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BY FAX: 518-486-9652 (5 pages)

BY CERTIFIED MAIL/RR: 7001-0320-0004-5457-4828

December 6, 2003

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

RE: CJA's December 6, 2002 and January 9, 2003 F.O.I.L. Requests, Renewing and Supplementing CJA's March 30, 1999 and March 30, 2001 F.O.I.L. Requests Pertaining to the Governor's Judicial Screening Committees for the Lower State Courts, as well as CJA's Request for the Financial Statement of Albert Rosenblatt in Connection with his Appointment 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 6, 2003 letter of Mark R. Ustin – the Governor's Records Access Officer and one of his Assistant Counsel – responding to our December 6, 2002 and January 9, 2003 F.O.I.L. requests, renewing and supplementing our March 30, 1999 and March 30, 2001 F.O.I.L. requests pertaining to the Governor's judicial screening committees for the lower state courts, as well as the financial statement of Albert Rosenblatt in connection with his appointment to the New York Court of Appeals.

By letter dated January 13, 2003, Mr. Ustin acknowledged receipt of our December 6, 2002 and January 9, 2003 requests, stating that "a further response" would be forthcoming "no later than February 10, 2003". By letter to Mr. Ustin, dated April 16, 2003, we asked that he advise as to "the status" of our F.O.I.L. requests. This, because we had received no subsequent response, substantive or otherwise.

Mr. Ustin has only now responded.

Mr. Ustin identifies (at pp. 1-2) the following three “core” requests from CJA’s March 30, 1999 and March 30, 2001 letters:

1. CJA’s request for “[W]ritten reports’ of the ‘Governor’s judicial appointees to the lower state courts”:

Mr. Ustin refers to the previous production of “written reports” on May 17, 2001¹, describing it as “all the written reports in question for appointees through March 30, 2001”. Yet, none of these previously-produced “written reports” were earlier than April 5, 1999 – a fact pointed out by CJA’s December 6, 2002 letter (at p. 3). Moreover, Mr. Ustin’s identification of “another forty-five (45) pages of reports issued through March 30, 2003” does not account for “written reports” to the present date – as CJA’s December 6, 2002 letter expressly requested (at p. 3).

2. CJA’s request for “The ‘Uniform Rules’ for the Governor’s judicial screening committee and the appendix thereto, ‘consisting of blank questionnaire forms which candidates are required to complete”:

Mr. Ustin refers to the previous production of the Uniform Rules on May 17, 2001, but does not identify whether those Rules are still “current”. As to his citation to Executive Order #10 for the confidentiality of “all communications...with respect to a candidate’s qualifications”, this is inapposite to CJA’s request for blank questionnaire forms which have nothing to do with any specific “candidate’s qualifications”. For the same reason, his citation to Baumgarten v. Koch, 97 Misc.2d 449 (New York Co., 1978) is inapposite because the blank questionnaire forms are not evaluative documents as to which the committees is performing its “purely advisory function”. These blank questionnaire forms are public documents, distributed to prospective applicants to complete. Prospective applicants are members of the public – and, certainly, a member of the public cannot determine whether he will be able to successfully complete the application process without first reviewing the blank questionnaire and other requirements set forth in the application package.

3. CJA’s request for “Records showing ‘the cost to the taxpayers of the Governor’s judicial screening committees’, including costs for ‘paid staff’ and ‘reimbursement of any necessary expenses”:

Mr. Ustin limits his response to “eight hundred twenty (820) pages of reimbursement records for 2002 alone”. This is not responsive to CJA’s request for “all records” – which would span from the inception of the temporary judicial screening committee in 1995.

¹ An obvious typo in Mr. Ustin’s response incorrectly refers to “May 17, 2002”.

Mr. Ustin then enumerates (at p. 2) six requests which he quotes from CJA's March 30, 1999 letter. He then identifies the further request presented by CJA's January 9, 2003 letter, which he also quotes.

As to four of these seven requests, Mr. Ustin responds:

“After a thorough review of our records, I have determined that this office does not possess any documents responsive to this request.”

These four requests, as enumerated and described by Mr. Ustin (at p. 2), are:

#1: “[T]he ‘financial statement’ of now Court of Appeals Judge Albert Rosenblatt”²;

#2 “[W]ritten rules and procedures, if any, of the temporary judiciary screening committee”;

#5: “[R]ecords showing whether and when the county screening committees became ‘operational’, including the names of the persons designated to each of the 62 county judicial screening committees by the chief executive officer of each county, as specified by ¶5 of Executive Order #10”;

“all notices during the Governor’s tenure...reflecting the...solicitation of candidates to fill judicial vacancies [as required by Section VII of the ‘Uniform Rules for Governor Pataki’s State Judicial Screening Committees’] – including advertisements” – this being the additional request from CJA’s January 9, 2003 letter.

Pursuant to Public Officers Law §89.3, CJA requests that you certify that the Governor, in fact, “possesses” none of the above-quoted requested documents, after “diligent search” -- bearing in mind the Committee on Open Government’s advisory opinion #10796 [“Record, Physical Custody of”] interpreting “possession”.

² The continuation, which Mr. Ustin does not quote from CJA’s March 30, 1999 letter, is “which the Governor was required to ‘make available to the public’, pursuant to Judiciary Law §63.4”.

As to Mr. Ustin's responses (at p. 2) to #4 and #6 that:

"I have determined that this office possesses a one-page document that is responsive to your request",

no claim is made by him that "a thorough review of our records" was undertaken and that no other responsive documents are in the "possession" of the Governor's office. These are for:

#4: "[T]he 'written notification', pursuant to ¶4 of Executive Order #11, from the chairpersons of the permanent judicial screening committees to the chairman of the temporary judicial screening committee that the permanent committees were 'fully operational'";

#6: "[A] copy of the Governor's letter appointing Paul Schechtman to the Ethics Commission, in or about April 1997, and his letter appointing Mr. Schechtman as Chairman of his State Judicial Screening Committee, in or about December 1998"³

As to these, too, CJA requests that you certify that Mr. Ustin's referred-to single-page documents are the extent of Governor's "possession" of relevant documents, "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, Mr. Ustin's response (at p. 2) to #3 for "[A] copy, in blank, of the questionnaire(s) that the temporary judicial screening committee required judicial candidates to complete, if any" essentially replicates his page 1 response to CJA's request for the appendix documents to the "Uniform Rules", "consisting of the blank questionnaire forms which candidates are required to complete". The only difference is that he substitutes citation to Executive Order #11 pertaining to the temporary judicial screening committee for Executive Order #10 pertaining to the permanent judicial screening committee. His claims of confidentiality are identically inapposite for the reasons hereinabove discussed.

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

³ Mr. Ustin's quoting of this request from CJA's March 30, 1999 letter misspells Mr. Shechtman's name, which has a single "c".

committee on open government a copy of [this] appeal when received...and the ensuing determination thereon."

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.

Meantime, we enclose a check for \$11.75 – the quoted “cost for the documents other than reimbursement records”. This would be for the 45 pages of “written reports” and the two one-page documents. As for “the reimbursement records for 2002”, we would like to make an appointment to inspect them – preferably together with inspection of reimbursement records for other years as well.

Thank you.

Yours for a quality judiciary,



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

Enclosure

TRANSMISSION VERIFICATION REPORT

TIME : 12/06/2003 13:55
NAME : CJA
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