis added). Mr. Ustin granted you access to the JSC written reports issued through March 30, 2003, two years after March 30, 2001 cutoff date specified in your letter. Therefore, this ground of appeal is hereby denied.

As for the third ground of your appeal, namely that Mr. Ustin's determination did not indicate whether the Uniform Rules of the JSC were current, please be advised that FOIL deals only with access to records or documents, not requests for information. As with any FOIL Request, we are obligated to grant access to those documents or records which are kept by the Executive Chamber, subject to certain well-defined exemptions. We are not obligated to grant access to those documents or records that are not in the

possession of the Executive Chamber or those documents or records that do not exist. In addition, FOIL does not require a state agency to create a document in response to a FOIL Request. Therefore, this ground of appeal is hereby denied.

As for the fourth ground of appeal, namely that Mr. Ustin did not grant you access to all records that showed the costs of the JSCs dating back to 1995, I have determined that you are correct in that all of these records were not made available to you. Mr. Ustin apparently made only those records from 2002 available to you to illustrate that your FOIL Request was extremely broad and would require the production of a voluminous amount of documents that would require a great deal of staff time and resources to compile such documents. If you would like to further narrow the scope of this request, or would like to indeed have our office continue to compile all of the requested documents, please let me know. However, please be advised that if you would like our office to continue compiling all of the requested documents, this request could take considerable time and further staff time and resources to complete.

As for the fifth ground of your appeal, namely that no claim was made that "a thorough review of [Executive Chamber] records" was undertaken for the written notifications made by chairpersons of the JSCs to the Temporary JSC that the JSCs were "fully operational", and copies of the letters of the Governor appointing Paul Shechtman as Chairman of the State Ethics Commission and the State JSC, please be advised that I have consulted with Mr. Ustin who confirms that indeed a thorough review was undertaken.

As for the sixth ground of your appeal, that the questionnaires of the JSC and the Temporary JSC should have been made available, notwithstanding Mr. Ustin's finding that Executive Order Nos. 10 and 11 and the case of Baumgarten v. Koch [citation *supra*] does not require disclosure, I concur with Mr. Ustin that the questionnaires may properly be withheld from disclosure. However, I am nonetheless granting you access to a blank JSC questionnaire, totaling fifty (50) pages, pursuant to Public Officers Law § 87 (2). Under the Public Officers Law, you have the right to inspect and make photocopies of this document at a cost of twenty five cents (\$0.25) per page. If you would otherwise prefer, this office can photocopy all of the documents to which you were granted access and forward them to you at a cost of twelve dollars and fifty cents (\$12.50) by check payable to the Executive Chamber.

Finally, you had asked that I certify that the Executive Chamber does not possess the following documents after a diligent search had been made: (1) the financial statement of Judge Albert Rosenblatt; (2) written rules and procedures, if any, of the Temporary JSC; (3) records showing whether and when the county screening committees became operational, including the names of the persons designated to each of the 62 county JSCs by the chief executive officer of each county; (4) written notification from

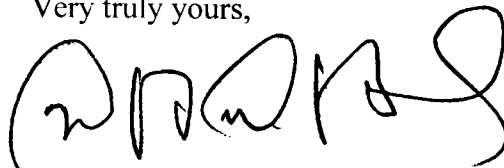
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the chairpersons of the permanent JSCs to the chairman of the Temporary JSC that permanent JSCs are fully operation; and (5) a copy of the Governor's letter appointing Paul Shechtman to the Ethics Commission and as Chair to the State JSC JSC (other than the one-page document identified in Mr. Ustin's letter as being responsive to your FOIL Request. I have made inquiry and to the best of my knowledge and belief, I hereby certify that the Executive Chamber does not possess any of the aforementioned documents after a diligent search.

Very truly yours,

A handwritten signature in black ink, appearing to read 'W. Brooks DeBow', written in a cursive style.

W. Brooks DeBow
Deputy Counsel to the Governor
Records Appeals Officer

c: Robert Freeman, Esq.
Committee on Open Government