



and Robert Tierney, Chairman of The New York City Landmarks Preservation Commission (“LPC”), submit this memorandum of law: (1) in further support of their cross-motion to dismiss this proceeding as to respondents Stringer and Tierney and DOI’s cross-motion to compel compliance with the DOI subpoena; (2) in further opposition to petitioner’s motion to quash; and (3) in opposition to petitioner’s cross-motions to strike, to declare Section 803(b)(2) unconstitutional as applied, and to enjoin respondents “from attempting to prevent or penalize the exercise of free speech by citizens at public hearings.”

As set forth in respondents’ initial papers in support of their cross-motions and in opposition to petitioner’s motion to quash, there is a legal basis for the challenged subpoena. Because petitioner has failed to provide any valid reason for not complying with the subpoena and, moreover, has not demonstrated that she is entitled to any of the other relief she has requested in her cross-motions, respondents’ motions should be granted and petitioner’s motion to quash and cross-motions to strike and for declaratory and injunctive relief should be denied.

Notwithstanding petitioner’s overheated rhetoric – see, e.g., Point V of Petitioner’s Memorandum of Law, dated August 7, 2007 – fundamentally, petitioner fails to refute DOI’s factual assertions on the merits. Instead, she argues that the facts are “irrelevant,” “scandalous” and “prejudicial.” Nor does she refute DOI’s authority to subpoena her. She instead argues that that authority should not apply to her. Although she may find the facts inconvenient, the facts are that petitioner, along with Ms. Miller, purported to speak at a public hearing on behalf of elected public officials without the imprimatur of those officials. That this is a matter of public concern and that DOI -- the City agency charged with protecting the integrity of government operations -- would attempt to interview the protagonists in this matter, should surprise no one.

## ARGUMENT

### POINT I

**PETITIONER HAS NOT PROVIDED ANY VALID REASON FOR NOT COMPLYING WITH THE SUBPOENA AT ISSUE; ACCORDINGLY, HER MOTION TO QUASH AND CROSS-MOTION TO DECLARE CITY CHARTER § 803(b) UNCONSTITUTIONAL AS APPLIED SHOULD BE DENIED.**

Petitioner has not set forth any valid basis for her failure to comply with the subpoena at issue. As explained in respondents' moving papers, DOI's jurisdiction under Section 803 of the Charter is broad, and DOI has authority to subpoena petitioner's testimony in order to ascertain facts that are relevant to its investigation, which concerns the affairs of the Landmarks Preservation Commission. See Respondents' Memorandum of Law, dated July 31, 2007 at pps. 6-11; Affidavit of Walter Arsenault, dated July 30, 2007 ("Arsenault Aff.").

Petitioner complains that the DOI subpoena and DOI's investigation violate her First Amendment rights. However, as explained in respondents' initial papers, this investigation concerns the issue of whether the petitioner and Ms. Miller misrepresented on whose behalf they were speaking at a public hearing of a City agency and misrepresented the views of the people on whose behalf they purported to speak; it does not concern the content of petitioner's and Ms. Miller's speech insofar as their own views are concerned. See Respondents' Memorandum of Law, dated July 31, 2007 at p. 13; Arsenault Aff. Private citizens are, of course, free to state their own opinions at public hearings. That right is not at issue in this proceeding or the investigation being conducted by DOI. However, the First Amendment does not protect private citizens when they falsely purport

to represent the views of public officials, and petitioner cites no authority to the contrary.<sup>1</sup> Accordingly, petitioner's motion to declare City Charter § 803(b) "unconstitutional as applied to a citizen's public hearing testimony" is without merit.

Petitioner also argues that the subpoena is prohibited under the Fifth Amendment because DOI's investigation could result in a criminal referral. Because petitioner remains free to invoke her Fifth Amendment privilege against self-incrimination, her argument lacks merit as the basis of a motion to quash the subpoena. It is well settled that a subpoena for testimony may not be quashed on Fifth Amendment grounds prior to an appearance before the investigating body and the posing of a specific question. Matter of Kennedy v. Curran, 33 NY2d 590, 591-592 (1973); Matter of Boikess v. Aspland, 24 NY2d 136, 140 (1969); People v. Laino, 10 NY2d 161, 174 (1961), appeal dismissed, cert. denied, 374 US 104 (1963) ("it is well settled that the privilege against self incrimination may not be asserted or claimed in advance of questions actually propounded"); Matter of Waterfront Commn. [Lamas], 245 AD2d 63, 64 (1st Dept. 1997) ("a blanket claim of privilege could not be invoked prior to questions actually having been asked").

---

<sup>1</sup> Petitioner's argument that her speech did not rise to the level of an "incitement" or a "clear and present danger," and therefore is not a matter of government concern, see Petitioner's Memorandum of Law, dated August 7, 2007, at p. 6, is far off the mark. A far more apt analogy is to the law of fraud, which permits the government, in both a civil and criminal context, to punish speech that is intended to deceive.

## POINT II

### PETITIONER'S MOTION TO STRIKE IS WITHOUT MERIT.

To the extent that petitioner seeks to have the Court strike the entire affidavit of Walter Arsenault, see Notice of Motion, the motion lacks any basis in law or fact.

All the information that petitioner seeks to strike is properly before the Court in order to explain the basis for the investigation, an obligation that respondents have to defend the propriety of the subpoena petitioner seeks to quash. See e.g., A'Hearn v. Committee on Unlawful Practice, 23 N.Y.2d 916, 918, 298 N.Y.S.2d 315, cert. denied, 395 U.S. 959 (1969) (the requirements for a government agency seeking to assert its subpoena power in conjunction with an investigation are: (1) that it has authority to engage in that investigation and to issue the subpoena; (2) that there is a basis to warrant inquisitorial action; and (3) that the information sought is relevant). For example, petitioner seeks to have the Court strike any references to Ms. Miller. Ms. Miller is an individual, apparently also associated with Landmarks West!, who may also have attempted to falsely represent the views of a public official at the very same public hearing.<sup>2</sup> Clearly, the description of DOI's investigation would not be complete without a description of the allegations concerning Ms. Miller.

As for the allegations that petitioner may have deliberately misrepresented herself as a representative of Borough President Stringer, these allegations may or may not prove to be substantiated. By mentioning the possibility of a criminal referral, respondents are not attempting to "humiliate and punish" petitioner as she claims. See Petitioner's Memorandum of Law, dated August 7, 2007 at p. 7. Instead, this information, like the other information presented, provides the

---

<sup>2</sup> The fact that Ms. Miller may have misrepresented the position of a State official, not a City official, see Petitioner's Memorandum of Law, dated August 7, 2007, at p. 3, is of no moment as the investigation concerns conduct at a public hearing of a City agency.

Court with important information concerning the context for DOI's investigation.<sup>3</sup> Accordingly, the references to a possible criminal referral are also properly before the Court.

Respondents' footnote inviting the Court to conduct an in camera review of DOI's files if the Court deems it necessary to consider additional evidence in order to decide the present motions is entirely proper and appropriate in connection with a motion to quash a subpoena issued in connection with a confidential investigation. It is not reasonably interpreted to insinuate that petitioner has "engaged in criminal, dark or improper behavior that cannot be discussed in public." Petitioner's Memorandum of Law, dated August 7, 2007 at p. 3.

Accordingly, petitioner's cross-motion to strike should be denied in its entirety.

### POINT III

#### **PETITIONER'S MOTION FOR INJUNCTIVE RELIEF IS GROUNDLESS.**

Petitioner seeks to enjoin respondents "from attempting to prevent or penalize the exercise of free speech by citizens at public hearings." To the extent the motion is directed to respondents Tierney and Stringer, petitioner cannot point to any conduct that these respondents engaged in that this Court would have any authority whatsoever to enjoin. As for DOI, it has at all times acted in good faith, with a lawful purpose, and consistent with the First Amendment rights of those who testify at public hearings. Accordingly, the motion is groundless.

---

<sup>3</sup> Petitioner's statement that "[t]he Commissioner of Investigation has no authority to investigate alleged criminal conduct as such," see Petitioner's Memorandum of Law, dated August 7, 2007 at p. 3, is off the mark. DOI has authority to conduct investigations concerning the affairs of City agencies, including investigations that might result in criminal referrals. Indeed, investigations that might result in criminal referrals are specifically contemplated in Section 803(c) of the City Charter. See N.Y.C. Charter Section 803(c) (providing that "[i]n the event that the matter investigated involves or may involve allegations of criminal conduct, the commissioner, upon completion of the investigation, shall . . . forward a copy of his written report or statement of findings to the appropriate prosecuting attorney . . .").

**CONCLUSION**

For the reasons set forth herein, as well as in the Affidavit of Walter Arsenault, dated July 30, 2007, and Respondents' Memorandum of Law, dated July 31, 2007, respondents request that Petitioner's motion to quash and cross-motions be denied, that DOI's cross-motion to compel be granted, that respondents' cross-motion to dismiss these proceedings as to respondents Stringer and Tierney be granted, and that the Court grant such other and further relief as may be just and proper.

Dated: New York, New York  
August 10, 2007

Respectfully submitted,

By: Emily Sweet  
Emily Sweet  
Assistant Corporation Counsel