

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. JOAN A. MADDEN

PRESENT: J.S.C.

PART 11

Index Number : 101332/2019
CARR, GWEN; ELLISHA FLAGG
vs
BILL DEBLASIO, MAYOR OF THE
Sequence Number : 001 and 002
ARTICLE 78

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is petition and motion
Sequence number 001+ are decided in accordance
with the annexed memoranda decision and
orders.

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

Dated: September 24, 2020

HON. JOAN A. MADDEN, J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X

In the Matter of
GWEN CARR, ELLISHA FLAGG GARNER,
CONSTANCE MALCOLM, LOYDA COLON,
JOO-HYUN KANG, MONIFA BANDELE, KESI
FOSTER, and MARK WINSTON GRIFFITH,

Petitioners,

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

-against-

Index No. 101332/2019

BILL DE BLASIO, Mayor of the City of
New York, JAMES P. O'NEILL, New York
City Police Commissioner, DANIEL A.
NIGRO, New York City Fire Commissioner,
KEVIN RICHARDSON, New York City Police
Department Deputy Commissioner, and
THE CITY OF NEW YORK,

Respondents.

-----X

JOAN MADDEN, J.

Petitioners Gwenn Carr (Ms. Carr), Elisha Flagg Garner
(Ms. Garner), Constance Malcolm (Ms. Malcolm), Loyda Colon (Ms.
Colon), Joo-Hyun Kang (Ms. Kang), Monifa Bandele (Ms. Bandele),
Kesi Foster (Ms. Foster), and Mark Winston Griffith (Mr.
Griffith) petition the court for an order convening a summary
judicial inquiry, pursuant to New York City Charter (City
Charter) § 1109.¹ Petitioners bring this proceedings under

¹Ms.Carr and Ms. Garner are, respectively, the mother and sister
of Mr. Garner; Ms. Malcolm, is the mother of Ramarley Graham,
who was killed by the NYPD in February 2012; Ms. Colon is Co-

section 1109 which provides that certain specified City officials, as well as any five citizens who are taxpayers, may petition a Justice of the Supreme Court to conduct a summary inquiry into "any alleged violation or neglect of duty in relation to the . . . government or affairs of the city" in which respondents may be required "to attend and be examined." City Charter § 1109. Petitioners seek a judicial inquiry relating to the July 17, 2014 arrest of Eric Garner (Mr. Garner) for the alleged sale of untaxed loose cigarettes and his subsequent death, and whether any investigation or disciplinary proceedings were conducted by the New York City Police Department (NYPD or Police Department) and the City concerning the circumstances of his arrest and death, and by the New York City Fire Commissioner concerning the lack of medical care given to Mr. Garner. Such an inquiry would involve the questioning of witnesses by counsel for petitioners and respondents, the recording of the witnesses' testimony and the filing of a transcript of the testimony in the office of the County Clerk. Petitioners do not seek, and section 1109 does not provide that

Director of the non-profit Justice Committee; Ms. Kang is the director of the non-profit Communities United for Police Reform; Ms. Bandele is the senior vice-president of the non-profit MomsRising.org; Ms. Foster is an organizer with the non-profit Make the Road New York; and Mr. Griffith is the executive director of the non-profit Brooklyn Movement Center.

the court make any findings with respect to the issues addressed in the inquiry.

Respondents, Bill De Blasio, Mayor of the City of New York (De Blasio or the Mayor); James, P. O'Neill, New York City Police Commissioner, at the time in issue (O'Neill or the Police Commissioner); Daniel A. Nigro, New York City Fire Commissioner (Nigro, or the Fire Commissioner); Kevin Richardson, NYPD Deputy Police Commissioner (Richardson or the Deputy Police Commissioner); and the City of New York (the City) move to dismiss the Petition.

Although the arrest and death of Eric Garner has received considerable attention in the press over the past six years, many facts relating to his arrest and death, and the investigations and any disciplinary actions taken in response to his death, have not been disclosed to the public or to the family of Mr. Garner. In this regard, the court notes that the purpose of section 1109 is to bring transparency to the actions of public officials.

Petitioners, who include the mother and sister of Mr. Garner, seek a summary inquiry that addresses the following allegations and issues:

"a) Violations and neglect of duties in connection with the stop and arrest of Mr. Garner and the force used by officers on Mr. Garner;

"b) Violations and neglect of duties concerning the failure, subsequent to Mr. Garner's death, to train NYPD officers adequately on appropriate guidelines on the use of force and the prohibition on the use of chokeholds;

"c) Violations and neglect of duties in connection with filing false official NYPD documents concerning Mr. Garner's arrest and making false statements in connection with the NYPD's internal investigation of Mr. Garner's death;

"d) Violations and neglect of duties concerning the unlawful leaking of Mr. Garner's alleged arrest history and the unlawful leaking of Mr. Garner's alleged medical history;

"e) Violations and neglect of duties in connection with incomplete and inaccurate statements to the media by the City concerning the July 17, 2014 stop and arrest of Mr. Garner;

"f) Violations and neglect of duties in connection with the medical care provided to Mr. Garner; and

"g) Violations and neglect of duties concerning the City's investigation and adjudication of, and imposition of discipline for, the aforementioned violations and neglect of duties, including (for example) false statements by NYPD concerning Mr. Garner's arrest."

NYSCEF Doc. No. 3, verified petition ¶ 4.

BACKGROUND

The following background description of Mr. Garner's arrest and death, unless otherwise noted, is based upon the decision of the Honorable Rosemarie Maldonado, Deputy Commissioner Trials, NYPD, in the administrative trial of Police Officer Daniel Pantaleo (Officer Pantaleo), who was charged with causing Mr. Garner's death by the use of a chokehold in the process of

arresting Mr. Garner. *Matter of Daniel Pantaleo*, Case No. 2018-198274 (Maldonado Decision). Significantly, Judge Maldonado considered those allegations only in the context of the charges against Officer Pantaleo.

The day after Mr. Garner's death, an investigation was commenced by the Internal Affairs Bureau of the Police Department (IAB) in which 16 civilian and 21 uniformed witnesses were interviewed. On January 15, 2015, the IAB issued an internal police department memo (IAB memo) requesting that charges and specifications be issued against Officer Pantaleo "for violation of Patrol Guide (P.G.) 203-11. 'Use of Force,' in that he placed Eric Garner in a chokehold." *Id.* at 12.

In response to the IAB request, the Civilian Complaint Review Board (CCRB) brought charges against Officer Pantaleo on two separate theories; the first involving reckless use of force against Mr. Garner, and the second, intentional use of force. Specifically, they charged that Officer Pantaleo recklessly used force (a prohibited chokehold) against Mr. Garner causing him physical injury in violation of the Police Department Patrol Guide (P.G. or Patrol Guide) and the Penal Law;² and that he intentionally used force (a prohibited chokehold), intentionally restricting Mr. Garner's breathing by applying pressure to his

² P.G. 203-11, Use of Force (in effect in 2014), and Penal Law § 120.00 (2), Assault in the Third Degree.

throat and/or neck without police necessity, causing him serious physical injury, also in violation of the Patrol Guide and the Penal Law.³

In the approximately 4 1/3-year period between the issuance of the IAB memo and the administrative trial of Officer Pantaleo,⁴ the arrest and death of Mr. Garner were apparently reviewed by a number of agencies, including the Richmond County District Attorney's office, the United States Attorney's office for the Eastern District of New York, and the United States Justice Department. Although the focus of those investigations is unclear, none of those agencies brought any charges with respect to Mr. Garner's arrest and death. As discussed below, it appears that those investigations were focused solely on the actions of Officer Pantaleo.

According to the factual overview of the background and events of July 17, 2014, as set forth in the Maldonado Decision, in March 2014, Lieutenant Christopher Bannon (Lt. Bannon), the Special Operations Lieutenant for the 120 Precinct in Staten Island, attended a meeting at One Police Plaza focusing on quality-of-life conditions in New York City. Lt. Bannon was specifically tasked with investigating the sale of untaxed

³ P.G. 203-11, Use of Force, and Penal Law § 121.13, Strangulation in the Third Degree.

⁴ The administrative trial was conducted between May 13 and June 6, 2019.

cigarettes in the vicinity of 200 Bay Street, Staten Island, near Tompkinsville Park. During the period between March 28 and July 16, 2014, multiple arrests were made for the sale of untaxed cigarettes in or near that area. It is alleged that, during that period, Mr. Garner was arrested twice for circumventing the State tax laws.

On July 7, 2014, Lt. Bannon was driving in the vicinity of Tompkinsville Park when he saw approximately 10 people "huddled" in the park who he believed were engaged in transactions relating to the illegal sale of untaxed cigarettes, although he did not see any cigarettes being sold. Lt. Bannon directed that Quality-of-Life Coordinator, Police Officer Justin Damico (Officer Damico) be dispatched to the area, with another police officer to assist him, to determine whether untaxed cigarettes were being sold. Officer Damico was sent out, accompanied by Officer Pantaleo. They conducted surveillance from an unmarked car, approximately 200-300 feet from 202 Bay Street, where they observed two men "congregating" near a beauty supply shop. Telling Officer Pantaleo that he observed a sale, Officer Damico and Officer Pantaleo then drove around the block and returned to Bay Street, double parked, got out of their vehicle and approached Mr. Garner. Officer Pantaleo testified that as they were approaching Mr. Garner, Officer Damico told him that he had seen another sale; however, Officer Pantaleo testified that he

did not see either alleged sale. Officer Damico did not testify to a second sale during Officer Pantaleo's administrative trial.

Approaching Mr. Garner, Officer Damico told him that he was under arrest for selling untaxed cigarettes. Mr. Garner denied selling the cigarettes and told Officer Damico that he had been breaking up a fight. Two men who were present, Ramsey Orta (Mr. Orta) and Michael Lewis (Mr. Lewis) testified consistent with Mr. Garner's statement that all he was doing was breaking up a fight between a man to whom Mr. Orta had given a dollar and another man who tried to take the dollar from him. Nonetheless, Officer Damico tried to convince Mr. Garner to comply with the arrest, but Mr. Garner, who, according to testimony, had been arrested in the past by both Officer Damico and Officer Pantaleo, claimed harassment and refused to be handcuffed.

Shortly after the police officers approached Mr. Garner, Mr. Orta began videotaping the interactions between the police and Mr. Garner.⁵

As the Maldonado Decision indicates, when Mr. Garner refused to be handcuffed, Officers Damico and Pantaleo each tried to grab one of his hands. According to the decision, by that time, two additional police officers, Craig Furlani and

⁵ At some point, Mr. Lewis also began videotaping the incident. Portions of those videotapes have been widely broadcast on TV news and the internet.

Mark Ramos, approached. The specific maneuvers used by Officer Pantaleo and how they were executed by him, formed the crux of the disciplinary case against him.

By the time Mr. Garner was brought to the ground, Sergeant Kizzy Adonis (Sgt. Adonis) and Police Officer William Meems (Officer Meems) arrived. Specifically, the Maldonado Decision states:

"According to [Officer Pantaleo], he heard Mr. Garner 'wheezing.' Mr. Garner repeatedly said 'I can't breathe' as he lay on the sidewalk. Mr. Garner's words became more labored until he fell silent.

"At trial it was noted that, due to Mr. Garner's size, the officers had to join three handcuffs to secure him. They then followed procedures by moving him from a prone position onto his side. Officers at the scene testified at trial that they believed Mr. Garner could have been feigning unconsciousness as part of a ruse to avoid arrest. During questioning Damico agreed that Mr. Garner might have been 'playing possum.' As Mr. Garner continued to lay unresponsive on the ground, Officer Meems observed that his breathing was shallow, confirmed there was a pulse and called for someone to notify EMS."

Maldonado Decision at 9 (Internal transcript and exhibit citations omitted).

In connection with the provision of medical services, Sergeant Dhanan Saminath (Sgt. Saminath) arrived at the scene in response to a call to Emergency Medical Services (EMS). Sgt. Saminath made a second call to EMS and directed Damico to search Mr. Garner's body. Officer Damico found four sealed packs of cigarettes and one open pack containing 15 cigarettes, for a

total of 95 cigarettes. Each of the packs had Virginia tax stamps, but none had a New York tax stamp.

EMS arrived on the scene approximately five minutes after Mr. Garner was brought to the ground. Multiple officers assisted in moving Mr. Garner to an ambulance, which drove for approximately five minutes and then pulled over and waited for a paramedic to arrive, who used a defibrillator to begin CPR. On arrival at the Richmond University Medical Center, where Mr. Garner was brought to the emergency room and CPR was continued, Mr. Garner was intubated with a breathing tube and a nasogastric tube was inserted into his stomach through his right nostril and esophagus. Mr. Garner ultimately died in the hospital.

When Sgt. Saminath returned to the precinct from the hospital, he notified his commanding officer that "'it doesn't look good.'" The commanding officer instructed Saminath to notify the IAB, which he did.

"He also texted Bannon to inform him that Mr. Garner had 'resisted' and 'might be DOA.' Lieutenant Bannon responded, 'For the smokes?' Sergeant Saminath confirmed, 'Yea' and explained that Respondent 'grabbed him [and] they both fell down.' Lieutenant Bannon answered, 'Ok, keep me posted, I'm still here...Not a big deal, we were effecting a lawful arrest.' At trial, Lieutenant Bannon explained that his intent was not to minimize the significance of a civilian's death, but to put the officers' 'mind[s] at ease' after a 'bad situation.'"

Maldonado Decision at 10.

When Officer Damico returned to the precinct he processed the arrest papers and drew up charges, filling in "no" for "force used," and for "top charge," writing, violation of New York Tax Law (Tax Law) § 1814(a), which is a class E felony, requiring the attempt to evade or defeat the tax on 10,000 or more cigarettes.

On July 18, 2014, an autopsy of Mr. Garner was performed by Dr. Floriana Persechino (Dr. Persechino) of the City's Office of the Chief Medical Examiner.

"As recorded in the Report of Autopsy, Dr. Persechino certified that the cause of Mr. Garner's death was 'compression of neck, chokehold, chest compression, prone positioning during physical restraint by police,' and listed 'acute and chronic bronchial asthma, obesity and hypertensive cardiovascular disease' as contributory causes. (Tr. 274, 319~20; CCRB Exs. 9, 16 at p.2)."

Maldonado Decision at 32.

At the administrative hearing, Dr. Persechino testified that

"[i]t is my opinion that ... the chokehold, the chest compression, the prone position, set into motion a lethal sequence [or cascade] of events, where [underlying] natural diseases now are contributing to ... the death but they are being triggered by what is happening, the injuries and the physical restraint at that point in time.' Dr. Persechino concluded that the chokehold was 'a significant initial factor in the cascade.' She noted that it 'compressed ... his airway making it difficult for him to breathe,' thereby 'participat[ing] in triggering the asthma attack' that ultimately contributed to Mr. Garner's death."

Maldonado Decision at 32-33.

In a 45-page decision, Judge Maldonado found Officer Pantaleo guilty of reckless use of force in violation of Penal Law § 120.00(2), Assault in the Third Degree, but not guilty of intentional use of force in violation of Penal Law § 121.13, Strangulation in the First Degree. Judge Maldonado recommended that he be dismissed from the police force.

On August 19, 2019, the Police Commissioner followed Judge Maldonado's recommendation and dismissed Officer Pantaleo from the police force.

RESPONDENTS' MOTION TO DISMISS

Respondents move to dismiss the petition on a number of grounds, arguing that: City Charter § 1109 is unconstitutional on its face and as applied; its reach is limited to acts of corruption and misapplication of funds; the petition raises issues that are nonjusticiable; petitioners should be required to pursue the information they seek by means of Freedom of Information Law (FOIL) requests, rather than through the mechanism of a summary inquiry; and in their petition, petitioners have failed to satisfy the requirements of section 1109. Respondents further argue that the court should exercise its discretion and deny the petition as the events surrounding the arrest and death of Mr. Garner have received widespread publicity.

The court will address respondents' arguments regarding the constitutionality, justiciability and reach of the summary inquiry provision, its relationship to FOIL, and the exercise of the court's discretion before considering the specific matters which petitioners seek to pursue in a summary inquiry and whether they have satisfied the requirements of section 1109.

Constitutionality of City Charter § 1109

Respondents contend that section 1109 of the City Charter is unconstitutional on its face and as applied. This argument with respect to the constitutionality of the Summary Inquiry provision has been addressed and rejected by numerous courts, most recently by the Appellate Division, First Department in *Matter of James v Fariña* (171 AD3d 44 [1st Dept 2019]).

In *Matter of James*, the Public Advocate for the City of New York sought a summary inquiry with respect to the computer software system adopted by the Department of Education to manage the records and generate documentation for the education of children with disabilities. The Supreme Court granted the Public Advocate's petition, directing a summary inquiry.

On appeal, though reversing the Supreme Court's decision to grant a summary inquiry on other grounds, the Appellate Division upheld the constitutionality of section 1109. The Court rejected the argument made by the Department of Education, that based on the decision in *Matter of Richardson* (247 NY 401

[1928]), section 1109 constitutes a public trust in violation of Article VI, § 20 (b) (1) of the New York State Constitution which provides that a Justice of the Supreme Court may not hold any other public office or trust. Respondents make that same argument here, relying on the same case law. The Appellate Division found *Richardson* inapplicable on the facts, as there, the Court of Appeals was considering the constitutionality of a statute that permitted the Governor to direct a Supreme Court judge to conduct a proceeding to investigate a public official and file a report with the Governor containing recommendations concerning the removal of that official. The Court of Appeals struck down that statute as charging the Supreme Court Justice with non-judicial duties and improperly making him or her a delegate of the Governor. The Appellate Division in *Matter of James* concluded that section 1109, unlike the statute at issue in *Richardson*, does not make a Supreme Court Justice "subject to the order or the delegate of either the legislative or executive branch of government." *Matter of James v Fariña*, 171 AD3d at 52. The Court further noted that "a judicial summary inquiry 'controlled' by a Supreme Court Justice has all the hallmarks of a grand jury proceeding, a quintessential judicial proceeding."⁶ *Id.* at 51.

⁶ Acknowledging that, in *James*, the Appellate Division recently considered and rejected this and other arguments by the City

Respondents also challenge the constitutionality of section 1109 on the grounds that it is violative of the separation of powers doctrine. In this regard, in *Matter of James*, the First Department, noting that this doctrine exists to prevent one branch of the government from unconstitutionally encroaching on another, found this argument was equally without merit. The Court noted that the analysis of whether section 1109 was unconstitutional as applied to a particular summary inquiry was a sui generis inquiry, that is, each application must be analyzed on its particular facts. The Court held that while a summary inquiry into the educational and pedagogical priorities of the Department of Education might have separation of powers problems, the Public Advocate's effort to obtain an inquiry into the Department's compliance with its duties under the regulations and statutes governing the provision of special education services created no such constitutional conflict. *Id.*

Respondents' reliance on the decision of the Court of Appeals in *Jones v Beame* (45 NY2d 402 [1978]), to argue that the request for a summary judicial inquiry here would violate the separation of powers doctrine, is similarly unavailing. In

challenging the constitutionality of section 1109, respondents have indicated that they are making these arguments to preserve them for appeal. This court, therefore, finds it unnecessary to address respondents' effort to challenge or distinguish the earlier Supreme Court decisions upholding the constitutionality of section 1109.

Jones v Beame, plaintiffs in each of two consolidated appeals sought declaratory and injunctive relief against officials of two different administrative agencies, one charged with the operation of the municipal zoos, and the other with the responsibility for the care and treatment of mentally ill patients allegedly prematurely placed in private homes and hotels without adequate supervision. Although recognizing the "dreadful conditions" alleged in both cases, the Court concluded that, in seeking declaratory and injunctive relief, the plaintiffs were seeking to have the court assume "a general supervisory power" over those administrative agencies. The Court indicated that "the judicial process is not designed or intended to assume the management and operation of the executive enterprise." *Jones v Beame*, 45 NY2d at 408.

Here, in contrast, petitioners are not seeking declaratory and injunctive relief, nor are they asking the court to assume the management and operation of any City agencies. Rather, they are merely seeking a summary inquiry into specific questions of alleged violation and/or neglect of duty by City officials and employees. Therefore, the concerns raised by the Court of Appeals in *Jones v Beame* regarding a court adopting supervisory power over an administrative agency, with the single exception indicated below, do not bar an inquiry into the issues raised in this petition. See *Matter of Green v Giuliani*, 187 Misc 2d 138,

146 (Sup Ct, NY County 2000) ("Even if [the holding in *Jones v Beame*] were treated as limiting the scope of Section 1109 in some circumstances, it has no application here, where the summary inquiry is sought with respect to allegations of specific misconduct in relation to specific statutory provisions.").

Respondents' arguments regarding justiciability are also without merit. Citing *Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo* (64 NY2d 233 [1984]), respondents argue that permitting a summary inquiry here would require this court to engage in a nonjusticiable controversy. There, employees at two correctional facilities sought to enjoin the closing of the facilities, arguing that the closures would violate their rights to a safe workplace. Citing *Jones v Beame*, the Court of Appeals indicated that policy matters such as the opening and closing of correctional facilities have been committed to a coordinate branch of the government and that the relief requested by the petitioners had likewise been committed to a coordinate branch of government. The Court held that, as in *Jones v Beame*, the correctional employees were basically seeking to have the court oversee administrative operations which were assigned to another branch of the government. As indicated above, that is in sharp contrast with what petitioners are seeking here, i.e., a public

inquiry into whether specific officials of the City have neglected or violated specific duties, and the filing of the testimony of officials with the County Clerk.

Respondents' argument that the matter is nonjusticiable because "it asks the Court to render what would essentially be an advisory opinion" (Respondents memorandum of law, at 49-50) fails, because section 1109 does not provide for any opinion by the court. Rather, the section provides that one or more officers, employees or other persons be examined regarding alleged violations or neglect of duty in relation to the government or affairs of the city, and that "[t]he examination shall be reduced to writing and shall be filed in the office of the [county clerk]" City Charter § 1109.

Nor is there merit to respondents' argument that section 1109 was originally intended to expose acts of corruption and raids on the city treasury, that a broader application would violate the separation of powers, and that courts have generally limited the application of the section to claims of corruption and misapplication of funds. That argument was rejected by the Court in *Matter of James* which agreed with the Supreme Court in *Matter of Green* that "1109's reach includes not only corruption but 'all forms of official misconduct.'" *Matter of James v Fariña*, 171 AD3d at 58, quoting *Matter of Green v Giuliani*, 187 Misc 2d at 150.

In enacting section 1109 of the City Charter, and its predecessor section 1534, the Legislature recognized the importance of shedding light on violations or neglect of duty relating to the government or affairs of the City. That light is equally important whether the problems to be illuminated involve corruption or other violations or neglect of duty relating to the affairs of the City. For it is only when such conduct is exposed to light that it can successfully be addressed.

Freedom of Information Law Requests

Respondents contend that the court should exercise its discretion to dismiss the petition because petitioners have made requests for documents pursuant to FOIL (Public Officers Law §§ 84, et seq.) which covers much of the same information and from the same agencies that they seek to examine in a summary inquiry. Respondents further argue that, to the extent petitioners seek testimony from City agencies to which they have not submitted FOIL requests, they could and should have done so, rather than seeking what respondents describe as an extraordinary and intrusive mechanism to obtain information.

Implicit in respondents' argument that the court should dismiss the petition in the exercise of its discretion is the recognition that there is no requirement that petitioners pursue their available rights under FOIL rather than under the City

Charter. Moreover, respondents also appear to recognize the limitations of requests made under FOIL, as they do not challenge petitioners' contention that such requests are subject to numerous exemptions from disclosure, including most inter- and intra-agency communications. With respect to the now-repealed section 50-a of the New York Civil Rights Law which prohibited the disclosure of police disciplinary records, many FOIL exemptions remain, despite the repeal of that section.

Nor do respondents address petitioners' contention that the FOIL timelines for the production of documents have not been met, and documents which may be produced under FOIL are subject to substantial redactions. See, *tr oral argument*, Aug. 10, 2020 at 46. In addition, a party seeking documents may be forced to turn to the courts to obtain the documents he or she seeks.⁷

Finally, as petitioners have pointed out, FOIL is limited to the production of documents that are in existence and does not require a government agency or official to create a record; thus, the information available to petitioners would be substantially more limited than that which petitioners could seek in a summary inquiry.

⁷ See *e.g. Matter of Malcolm v New York City Police Department*, Sup Ct, NY County, Index no. 100466/17, July 31, 2018, Mendez, J., involving an unrelated FOIL request by one of the petitioners here.

Respondents also argue that the court should exercise its discretion and deny the petition as the events have been sufficiently publicized. In support of this argument respondents rely on *Matter of Riches v New York City Council* (75 AD3d 33 [1st Dept 2010]) and *Matter of James v Fariña* (171 AD3d 44).

The situation here is in sharp contrast with that which was in *Riches*, where the Appellate Division affirmed the Supreme Court's exercise of its discretion dismissing a section 1109 petition. There, the petitioners sought a summary inquiry into the City Council's practice of allocating funds to nonexistent entities during its budgeting process. The Supreme Court denied the petition because the practice had been acknowledged by respondent City Council and had received extensive publicity, and the Supreme Court found that the ongoing investigation of the practice by two governmental agencies was sufficient to protect the public interest. Here, the alleged violations and/or neglect of duty have not been acknowledged by respondents and there is no indication that any governmental agencies are investigating the actions of any police officers other than Officer Pantaleo.

In *Matter of James*, which is also relied on by respondents, the Court specifically noted that the petitioner, Public Advocate James, had already "conducted a 'lengthy and thorough'

investigation concerning respondents' perceived administrative failures, as she is empowered to do . . . under the Charter" and that section 24 of the City Charter empowered her, as Public Advocate,

"with extensive and wide-ranging investigatory authority, and authorize[d] her to hold public hearings . . . [and section] 1123 empowers the Public Advocate to compel attendance of any . . . 'officer or employee of the city' to a convened hearing and failure to appear or testify 'shall' result in removal from office or termination of employment."

Matter of James v Fariña, 171 AD3d at 63. Petitioners here are without such powers or authority.

As discussed above, despite the publicity, much is still unknown about the actions of the police that resulted in Mr. Garner's death, including what, if any, investigations and disciplinary measures have been undertaken concerning the police actions, other than the administrative trial and firing of Officer Pantaleo, to ensure that the police officers and their superiors are held accountable. Public concern over the arrest and death of Mr. Garner continues unabated, and the words "I can't breathe" continue to resonate.

Respondents contend that allegations of misconduct and use of excessive force are routinely raised against police officers; and, if this court concluded that the allegations here were sufficient to justify a summary inquiry under section 1109, "the

courts would position themselves as super-investigators of alleged police misconduct, usurping the role of the investigative arms of City government.” Respondents’ reply memorandum of law at 14. The allegations here, relating to the use of force resulting in the death of an unarmed man, are far from routine, and it is the view of this court that granting the petition is not likely to transform the courts into super-investigators of police misconduct.

For these reasons, the court concludes that it should not dismiss the petition in an exercise of its discretion.

Failure to Allege the Existence of a Violation or Neglect of
Duty

With respect to the substance of the petition, respondents contend that petitioners have failed to allege the existence of a specific duty or duties that respondents have violated or neglected. They further contend that respondents were not personally involved in any of the events involving the stop, arrest and death of Mr. Garner, and that petitioners fail to allege that respondents have personal knowledge of those events.

The court will address the assumptions underlying respondents’ contentions concerning the threshold that petitioners must meet for a court to grant a judicial inquiry, and then examine each of the specific areas with respect to

which petitioners seek an inquiry to determine whether petitioners have sufficiently alleged a violation or neglect of duty. The starting place for the discussion is the language of City Charter section 1109. *Matter of Walsh v New York State Comptroller*, 34 NY3d 520, 524 (2019).

As set forth above, section 1109 provides for a summary inquiry into "any alleged violation or neglect of duty in relation to the property, government or affairs of the city ... 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." City Charter § 1109.

The clear language of the provision requires only that petitioners allege a violation or neglect of duty relating to the property, government or affairs of the City and that the person or persons named as respondents have knowledge or information concerning the alleged violation or neglect of duty. Contrary to respondents' contentions, the language of section 1109 does not require that respondents themselves have violated or neglected the duty mentioned. In other words, the violated or neglected duty need not be a duty imposed upon the named respondent, but there must be a basis alleged upon which the named respondent has knowledge of such neglect or violation. Nor does the language of the section require that respondents have

personal knowledge or information regarding the alleged violation or neglect as respondents contend.⁸ That is, it is not necessary that the respondent was present and/or directly involved in the particular events when they took place. Knowledge can be based, for example, upon access to departmental documents or participation in governmental meetings or discussions and decisions regarding the events in question, or inferred from knowledge necessary in performance of a responsibility or duty imposed by office in connection with such events.

Absent such language, the court will not graft either requirement onto section 1109.

With respect to respondents' motion to dismiss, the court makes the following determinations regarding the specific areas of inquiry proposed by petitioners.

a) Violations and neglect of duties in connection with the stop and arrest of Mr. Garner and the force used by officers on Mr. Garner.⁹

⁸Nor does anything in footnote 3 of the *James* decision (171 AD3d at 49) suggest that the knowledge must be personal knowledge, as argued by respondents. See Tr. Oral argument August 10, 2020, at 23-24.

⁹ The court notes that to the extent that petitioners seek a summary inquiry to address the actions of police officers involved in the stop and arrest of Mr. Garner, it is not addressing the actions of Officer Pantaleo, which have been the subject of a Police Department administrative trial resulting in a recommendation that Officer Pantaleo be fired, which recommendation was followed by the Commissioner of Police. Nor is the court addressing the involvement of Sgt. Adonis, who apparently, as a result of a negotiated resolution of

Petitioners contend, during the arrest of Mr. Garner, in addition to the excessive force used by Officer Pantaleo, that excessive force was used by other police officers in their efforts to assist in restraining and handcuffing Mr. Garner. They contend that the use of excessive force against Mr. Garner violated his rights under the Fourth Amendment to the United States Constitution and Article I, section 12 of the New York State Constitution, which provisions protect against unreasonable search and seizure, and also violated NYPD Patrol Guide, 208-01 (03) governing reasonable cause for arrest, and New York Penal Law §§ 35.30 governing the use of physical force in making an arrest.

The facts as set forth in the decision of Judge Maldonado raise serious questions of whether there was a legal basis for the stop and arrest of Mr. Garner and whether the police use of force which resulted in his death, in an effort to arrest a man who police accused of selling an untaxed cigarette or cigarettes, was excessive.

disciplinary charges, forfeited 20 vacation days for failure to supervise.

<https://www.nytimes.com/2019/08/21/nyregion/sergeant-kizzy-adonis-eric-garner-pantaleo.html>; tr of oral argument, August 4 2020, at 12. See *Matter of James v Fariña*, 171 AD3d 44.

For example, a question exists as to whether Officer Damico could have seen a sale of an untaxed cigarette from his vehicle located approximately 200-300 feet from where Mr. Garner was standing on Bay Street (see Maldonado Decision at 4).¹⁰ Additionally, the CCRB, which brought the administrative case against Officer Pantaleo, disputed the allegation that Mr. Garner was selling untaxed cigarettes when he was stopped, questioned and arrested. The CCRB presented the testimony of two witnesses, Mr. Orta and Mr. Lewis, which was consistent with Mr. Garner's statement that he had not been selling cigarettes, but had been breaking up a fight, raising additional questions concerning whether there was a legal basis for his arrest. See Maldonado Decision at 4-5.

With respect to petitioners' allegations regarding excessive use of force, as the court notes above, the actions of Officer Pantaleo have already been addressed in an administrative trial, and disciplinary actions were taken by the Police Department, and, thus, are not the focus of this proceeding. In addition to the actions of Officer Pantaleo, however, petitioners allege that during the efforts to handcuff

¹⁰ Moreover, in the administrative trial, Officer Panteleo testified that, while walking over to where Mr. Garner was standing, Officer Damico told him that he saw another sale, but Officer Pantaleo, further testified that he had seen neither alleged sale. Judge Maldonado also noted that Officer Damico did not testify to a second sale. Maldonado Decision at 4.

Mr. Garner, several police officers were on top of Mr. Garner, covering nearly his entire body. Video clips of the arrest referred to in the papers of both petitioners and respondents indicate the involvement of several police officers in addition to Officer Pantaleo in the process of handcuffing Mr. Garner when he was on the ground. From those video clips, however, it is difficult, at best, for the court to determine the level of involvement of the various officers who participated in the arrest, the nature and degree of force used by them, and the consequences of that use of force. The decision of Judge Maldonado stated, however, "According to [Officer Pantaleo], he heard Mr. Garner 'wheezing.' Mr. Garner repeatedly said 'I can't breathe' as he lay on the sidewalk. Mr. Garner's words became more labored until he fell silent." Maldonado Decision at 9. The decision further refers to testimony of the officers at the scene that Mr. Garner could have been feigning unconsciousness or "playing possum." Moreover, Officer Meems testified that Mr. Garner's breathing became shallow, that he took his pulse and called for EMS to be notified.

Although Judge Maldonado noted that the NYPD Patrol Guide permits the use of "reasonable force" when necessary to take an uncooperative person into custody, the court notes that Judge Maldonado did not examine the question of whether there was probable cause for the arrest, or whether the force used by the

police officers assisting Officer Pantaleo was reasonable or excessive, and, therefore, whether those officers violated both Mr. Garner's constitutional rights and the NYPD Patrol Guide, as petitioners allege. In this connection it is significant that in the medical examiner's opinion, Mr. Garner's death was due not just to the compression of his neck and the chokehold, but also due to his prone position and chest compression during physical restraint by the police.

There is no indication that respondent former Police Commissioner or anyone under his command undertook any investigation of whether there was probable cause for the arrest of Mr. Garner, or whether the extent of force used by the officers assisting Officer Pantaleo was justified given the nature of the alleged offense, which only carried the potential top charge of a misdemeanor for the sale of untaxed cigarettes. See Tax Law § 1814 (b).

Under section 434 of the City Charter, the Police Commissioner has the following powers and duties:

"§ 434: Commissioner; powers and duties.

"a. The commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department.

"b. The commissioner shall be the chief executive officer of the police force. He shall be chargeable with and responsible for the execution of all laws and the rules and regulations of the department."

Moreover, in matters relating to police discipline, the Police Commissioner "is accountable to the public for the integrity of the Department." *Matter of Berenhaus v Ward*, 70 NY2d 436, 445 (1987).

"As chief executive officer of the police force, the New York City Police Commissioner is vested with 'cognizance and control' over the discipline of uniformed officers (N.Y. City Charter § 434[a]). New York City Administrative Code § 14-115(a) broadly empowers the Commissioner to 'punish' members of the force for a wide range of infractions, including 'any criminal offense, or neglect of duty, violation of rules, or neglect or disobedience of orders, or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct or conduct unbecoming an officer, or any breach of discipline.'"

Matter of Montella v Bratton, 93 NY2d 424, 429 (1999).

Furthermore, although an independent CCRB has the authority to investigate, hear, make findings and recommend action against members of the police department based upon complaints by members of the public pursuant to section 440 of the City Charter, that provision "shall not be construed to limit or impair the authority of the police commissioner to discipline members of the department." *Id.*

As the Police Commissioner at the time in issue, respondent O'Neill had the "'cognizance and control' over the discipline of uniformed officers" (*Matter of Berenhaus v Ward*, 70 NY2d at 445) and is accountable to the public for the

integrity of the Department at the time. While respondents generally contend that O'Neill's "cognizance and control" constitutes a power rather than a duty and, therefore, its exercise is discretionary and beyond the reach of section 1109, respondents fail to cite any authority that supports such a distinction between a power and a duty of the Police Commissioner. Given the serious nature of the questions involved here, petitioners, and the public at large, are entitled to know whether an investigation was conducted concerning the actions of the police officers in stopping and in arresting Mr. Garner, and whether the use of force in restraining him, complied with legal requirements including the federal and state constitutions, case law, and the Patrol Guide or were actions carried out in violation of law. Significantly, here, the police actions resulted in the death of an unarmed man and do not involve an inquiry into "administrative mismanagement" or "inefficient governmental administration" that the Court in *Matter of James* indicated would be improper subjects of a summary inquiry. (171 AD3d at 62).

As the chief executive officer of the City, respondent Mayor DeBlasio is "responsible for the effectiveness and integrity of city government operations." City Charter § 8 (a). In addition, the mayor "shall establish and maintain such

policies and procedures as are necessary and appropriate to accomplish this responsibility including the implementation of effective systems of internal control by each agency and unit under the jurisdiction of the mayor." *Id.* Certainly, the death of an unarmed man during a police arrest raises questions of both the effectiveness and integrity of city government with regard to which the mayor has responsibilities.

Respondents claim that petitioners' request for a summary inquiry regarding the actions of the police officers during the arrest of Mr. Garner is undercut by the reference in the petition to an IAB investigation of the actions of all of the officers at the scene of Mr. Garner's arrest and resulting death. Respondents' reply memorandum at 8. However, petitioners' mention of such an IAB investigation is based upon a New York Times article cited in the petition which states,

"Daniel Pantaleo, was ordered to turn in his badge and gun; another officer who first approached Mr. Garner, Justin Damico, was reassigned to desk duty; and the roles of the other officers at the scene who helped wrestle Mr. Garner to the ground are under review by the Police Department's Internal Affairs Bureau as investigators await the results of an autopsy by the medical examiner's office."

J. David Goodman and Vivian Yee, *Death of a Man in Custody Adds Fuel to a Dispute A Policing Strategy*, NY Times, July 20, 2014.¹¹

¹¹This article is located at <https://www.nytimes.com/2014/07/21/nyregion/death-of-a-man-in->

For the reasons discussed below, petitioners' reference to the New York Times article does not warrant denying an inquiry into the actions of the other officers.

Significantly, respondents do not reveal the nature, extent or outcome of the alleged IAB investigation and in particular whether any investigation examined the actions of the other police officers.¹² Respondents also argue that an inquiry is barred based upon the language in *Matter of James* that a complete failure to carry out a duty must be shown.¹³

Given the fatal consequences that flowed from the police conduct, this court concludes that, at a minimum, the Commissioner had a duty to investigate whether the arrest of Mr. Garner and the force used by the police officers, other than

[custody-adds-fuel-to-a-dispute-over-a-policing-strategy.html](#). The court notes that the Maldonado decision indicates that the day after Mr. Garner's death, the IAB commenced an investigation in which 16 civilians and 21 uniformed witnesses were questioned. It is unclear whether the subject matter of that questioning was limited to the actions of Officer Pantaleo and whether that questioning constituted the "review" referred to in the New York Times article. See Maldonado Decision at 12.

¹² This is in contrast with the sworn statement of Dr. Glenn Asaeda regarding the investigations of the EMS personnel and paramedics discussed below.

¹³ The court notes, however, that the dissent in *James* reached a different conclusion stating "the plain language of section 1109 makes clear that 'any alleged violation or neglect of duty,' without limitation, is subject to a summary inquiry (emphasis added). . . [and that] a failure to fulfill an official duty to any degree that results in a significant harm to the City or its citizens is the appropriate subject of a summary inquiry." *Matter of James v Fariña*, 171 AD3d at 71-72, Gesmer, J. (dissenting).

Officer Pantaleo, constituted violations of the United States and New York constitutions and laws as well as the NYPD Patrol Guide, and depending, upon his findings, to take appropriate action. The actions of those officers raise possible violations of the law and Patrol Guide separate from the chokehold administered by Officer Pantaleo. A failure to conduct such an investigation of the other officers and their conduct would constitute a neglect of duty, that is, "the outright omission of performance of a duty", notwithstanding the investigation and trial of Officer Pantaleo. See *Matter of James v Fariña*, 171 AD3d at 62.

For the same reasons, respondents' argument that several other agencies, including the U.S. Department of Justice, investigated the arrest and death of Mr. Garner and declined to take any action, fails. The very press release relied on by respondents, however, would seem to indicate that the investigation undertaken by the federal officials was focused on Officer Pantaleo and not on the other police officers who were involved in the events of July 17, 2014. That press release, quoted by respondents, states that the DOJ concluded that there was "insufficient evidence to prove beyond a reasonable doubt that [Officer] Pantaleo acted in willful violation of the law." Respondents' memorandum of law 9; see also Press Release,

Department of Justice, Statement by United States Attorney

Richard P. Donoghue, July 16, 2019.¹⁴

Similarly, with respect to the investigation of the Staten Island District Attorney, as respondents indicated, the grand jury declined to indict Officer Pantaleo. See respondents' memorandum of law at 8. There is no indication that the grand jury even considered the actions of the other officers.

Therefore, a summary inquiry into violations and neglect of duties in connection with the stop and arrest of Mr. Garner and the force used by police officers other than Officer Pantaleo in connection with the arrest is granted.

b. Violations and neglect of duties concerning the failure, subsequent to Mr. Garner's death, to train NYPD officers adequately on appropriate guidelines on the use of force and the prohibition on the use of chokeholds

Although petitioners seek a summary inquiry into respondents' alleged failure, after Mr. Garner's death, to train NYPD officers adequately with respect to the appropriate use of force or prohibition on the use of chokeholds, they fail to allege that such violations and neglect of duty have in fact occurred. Without such an allegation, a summary inquiry into the current training of police officers would be more akin to

¹⁴The statement is available at <https://www.justice.gov/usao-edny/pr/statement-united-states-attorney-richard-p-donoghue>

the type of administrative oversight that was rejected by the Court in *Matter of James v Fariña* (171 AD3d at 62) and is not appropriate under section 1109 at this time.

c. Violations and neglect of duties in connection with filing false official NYPD documents concerning Mr. Garner's arrest and making false statements in connection with the NHYPD's internal investigation of Mr. Garner's death

According to testimony presented at Officer Pantaleo's administrative trial, when Officer Damico returned to the police precinct after Mr. Garner's death, he filled out a form and indicated that no force was used and that a felony was the "top" charge against Mr. Garner. The actual complaint report filed by Officer Damico, however, indicated that Mr. Garner was charged with a tax law misdemeanor and, in his testimony, Officer Damico indicated that Mr. Garner did not have a sufficient number of cigarettes for a felony charge. Maldonado Decision at 11.¹⁵

Under section 1116 (b) of the City Charter, "[a]ny officer or employee of the city or of any city agency who shall knowingly make a false or deceptive report or statement in the course of duty shall be guilty of a misdemeanor and, upon conviction, forfeit such office or employment." City Charter § 1116 (b); see also Penal Law § 175.30 Offering a false

¹⁵ As previously noted, to establish a felony, section 1814(a) of the tax law requires an attempt to evade or defeat the tax on a minimum of 10,000 cigarettes and Mr. Garner had only 95 cigarettes.

instrument for filing ("A person is guilty of offering a false instrument for filing in the second degree when, knowing that a written instrument contains a false statement or false information, he offers or presents it to a public office or public servant with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant.") Offering a false instrument for filing constitutes a class A misdemeanor. Additionally, under Patrol Guide 203-08,

"[t]he intentional making of a false official statement is prohibited, and will be subject to disciplinary action, up to and including dismissal. Intentionally making a false official statement regarding a material matter *will* result in dismissal from the Department, absent exceptional circumstances. Exceptional circumstances *will* be determined by the Police Commissioner on a case by case basis."
(emphasis supplied).

It is unknown whether any investigation or disciplinary action was taken by the Commissioner or the NYPD in connection with Officer Damico's filing of police reports after Mr. Garner's death that apparently contain false statements that no force was used and that the top charge was a felony. For the reasons stated above discussing the questions regarding the possible lack of probable cause and excessive force used in connection with Mr. Garner's stop and arrest, the court concludes that a summary inquiry is appropriate here.

d) Violations and neglect of duties concerning the unlawful leaking of Mr. Garner's alleged arrest history and the unlawful leaking of Mr. Garner's alleged medical history

Petitioners quote several articles from the New York Times discussing Mr. Garner's death indicating that the police stated that Mr. Garner had been arrested numerous times (more than 30 times).¹⁶

Additionally, petitioners quote from a New York Times article discussing Mr. Garner's medical history which they indicate was addressed in his autopsy.¹⁷

Petitioners cite Criminal Procedure Law (CPL) 160.50 requiring the sealing of any police record terminating in favor of the accused and the sealing of records where a criminal

¹⁶ See e.g. Joseph Goldstein and Marc Santora, "Staten Island Man Dies After Police Try to Arrest Him," New York Times, July 17, 2014, <https://www.nytimes.com/2014/07/18/nyregion/staten-island-man-dies-after-police-try-to-arrest-him.html>; Joseph Goldstein & Nate Schweber, "Man's Death After Chokehold Raises Old Issue for the Police," New York Times, July 18, 2014, <https://www.nytimes.com/2014/07/19/nyregion/staten-island-man-dies-after-he-is-put-in-chokehold-during-arrest.html>; Jim Dweyer, "Two Fatal Police Encounters, but Just One Video," New York Times, August 5, 2014, <https://www.nytimes.com/2014/08/06/nyregion/two-fatal-police-encounters-but-just-one-video.html>.

¹⁷ See Joseph Goldstein & Marc Santora, "Staten Island Man Died From Chokehold During Arrest, Autopsy Finds," New York Times, August 1, 2014, <https://nytimes.com/2014/08/02/nyregion/staten-island-man-died-from-officers-chokehold-autopsy-finds.html> indicating that some of Mr. Garner's medical conditions described in the article were cited in the autopsy report as contributing to his death.

proceeding is terminated by the conviction for a non-criminal offense (CPL 160.55); NYPD Patrol Guide 203-10 (3) prohibiting the "[d]ivulging or discussing official Police Department business except as authorized" and 9 NYCRR 6150.4 (b)(6) which exempts from public disclosure, information from a criminal history file which would result in an "unwarranted invasion of personal privacy."

With respect to the release of information regarding Mr. Garner's alleged prior arrests, respondents argue that the provision regarding the sealing of arrest records only applies to arrests which are terminated in favor of the accused and that petitioners do not allege that any arrest records were sealed. While it is not clear whether any of the more than 30 alleged arrests were, in fact, terminated in Mr. Garner's favor, such information would not necessarily be known to petitioners, but would be accessible to the police respondents. If any were terminated in his favor, information regarding those arrests would be sealed and any public discussion of them improper.

Respondents further argue that at least one of the newspaper articles states that the source of the information regarding Mr. Garner's arrest was the president of the NYPD union, who, they contend, is not bound by the record-sealing provisions. However, even assuming the union president is not bound by the sealing requirements, a reasonable inference may be

drawn that he obtained that information from someone who is bound by those requirements.

It has not been revealed whether any investigation has been conducted into the alleged release of information contained in sealed records. The Police Commissioner, therefore, had the duty to determine whether information from sealed records was made available to the press, and if so, by whom, how that information was released, and what if any disciplinary action should be taken with respect to any persons responsible for that release. Thus, a summary inquiry into the release of information concerning Mr. Garner's alleged arrest history is proper. See *Matter of Green v Giuliani*, 167 Misc 2d 138, granting the Public Advocate's petition for a summary inquiry into public statements by the Mayor concerning the juvenile and criminal record of an individual shot and killed by a New York City police officer).

With respect to the allegedly improper release of information from Mr. Garner's autopsy report, pursuant to City Charter § 557 (g), where, in the judgment of the Chief Medical Examiner, there is any indication of criminality in connection with a death, he or she shall promptly deliver copies of all records relating to the death to the appropriate district attorney. "Such records shall not be open to public inspection." City Charter § 557 (g).

As a question exists of whether information from the autopsy report was made public, and if so, by whom, an inquiry is granted into whether any investigation was conducted by the Chief Medical Examiner, or by the Mayor, who appoints the Chief Medical Examiner (see City Charter § 557 [a]), into the allegedly improper release of information from Mr. Garner's autopsy by the office of the Chief Medical Examiner.

e) Violations and neglect of duties in connection with incomplete and inaccurate statements to the media by the City concerning the July 17, 2014 stop and arrest of Mr. Garner

Petitioners state that, prior to the administrative trial of Officer Pantaleo, news outlets reported statements made by police officers in connection with NYPD's initial investigation that were false and were not addressed in the Pantaleo trial. Petitioners focus on the following statements: a) "Sgt. Adonis initially reported that she 'believed she heard [Mr. Garner] state that he was having difficulty breathing,' but, her view was that his 'condition did not seem serious and that he did not appear to get worse[;]'" Petition ¶ 42 (d); b) "Sgt. Dhanan Saminath, another supervising officer at the scene, told NYPD investigators that Mr. Garner 'did not appear to be in great distress[;]'" *id.*; and c) "The initial police report about Mr. Garner's arrest made no mention of a chokehold." *Id.*

These statements relate to the underlying arrest and the force used against, and to the allegations of the lack of

medical aid to Mr. Garner at that time which are the subjects of sections a) above, and f) below. Rather than being considered separately, to the extent relevant, they may be explored as part of the summary inquiry granted in connections with the violations and neglect of duty asserted in those sections.

f) Violations and neglect of duties in connection with the medical care provided to Mr. Garner

NYPD Patrol Guide 216-01 contains the general procedures governing the rendering of medical or other aid. See "Aided Cases," "occurrence[s] coming to the attention of a uniformed member of the service which require[] that a person . . . receive medical aid or assistance." Patrol Guide 216-01. Among the categories of persons to whom aid is required are "Adult requiring care due to arrest. . . ." *Id.* The Patrol Guide requires that upon arrival at the scene, the police officer (1) "[r]ender reasonable aid to sick or injured person;" (2) "[r]equest an ambulance or doctor if necessary;" (3) "[w]ait in view to direct the ambulance or have a responsible person do so;" and (4) "[m]ake a second call in twenty minutes if ambulance does not arrive." *Id.*

Although it appears from the facts set forth in the Maldonado Decision that two calls were made for an ambulance, there is no indication that any of the police officers present or those who arrived at the scene rendered any aid to Mr.

Garner, from the very inception of his shallow breathing, beyond confirming that he had a pulse. See Maldonado Decision at 9. Nor is it clear whether any investigation of that lack of aid was undertaken by the NYPD.

A failure to undertake such an investigation would, at the least, constitute a neglect of duty by the Police Commissioner and is the proper subject of a summary inquiry.

According to Judge Maldonado's decision, approximately five minutes after Mr. Garner was "brought to the ground" representatives from EMS arrived at the scene and with the assistance of several officers they moved Mr. Garner into the ambulance and began to drive to Richmond University Medical Center. After driving a short distance, they pulled over and waited for an EMT to arrive, who, upon arrival, used a defibrillator and began CPR. There is no evidence that Mr. Garner was given any treatment by the representatives of EMS prior to the arrival of the EMT. At the hospital, Mr. Garner was intubated with a breathing tube and a nasogastric however, he did not survive.

According to respondents, four Richmond University Medical Center (RUMC) Emergency Medical Service (EMS) staff members, two EMTs and two paramedics, arrived on the scene of Mr. Garner's arrest. Respondents cite a New York Post article which, based on videos of the scene, states that although one of the EMS

workers checked Mr. Garner's pulse, none administered any medical care or immediately placed him on a stretcher, checked his breathing or provided him with an oxygen mask. The article further indicates that the four emergency medical workers were barred from going on further ambulance calls pending investigation.¹⁸

According to the sworn statement of Dr. Glenn Asaeda, Chief Medical Director, of the Office of Medical Affairs (OMA), the New York City Fire Department (FDNY) which oversees the EMS, states, on the basis of the video footage of the events, OMA initially placed the restrictions on the four EMS workers but "subsequently learned that there was no information showing that the two Paramedics were involved in patient care" and lifted the restrictions on the paramedics. Aff of Dr. Glenn Asaeda, NYSCEF Doc. No. 8, ¶ 12. The two EMTs remained restricted from patient care pending a medical review of the case. In 2016, RUMC submitted a written request to OMA with a summary outcome of the review of the case requesting that the two EMTs be reinstated. That request was granted by OMA. *Id.* ¶¶ 15-16. According to Dr. Asaeda, the written request and the results of the medical case review are part of the state mandated "Quality Assurance"

¹⁸ <https://knypost.com/2014/07/20/4-ems-workers-barred-from-duty-after-chokehold-death/>.

process and are confidential and, pursuant to Public Health Law § 3006, are not subject to public disclosure. *Asaeda aff*, ¶ 17.

The court concludes that, in light of the sworn statement of Dr. Asaeda regarding the investigation and actions taken by the OMA, it is constrained by the interpretation of the phrase "neglect of duty" in City Charter § 1109 by the majority in *Matter of James* suggesting that a complete failure to carry out a duty must be shown to warrant a summary inquiry into the medical care or lack thereof given to Mr. Garner by the EMTs and paramedics. Therefore, a summary inquiry into the actions of the EMTs and paramedics is denied.

g) Violations and neglect of duties concerning the City's investigation and adjudication of, and imposition of discipline for, the aforementioned violations and neglect of duties, including (for example) false statements by NYPD officers concerning Mr. Garner's arrest.

This subsection merely incorporates and is duplicative of the above areas and, therefore, need not be considered again.

Finally, respondents note that after his death, Mr. Garner's mother, as the administrator of his estate and on behalf of his family, filed a notice of claim, informing the City that they intended to sue the City and the NYPD for the acts of the police officers that resulted in his death, and that ultimately the parties reached a settlement of approximately \$5.9 million. But financial compensation to the family of

someone whose life was wrongfully ended as a result of police misconduct, standing alone, is unlikely to result in a change in such conduct. Rather, section 1109 provides the citizens of New York, in addition to, specified city officials, a mechanism by which to shed light on misconduct of our public servants so that once brought to light, any such misconduct can be addressed. The court concludes that it is appropriate to utilize that mechanism here.

In the conclusions of their memos of law in support of their motion to dismiss the petition, respondents request permission to serve an answer to contest the specific allegations in the petition if their motion is denied. "[T]he express language of CPLR 404 (subd. [a]) . . . provides that, if the respondent's motion is denied, 'the court may permit the respondent to answer, upon such terms as may be just.'" *Matter of Dodge*, 25 NY2d 273, 286 (1969) (emphasis in original). Respondents failed to submit any factual basis for such an answer. Moreover, respondents have already submitted the factual affidavit of Dr. Glen Asaeda, Chief Medical Director of the Office of Medical Affairs of the New York City Fire Department, which the court has considered in connection with respondents' objections to the petition with respect to the actions of the EMS and paramedics. Absent such factual basis, respondents have failed to establish that an answer is

warranted. Given the purpose and nature of this proceeding to provide transparency to government conduct, the court concludes that as in *Matter of Dodge*, "no useful purpose can be served by any answer." *Id.* at 287; see also *Matter of Cunningham & Kaming*, 75 AD2d 521, 522 (1st Dept 1980). Respondents' request for permission to serve an answer is therefore denied.

Accordingly, it is hereby

ORDERED, that consistent with the decision above, respondents' motion to dismiss the petition is denied to the extent of ordering a judicial inquiry into alleged violations and neglect of duties in connection with:

1) the stop and arrest of Mr. Eric Garner, and the force used by police officers other than Officer Pantaleo;

2) the filing of official documents concerning Mr. Garner's arrest;

3) the leaking of Mr. Garner's alleged arrest history and medical condition in the autopsy report; and

4) alleged lack of medical care provided to Mr. Garner by police officers; and, it is further

ORDERED that respondents' request to submit an answer is denied; and it is further

ORDERED that respondents' motion is granted to the extent that a summary inquiry is denied in connection with alleged violations and neglect of duties in connection with:

1) present training of NYPD officers concerning appropriate guidelines on the use of force subsequent to Mr. Garner's death; and


2) statements to the media by the City concerning the stop and arrest of Mr. Garner, except to the extent that those statements, where relevant, may be explored as part of the inquiry concerning the stop and arrest of, and use of force against Mr. Garner; and

3) medical care provided to Mr. Garner by members of the EMS and paramedics; and it is further

ORDERED that this matter is placed on the calendar for a conference call with the court on October 6, 2020 at 11:00 a.m. with respect to further proceedings.

Dated: September 24, 2020

ENTER:



J.S.C.

**HON. JOAN A. MADDEN
J.S.C.**