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Commission of Judicial Conduct

**Not Accountable to the Public:
Resolving Charges Against Judges
is Cloaked in Secrecy**

Report 90-S-23

**Office of the
State Comptroller**

**Edward V. Regan
State Comptroller**

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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
ALBANY, NEW YORK
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EDWARD V. REGAN
STATE COMPTROLLER

November 15, 1989

DIVISION OF MANAGEMENT AUDIT
AND FINANCIAL REPORTING

The Honorable Gerald Stern
Administrator
Commission on Judicial Conduct
801 Second Avenue
New York, NY 10017

Re: Report 90-S-23

Dear Mr. Stern:

Pursuant to the State Comptroller's authority as set forth in Section 1, Article V of the State Constitution and Section 8, Article 2 of the State Finance Law, we examined the Commission on Judicial Conduct's (Commission) financial management practices. We also reviewed the Commission's compliance with the requirements of Sections 40 through 48 of the Judiciary Law and Part 7000 of the Codes, Rules and Regulations of the State of New York which govern the disposition of complaints made against judges of the State's Unified Court System. The Commission is responsible for complying with these requirements. Our audit period consisted of the two fiscal years ended March 31, 1989.

Our examination was a financial related and compliance audit and our principal objectives were to determine whether the Commission was operating in accordance with sound financial management practices and whether the Commission was disposing of complaints against judges in accordance with the prescribed criteria. To accomplish our audit objectives, we reviewed applicable laws, rules and regulations, policies, procedures, certain financial and operating records, and we interviewed Commission management and staff.

Except as discussed in the following two paragraphs, our examination was made in accordance with generally accepted government auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

During the audit nothing came to our attention that would lead us to believe that the Commission was not operating in accordance with sound financial management practices. The Commission was able to provide us with documentation to adequately support the specific financial transactions we selected for review. However, we were unable to complete our compliance audit testing because Commission officials, citing confidentiality restrictions, denied us access to pertinent operating records that were necessary for us to achieve our audit objective of determining compliance with prescribed criteria for disposing of complaints against judges.

Because we were denied such access to Commission records, the scope of our audit work was impaired to the extent that we were unable to determine whether the Commission on Judicial Conduct was in compliance with laws and procedures governing the disposition of complaints against judges. Furthermore, we were unable to determine whether the Commission has conducted thorough investigations and hearings, and that it has documented its decisions for dismissing complaints, or disciplining judges. Accordingly we are not able to, and we do not, express an opinion regarding the adequacy of the Commission's compliance with applicable laws and procedures governing the disposition of complaints against judges.

*Office of the State Comptroller
Division of Management Audit*

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COMMISSION ON JUDICIAL CONDUCT
NOT ACCOUNTABLE TO THE PUBLIC:
RESOLVING CHARGES AGAINST JUDGES
IS CLOAKED IN SECRECY

A. Introduction

The Commission on Judicial Conduct (Commission) investigates complaints against judges of the Unified Court System and determines if disciplinary action is warranted. In performing its investigatory and disciplinary role, the Commission holds closed door hearings. The entire proceedings remain secret from the public except when a judge is disciplined. Even then, all investigations and pre-hearing records remain confidential. If the judge is not disciplined, all records of the proceedings remain secret forever.

The Commission has shielded itself from any independent review of its operations by invoking confidentiality provisions of the Judiciary Law. During the course of this audit, their practice of operating in secrecy was cited to deny the State Comptroller's auditors access to confidential operating records thereby impairing the State Comptroller's ability to conduct an independent audit of Commission activities in accordance with generally accepted government auditing standards. The State Comptroller has traditionally served as the people's watchdog and, as such, has played a vital role in the system of checks and balances which strengthen our form of democratic government. When important hearings such as these are closed and the State Comptroller is denied access to independently review operating records, the citizens of the State are foreclosed from receiving any independent assurance regarding the prudent and fair operation of a critical State program, which, if abused, negatively affects the foundation of State government.

The Commission was established by Chapter 156 of the Laws of 1978 to receive, initiate, investigate and hear complaints of misconduct against judges in New York's Unified Court System. In doing so, it conducts investigations and hearings, subpoenas witnesses and documents, and makes appropriate determinations as to dismissing complaints or disciplining judges. The Commission also has jurisdiction over matters pertaining to the physical and mental disability of judges. It does not review judicial decisions or alleged errors of law, nor does it issue advisory opinions, give legal advice or represent litigants. When appropriate, it refers complaints to other agencies.

Misconduct includes, but is not limited to the persistent failure to perform duties, habitual intemperance, assertion of influence, gender bias, corruption and conduct on or off the bench prejudicial to the administration of justice. Discipline can be in the form of admonishment, censure, removal or retirement of the judge.

The Commission is composed of 11 members serving four year terms. Four members are appointed by the Governor, three by the Chief Judge of the Court

of Appeals, and one each by the four leaders of the legislature. The Constitution requires that Commission membership include four judges, at least one attorney and no fewer than two lay persons. The Commission elects a chairperson and appoints an administrator, who is responsible for hiring and supervising staff under the direction of the Commission.

The Commission has an administrative staff of 41 employees, including attorneys, investigators, and support staff. Although the Commission's main office is located in New York City, investigations are also conducted from offices in Albany and Rochester. The Commission spent about \$2 million in fiscal year 1988-89.

Draft copies of the matters in this report were provided to Commission officials for review and comment. Their comments were considered in preparing this report and are attached as Appendix A to this report.

Commission officials disagree with our recommendation that the Commission propose legislation authorizing the State Comptroller to have access to the Commission's non-public operating records for audit purposes. The Commission states that it is not in the best position to seek a change in the law which makes Commission records confidential, because "...the Commission has some strong doubts about the kind of access being sought for the purposes expressed in your report...."

We sought access to Commission records to determine whether the Commission conducts thorough investigations and hearings, and that it documents its decisions for dismissing complaints against judges, or disciplining judges. We did not attempt to determine whether the Commission's decisions were appropriate, and we would not propose to do so. We believe that the Commission serves a vital public function in disposing of complaints against judges and that it is in the public's interest that this function be properly conducted. However, due to the Commission's invoking of the confidentiality provisions of the Judiciary Law during our audit, the Commission's activities remain shielded from independent review and the citizens of the State are denied independent assurance that a critical State program is operated in compliance with all applicable laws and procedures.

Because the Commission has refused to propose legislation to open its records to the State Comptroller's independent review, we suggest that the leadership of the State Legislature consider acting to provide the State Comptroller with specific statutory authority for access to the Commission's non-public records for audit purposes so there can be adequate public accountability over this vital government activity.

Within 90 days after the final release of this report, as required by Section 170 of the Executive Law, the Administrator of the Commission shall report to the Governor, the State Comptroller and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons therefor.

In addition to matters discussed in this report, we have provided the Commission with comments concerning certain financial management practices at the Commission. Although these matters, which are considered to be of lesser significance, are not included in this report, the recommendations should be implemented to improve operations. Included in this letter is our report of internal controls over financial management practices of the Commission.

B. Results of Examination

In reviewing the financial management practices of the Commission, nothing came to our attention that would lead us to believe that the Commission was not operating in accordance with sound fiscal practices. We were satisfied that there was sufficient documentation to support the specific financial transactions we selected for review.

However, we were unable to complete our compliance audit. Officials of the Commission on Judicial Conduct (Commission), citing confidentiality restrictions, denied our auditors access to certain operating records and we therefore were unable to independently determine whether the Commission is complying with all applicable laws and procedures. Because of this, and because there is no other independent review of Commission activities, the Commission operates without appropriate independent oversight of its activities. The public, therefore, lacks assurance that the Commission conducts thorough, objective investigations and hearings and that it documents its decisions for dismissing complaints or disciplining judges. Further, without an effective system of checks and balances, the potential exists that the Commission may be abusing its authority by wrongfully dismissing complaints against judges without cause and justification.

Government entities and employees are accountable to the public and to other branches of government. While not always specified by law, this accountability is inherent in our governing process through appropriate checks and balances. Accountability is generally established through the independent audit process or through some independent oversight body. An independent audit agency provides an objective evaluation of the extent to which government officials are faithfully, efficiently and effectively carrying out their responsibilities. To ensure that there is a proper assessment of accountability, an audit organization must have full access to records. Denying auditors access to records results in an audit scope impairment.

Scope impairments include factors external to the audit organization which can restrict the auditor's ability to render objective opinions and conclusions on the entity. Examples of external audit scope impairments include denying auditors access to sources of information, such as books, records, and supporting documents, and denying auditors the opportunity to meet with officials and employees of the organization under audit. Such impairments prohibit the audit organization from determining whether the auditee is operating in accordance with the law.

The Commission cited the confidentiality provisions of Sections 45 and 46 of the Judiciary Law as a basis to deny us access to certain non-public operating records. This law provides that all complaints, correspondence, Commission proceedings and transcripts thereof, other papers and data and records of the Commission are confidential and shall not be made available to anyone other than the Commission, its designated staff personnel and its agents in the performance of their power and duties. If the Commission determines that a judge be admonished, censured, removed or retired, the determination of the Commission, its findings and conclusions shall be made

public. However, all investigative and pre-hearing records remain confidential.

The Commission has successfully rejected requests for non-public records in the past. The New York County district attorney (Stern V. Morgenthau 62 NY 2d 331 [1984]) issued a subpoena to the Commission demanding production of all complaints, correspondence, letters, investigative reports and transcripts which the Commission maintained concerning a matter which the Commission was investigating. Although the lower courts denied the Commission's motion to quash the subpoena, the Court of Appeals held that Commission records were exempt from grand jury scrutiny.

In another case, the Commission on Judicial Nomination (CJN) requested non-public records from the Commission concerning nominees to the Court of Appeals. CJN considers and evaluates the qualifications of candidates for appointment to the Court of Appeals. The Commission denied access based on the confidentiality provisions of the Law. Subsequently, the Legislature amended Section 45 of the Judiciary Law to allow the Governor, the State Senate, and the Commission on Judicial Nomination to receive certain statutorily-specified Commission records with respect to judicial nominations. However, the amended law does not permit unlimited access to Commission records. Therefore, as a result of the confidentiality provisions, the Law as currently written and interpreted by the Commission, does not allow for any government organizations to monitor or review all Commission activities.

During our review of the Commission's public records, we noted that the Commission has allowed certain outside contractors and their employees access to confidential information. When we inquired to Commission officials about the disclosure of this information they indicated that access to information was necessary for the contractors to perform their work and that they were considered to be agents of the Commission.

Section 46, which deals with the breaches of confidentiality, refers to agents of the Commission. The reference to agent in Section 46 of the Judiciary Law could be, and apparently has been, interpreted by the Commission to permit it to provide access to agents of the Commission where such access is necessary for the agents to carry out their duties. We therefore asked if on a similar basis, the Commission could designate the Comptroller's auditors as agents. Commission officials responded that it would be inappropriate to provide such designation to our auditors.

Commission officials need not look any further than their own operations to understand the difficulties of carrying out mandated objectives when denied access to records. In their 1989 annual report, Commission officials discuss problems with access to sealed or other confidential court records from judges who are the targets of complaints. According to the report, the Commission has encountered difficulty in expeditiously obtaining required material with respect to records either under court seal or made confidential by statute. It is often the case that the judge with jurisdiction over the required file is also the judge under investigation.

In one instance, a judge placed his records under court seal after a complaint was lodged against him.

The annual report states that no judge should be shielded from proper inquiry because the alleged misconduct is under court seal. It further says that any concern that releasing such files to the Commission might compromise innocent participants of the proceedings should be allayed by the strict confidentiality mandate which would cover such files upon receipt by the Commission. The report concludes that the Commission cannot discharge its own mandate without expeditious access to confidential files when circumstances warrant.

Just as the Commission requires access to confidential files to carry out its mandate, the Comptroller's Office requires access to carry out its constitutional mandate. We indicated to Commission officials that not only would we be subject to the same confidentiality provisions of the Judiciary Law, but we would also be subject to restrictions included in the Freedom of Information Laws which would preclude us from making public any data that is held to be confidential by Sections 45 and 46 of the Judiciary Law.

Without complete access to Commission records we cannot determine whether the Commission has made appropriate and efficient use of State resources, has conducted thorough investigations and hearings in compliance with laws and procedures, and has documented its determinations for dismissing complaints or disciplining judges. Since the Commission was established, there reportedly have been 10,680 complaints of judicial misconduct, of which 7,615 (71 percent) have been dismissed without investigation. During 1987 and 1988, the Commission acted on 1,906 complaints, including 1,271 complaints against State judges and 635 complaints against town justices. The Commission investigated only 152 (12 percent) complaints against State judges and 238 (37 percent) complaints against town justices. The remaining 1,119 complaints against State judges and 397 complaints against town justices were dismissed. In higher courts, the Commission investigated only 53 of 436 (12 percent) complaints against Supreme Court judges and 2 of 25 (8 percent) complaints against appellate judges. The Commission's complaint statistics do not distinguish between judges on the Appellate Division and judges on the Court of Appeals. There are only seven judges on the Court of Appeals and the Commission wants to protect the identity of those judges who are targets of complaints. Because our auditors did not have access to Commission records, we could not determine the reasons the Commission investigated a higher percentage of complaints against town justices than State judges, and we could not determine whether the Commission followed proper procedures when complaints were dismissed without investigation.

Further, if the Commission determines that a judge should be admonished, censured, removed or retired, the judge can request the Court of Appeals to review the Commission's determination. The Court of Appeals can then either accept or reject the Commission's determined sanction, impose a different sanction, or impose no sanction. This appears to be an inherent conflict of interest in that the Court of Appeals, which is a body whose members the

Commission is responsible for handling complaints against, is ruling on Commission determinations of sanctions to be imposed.

Section 45 of the Judiciary Law has, in effect, allowed the Commission on Judicial Conduct to shield itself from independent review of its operating activities. Because of this lack of independent review and accountability, we recommend that the Commission propose legislation to provide specific statutory authorization for access by the State Comptroller to the Commission's non-public operating records to allow for effective independent review of Commission activities. This could be accomplished without violating the confidentiality of the judges involved.

Recommendation

Propose legislation to provide specific statutory authorization for access by the State Comptroller to Commission on Judicial Conduct non-public operating records for audit purposes. Such legislation would allow for effective independent review of Commission activities, improve accountability, and enhance the credibility of Commission operations.



STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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October 25, 1989

Roland M. Malan
Assistant Deputy Comptroller
Office of the State Comptroller
Division of Management Audit
and Financial Reporting
Albany, New York 12236

Re: Formal comments in response to findings
and recommendations of Report 90-S-23

Dear Mr. Malan:

These are my comments, which I have discussed with the Commission, in response to Report 90-S-23, concerning the audit of the State Commission on Judicial Conduct.

Preliminarily, I want to commend your staff for their professionalism, courtesy, and the assistance they provided. The entire experience was helpful to us. I was especially pleased that following such an intensive and comprehensive financial audit our financial management and practices were found to be consistent with "sound financial practices" expected of state agencies.

The only concerns raised in the report relate to the "compliance audit." You state in the report (p.3) that, citing confidentiality restrictions, we denied the auditors "access to certain operating records" and, as a result, your staff was "unable to independently determine whether the Commission is complying with all applicable laws and procedure." Your report concludes that because your staff was denied access to confidential records and proceedings, you were unable to determine whether the Commission has been "abusing its authority by wrongfully dismissing complaints against judges without cause and justification" (p.3).

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As your report indicates, the Commission is governed by a strict confidentiality law that mandates confidentiality, with certain legislative exceptions, and sets forth punitive measures for any violation of confidentiality.

As your report also indicates, the confidentiality provision, Judiciary Law, Section 45, has been challenged in court by a grand jury seeking information concerning a criminal investigation. The challenge was resolved by a unanimous Court of Appeals decision holding that (1) our confidential files are not obtainable by a grand jury subpoena and (2) the legislature, by expressly making exceptions to the confidentiality provision, indicated its intent to make our files confidential except as authorized by the legislature. Thus, any agency that is not listed in the law may not obtain access to those files, and it is not for us to determine the importance of the purpose of the agency that seeks access to such files and proceedings. If we do not follow the law, we are vulnerable not only to sharp criticism but to the penalties that are set forth in the law.

Accordingly, in complying with the law, the Commission has not "shield[ed] itself from independent review of its operating activities." Only the legislature may decide whether the Office of the State Comptroller should be given access to the Commission's files and proceedings to determine (a) whether the Commission has been inappropriately dismissing complaints against judges without cause or justification and (b) whether the Commission's investigations and hearings are "thorough" (p.3).

The report states (p.4) that the Commission has permitted "certain outside contractors and their employees access to confidential information." State funding is provided for referees, court reporters and, from time to time, for temporary personnel. It is essential for the Commission to retain the services of certain specialized personnel who are paid by the Commission and who are governed by the confidentiality provisions of the law. The report accurately states that the Commission declined to make the auditors the Commission's "agents." There is no basis in the law to permit the Comptroller's auditors to have unlimited access to all files and proceedings under a theory that the auditors are the Commission's employees or agents.

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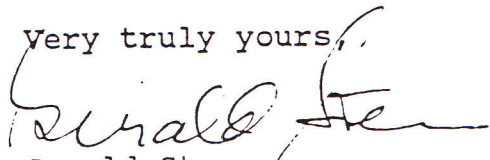
One further point requires explanation. The report states (p.3) that the auditors were denied "the opportunity to meet with officials and employees of the organization under audit." That may be misinterpreted by readers to mean that your staff was denied access on questions of policy, or to obtain information and records related to the financial audit, or to discuss concerns. I am confident that your staff will confirm that it had unlimited access to my office, to me, and to my staff. In fact, in your letter of September 22, 1989, you were kind enough to express appreciation for the cooperation and courtesies extended to the auditors.

I denied a request by your auditors to observe our investigators and attorneys while they were performing highly confidential tasks, such as investigating judges, observing specific court proceedings, interviewing witnesses, questioning judges under investigation and the like. That request was denied for the reasons expressed above, and, again, I suggest that such an "audit" raises the most fundamental and troubling issues of confidentiality.

That leads me to the only recommendation in Report 90-S-23: that the Commission should "propose legislation to provide specific statutory authorization for access by the State Comptroller to the Commission's non-public operating records...." The Commission believes that such a recommendation, if it is made, should come from the agency seeking access. As I have indicated to your staff in earlier discussions, although the Commission recognizes the importance of your agency's work, there are some serious theoretical and practical conflicts in having an auditing agency gain unlimited access to confidential files and proceedings of the State Commission on Judicial Conduct to determine whether the Commission's decisions are appropriate. Since the Commission has some strong doubts about the kind of access being sought for the purposes expressed in your report, it would not be in the best position to seek the change in law that would provide such access. For those reasons, the Commission respectfully declines to make such a recommendation to the legislature.

Again, I thank you and your able staff for the professionalism and courtesies extended to us.

Very truly yours,



Gerald Stern