SCANNED ON 7/21/2008

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: COBIS PART 6

Justice

INDEX NO. 106116/08

JAMES RICHES

MOTION DATE 6/26/08

- v -

MOTION SEQ. NO. 2

NYC COUNCIL

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion for leave to intervene

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

UNELECTED JUDGMENT
The Judgment has not been entered by the County Clerk and a copy of this order cannot be served based thereon. To obtain entry, counsel or authorized representative must appear in the Judgment Clerk's Desk (Room 141B)

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/16/08

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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In the Matter of JAMES RICHES, JONATHAN WEISS, CARMEN COLON, PHILIP DEPAOLO, MARQUEZ CLAXTON, PETER KILLEN, EMMANUEL GONZALEZ, Jr., and RAFAEL MARTINEZ ALEQUIN,

Petitioners,

Index No. 106898/08

For an Order Convening a Summary Judicial Inquiry Pursuant to New York City Charter § 1109

Decision and Order

-against-

NEW YORK CITY COUNCIL and CHRISTINE QUINN, Speaker of the New York City Council,

Respondents.

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JOAN B. LOBIS, J.S.C.:

Motion Sequence Numbers 001 and 002 are consolidated for disposition. In Motion Sequence Number 001, petitioners James Riches, Jonathan Weiss, Carmen Colon, Philip DePaolo, Marquez Claxton, Peter Killen, Emmanuel Gonzalez, Jr., and Rafael Martinez Alequin bring this special proceeding against respondents the New York City Council (the "City Council") and Christine Quinn, the Speaker of the City Council, for an order granting their request for a Summary Judicial Inquiry, pursuant to New York City Charter § 1109, with respect to claims of an alleged violation or neglect of duty by respondents. Respondents move to dismiss the petition. In Motion Sequence Number 002, the United States moved for leave to intervene in this proceeding and, in the event the court were to grant the petition, for a stay for an initial period of ninety (90) days of any testimony that would confer immunity on any witness. At oral argument on June 26, 2008, this court granted the request for leave to intervene, on consent of petitioner and respondents.

The eight petitioners commenced this proceeding after learning of a practice that has been going on for a number of years with respect to the budget process in New York City. On April 2, 2008, an article in the New York Post reported publicly for the first time that Speaker Quinn's office hid millions of taxpayer dollars by allocating grants to fictitious nonprofit organizations. Following the publication of this article, Speaker Quinn held a news conference the next day. She announced that she had learned of this practice in the spring of 2007 and had ordered it stopped. She further revealed that when she learned in the fall of 2007 that, despite her directive, members of her finance staff were continuing the practice of using names of fictitious organizations to set aside money, Speaker Quinn alerted investigators from the United States Attorney's Office and the New York City Department of Investigation ("DOI").

The United States Attorney for the Southern District of New York and the DOI have been conducting investigations since in or about last summer. In October 2007, the DOI requested that the City Council produce certain documents related to the budgeting and allocation procedures with respect to City Council Expense Member Initiatives. During this process, the City Council learned that certain funds were not being allocated to actual organizations, but were held in reserve and assigned to fictitious organizations called "holding codes." The investigation has revealed that the practice of appropriating money to nonexistent organizations arose from a bookkeeping maneuver that reportedly dates from at least 1988, whereby "holding accounts" or "holding codes" were established by the City Council to keep money in reserve for community programs or other needs that arose during a given fiscal year. During this time, funds allocated to the holding codes would be reallocated and disbursed to various community organizations, through contracts with City

agencies, including the Department for the Aging and the Department of Youth and Community Development.

Since 2001, approximately $17.4 million has been budgeted in this manner. But, there is no allegation that funds were ever disbursed to any fictitious organizations or improperly disbursed from these accounts. The investigation is continuing. On April 15, 2008, a federal grand jury sitting in the Southern District of New York returned an indictment against two staff members of a New York City Council member for conspiracy to commit mail fraud and conspiracy to commit money laundering in connection with an alleged scheme to embezzle money from an actual nonprofit organization, the Donna Reid Memorial Education Fund, for which funds had been appropriated by the City Council.

Petitioners seek a summary judicial inquiry, claiming that this is an "alleged violation or neglect of duty" by the City Council. They seek to hold respondents accountable for what they claim are gross improprieties that strike at the foundation of open government. Petitioners seek to have current Mayor Michael Bloomberg, current Comptroller William Thompson, Speaker Quinn, former Mayor Rudolph Giuliani, former Comptroller Alan Hevesi, and former City Council Speakers Gifford Miller and Peter Vallone, Sr., among others, testify at a public hearing. Petitioners argue that the allegations require a "full public disclosure of facts," and that a DOI investigation or investigation by the United States Attorney serves a different purpose and does not take the place of a summary judicial inquiry.

The section of the City Charter that petitioners rely on provides as follows:

> [a] summary inquiry into any alleged violation or neglect of duty in relation to the property, government or affairs of the city may be conducted under an order to be made by any justice of the supreme court in the first, second or eleventh judicial district on application of the mayor, the comptroller, the public advocate, any five council members, the commissioner of investigation or any five citizens who are taxpayers, supported by affidavit to the effect that one or more officers, employees or other persons therein named have knowledge or information concerning such alleged violation or neglect of duty. Such inquiry shall be conducted before and shall be controlled by the justice making the order or any other justice of the supreme court in the same district. Such justice may require any officer or employee or any other person to attend and be examined in relation to the subject of the inquiry. Any answers given by a witness in such inquiry shall not be used against such witness in any criminal proceeding, except that for all false answers on material points such witness shall be subject to prosecution for perjury. The examination shall be reduced to writing and shall be filed in the office of the clerk of such county within the first, second or eleventh judicial district as the justice may direct, and shall be a public record.

New York City Charter § 1109. The City Council opposes the petition and moves to dismiss, challenging the constitutionality of the section, both on its face and as applied. The City Council also disputes the propriety of utilizing this provision under the factual circumstances presented here.

In Matter of Green v. Giuljani, 187 Misc. 2d 138 (Sup. Ct. N.Y. Co. 2000), then-Public Advocate Mark Green brought a petition pursuant to § 1109 for summary judicial inquiry as to how then-Mayor Rudolph Giuliani obtained the sealed juvenile and criminal records of Patrick Dorismond, who had been shot by a New York City police officer. The inquiry was sought into how the Mayor obtained the information that he made public; whether the information was from sealed records; and, whether the release was made without regard to the statutory protection of such records

from disclosure. Respondent Mayor of the City of New York moved to dismiss the petition in that case on similar grounds to those asserted herein, namely, that § 1109 was unconstitutional, both on its face and as applied; that the dispute does not fall within the scope of an inquiry under § 1109 because it does not concern municipal corruption or closely related matters; that the underlying facts are undisputed and have been publicly addressed, and do not warrant an inquiry; and, that the dispute is primarily political and an additional factual inquiry would constitute a waste of judicial and public resources. The Honorable Louise Gruner Gans found that § 1109 was constitutional both on its face and as applied; that § 1109 does not apply only to allegations of acts of corruption and misapplication of City funds; and, that although there were no questions of fact as to whether confidential information was made public, a summary inquiry would not be an inappropriate waste of resources.

Respondents make the identical arguments here. In addition, respondents also argue that a summary inquiry would likely frustrate any criminal investigation concerning the reservation of funds to fictitious organizations, pointing to the provision in § 1109 for a blanket granting of immunity for all testimony in the inquiry. This argument, however, is more appropriately addressed to the United States' request for a stay, rather than the question of the propriety of holding of the summary inquiry in the first instance.

This court need not reach the issue of whether or not a stay is required because a summary inquiry is not warranted under the nature of the allegations in the petition. The summary inquiry provided for under § 1109 was described by the Appellate Division in Mitchel v. Cropsey,

177 A.D.663, 670 (2d Dep't 1917) as a proceeding intended

> to expose the acts of corruption and raids on the city treasury, then believed to be prevalent, and obviously not to investigate the propriety and wisdom of questions of a legislative nature pending for determination or action. The wording of the act is apt for this purpose. The examination is confined to alleged (i.e. alleged in the affidavit on which the order is based) wrongful diversion or misapplication of any moneys or fund, or any violation of the provisions of law, or any delinquency touching the office or the discharge or neglect of duty. To bring this case within the act the affidavit must show these existing facts.

177 A.D. at 670.

In the years after Mitchel, the language of the Charter was changed to the present language of "any alleged violation or neglect of duty in relation to the property, government or affairs of the city." Petitioners argue that this language broadens the scope of the provision so that judicial inquiry is not limited to only instances of illegality. Petitioners assert that the language broadened the application of a summary judicial inquiry beyond Mitchel's limited application of the section to circumstances concerning acts of corruption and misapplication of New York City funds.

While furthering transparency in the budget process is a laudable goal, I do not find that the facts herein rise to the conduct required for invocation of this Charter section. In the years since Mitchel was decided and the Charter was amended, other courts that considered the appropriateness of a § 1109 summary inquiry recognized that the "sole legislative purpose in the enactment of section 1109 was to bring acts of corruption to the public's attention by an investigation that thereafter 'shall be a public record'." In re Moskowitz (Lindsay), N.Y.L.J., July 7, 1970, at 10, col. 6T (Sup. Ct. N.Y. Co. 1970), quoting Matter of Greenfield v. Quill, 189 Misc. 91 (Sup. Ct.

Kings Co. 1946). Where "[t]here is in fact no dispute as to the material facts . . . no need is shown for a summary inquiry as contemplated by [§ 1109]." Larkin v. Booth, 33 A.D.2d 542 (1st Dep't 1969), aff'g, Matter of Larkin, 58 Misc. 2d 206 (Sup. Ct. N.Y. Co. 1968) ("where, as here, the facts are undisputed, an inquiry would serve no purpose.").

In papers in response to the application of the United States for a stay, petitioners' counsel states that the purpose of a summary inquiry is "to give citizen tax-payers a remedy of public information, enabling them to make the exercise of their rights as citizens and tax-payers more effective, and, by publicity, to concentrate the mind of a democratic system on meaningful reform." The matter at issue has already received substantial publicity and press coverage. The practice has allegedly stopped and investigations by governmental agencies are underway to further safeguard the public and presumably punish any wrongdoers. The primary purpose of the summary inquiry, as stated in Mitchel, supra, is not met here.

The decision to hold a summary inquiry is wholly discretionary, and upon a factual review of the allegations, courts have denied requests on this ground. Larkin v. Booth, supra, 33 A.D.2d at 542 (holding that the petition did not present "a proper case for exercise of the discretion of the court to direct an inquiry."); Matter of City of New York, N.Y.L.J., Feb. 5, 1964, at 14, col. 1F (Sup. Ct. N.Y. Co. 1964) (denying request to hold summary inquiry into alleged neglect of city-owned pier in the East River in the exercise of sound judicial discretion); Matter of Summary Inquiry into the Use of Property of the City of New York (Seligman), 179 Misc. 505, 511 (Sup. Ct. Bronx Co. 1942). I hold that a summary inquiry under § 1109 is not warranted here.

Accordingly, the petition is denied and the proceeding is dismissed. In view of the foregoing and the dismissal of the petition, the request by the United States for a stay (Motion Sequence Number 002) is denied as moot.

This constitutes the decision, order and judgment of the court.

Dated: July 16 , 2008

JOAN B. LOBIS, J.S.C.