No. 112488

IN THE SUPREME COURT OF ILLINOIS

JOSEPH M. FERGUSON, In his official capacity as Inspector General of the City of Chicago, Plaintiff-Appellant, v. MARA S. GEORGES, In her official capacity as Corporation Counsel of the City of Chicago, Defendant-Appellee.	)	On Petition for Leave to Appeal from the Illinois Appellate Court, First District No. 10-1152 There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division No. 09 CH 43287 Hon. Nancy J. Arnold

ANSWER TO PETITION FOR LEAVE TO APPEAL

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INTRODUCTION

This action was brought by the City of Chicago Inspector General to enforce a subpoena the Inspector General's Office (IGO) issued and served upon the Corporation Counsel of the City of Chicago as part of an official IGO investigation into possible misconduct in City government. The Corporation Counsel[1] now seeks review of the Appellate Court's determinations "that the Inspector General [is] entitled to hire a private attorney to sue to enforce the subpoena served on the Corporation Counsel," and that the dispute between the two parties is justiciable. A 8.[2]

The Petition fails to articulate any of the "character of reasons" described in Supreme Court Rule 315(a) that this Court typically considers when determining whether to grant a petition for leave to appeal. Apart from being clearly correct on the merits of the justiciability and capacity issues (see Argument II, *infra*), the ruling below is interlocutory, does not conflict with any opinion of any court, and does not call for the exercise of this Court's supervisory powers. Although the ruling is important in that it rebuffs Corporation Counsel's attempt to "frustrate" and render "meaningless" (A 14) the City of Chicago's effort to address a corrosive characteristic of modern government that "systematically undermines democratic principles" and "diminishes people's faith in the

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[1] The named defendant, Mara S. Georges, was Corporation Counsel of the City of Chicago until May 25, 2011. Stephen R. Patton was confirmed as Corporation Counsel on June 8, 2011.

[2] The Appellate Court decision is included in the Appendix to the Petition for Leave to Appeal. Citations to "A" are to the Appellate Court decision; Citations to "P" are to Corporation Counsel's Petition, and citations to "C" are to the Verified Complaint.

political process,"[3] it is not of "general" importance under this Court's Rule 315(a). This is so because the ruling is carefully confined to the "unique role" of the Inspector General of the City of Chicago in combating public corruption, and is further limited to the situation in which the Inspector General seeks to enforce a subpoena served upon the Corporation Counsel. Thus, the Appellate Court correctly determined that the Corporation Counsel's proposed procedure for conflict resolution – asking the Mayor to resolve the dispute – would "frustrate the independent investigative duties of the inspector general." A 14. To require the Inspector General to obtain Corporation Counsel approval and legal assistance to enforce subpoenas the IGO issues – even when the IGO may be investigating misconduct within the Office of the Mayor (as in this instance) or the Law Department itself – would nullify the Inspector General's expressly granted statutory subpoena power and strip the IGO of the functional independence with which the City Council endowed it.

Accordingly, the Inspector General opposes the Petition for the reason that it does not advance any of the character of reasons set out in Rule 315(a) that this Court has indicated it will consider in addressing such petitions. In this Answer we first make clear (Argument I, *infra*), as the Petition utterly fails to do, that the ruling below is in two respects so limited as to deprive it of "general" importance, and that it comports with existing law. We then also respond (Argument II, *infra*) to the Petition's attack on the merits of the ruling on the justiciability and capacity issues.

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[3] Christopher J. Anderson and Yuliyaa V. Tverdova, "Corruption, Political Allegiances, and Attitudes Toward Government in Contemporary Democracies," *American Journal of Political Science*, Vol. 47, No. 1, January 2003, p. 91.

STATEMENT OF FACTS

The Office of Inspector General.

The IGO is an independent office of City government, created by Chapter 2-56 of the Municipal Code of Chicago ("MCC"), and charged with detecting and preventing misconduct, inefficiency, and waste in City government. MCC § 2-56-010, -030(a)-(c). It does so by conducting independent investigations, audits, and program reviews leading to the issuance of reports containing findings and recommendations of a disciplinary and policy nature.

The IGO's mission necessitates independence, which in multiple ways has been "built into" the ordinance establishing the office. As the Appellate Court noted, "[t]he Inspector General occupies a unique role within the City of Chicago's government." A 13. He does not serve at the grace of the Mayor (and may be removed only for cause, with recourse to challenge his removal before the City Council) and has been accorded a four-year term that runs independent of the terms of the Mayor and members of City Council. MCC § 2-56-020, -130. In addition to his general power to conduct investigations on his own initiative, § 2-56-030(b), the Inspector General's independence is buttressed by express powers to "conduct public hearings, at his discretion," and to "administer oaths and to examine witnesses under oath," § 2-56-030(f)-(g).

Beyond these powers, the Municipal Code grants the IGO the authority to request information related to an IGO investigation from "*any* [City] employee, officer, agent or licensee," § 2-56-030(e) (emphasis added), and the power to issue subpoenas to compel the attendance of witnesses and the production of documents. § 2-56-030(h). Reinforcing these two powers, § 2-56-090 makes it the unqualified "duty of *every* [City]

officer, employee, department, [and] agency . . . to cooperate with the [IGO] in any investigation or hearing undertaken pursuant to [the] chapter," and directs that "*[e]ach department's* premises, equipment, personnel, books, records and papers . . . be made available as soon as practicable to the inspector general." (Emphasis added). In addition, § 2-56-140 mandates compliance with IGO subpoenas.

The Instant Investigation.

In January 2007, the IGO began investigating the award of a sole-source contract to a former City employee made in apparent violation of City ethics and contracting rules. C 6-7 (¶¶12-17).[4] The investigation, which relates to possible misconduct by current and former City employees acting in their capacity as City employees, is within the authority of the IGO under Chapter 2-56.

Since initiating the investigation, the IGO has interviewed eighteen persons, requested and received documents from five City departments or offices, and reviewed thousands of relevant documents. C 6 (¶14). On August 15, 2008, the IGO sent a written request to the City's Law Department for documents relevant to the award of the sole-source contract. C 7 (¶15). The Law Department produced some documents but redacted others on the basis of attorney-client privilege and/or the work product doctrine. *Id.*

Believing that the City could not properly assert the attorney-client privilege and work product doctrine under these circumstances, and after unsuccessful attempts to persuade the Corporation Counsel otherwise, on October 8, 2009, the IGO issued and

[4] "Sole-source" contracts are awarded without a competitive process. Non-competitive procurements are allowed under the Municipal Purchasing Act, the City Procurement Code, and the City's Department of Procurement Services' policies and procedures, but only under limited circumstances following a rigorous internal process. The IGO's investigation to date suggests that the City's process for awarding the contract at issue was inappropriately manipulated by City employees. C 6 ¶ 12 & n.2.

served a subpoena for the documents. C 7 (¶¶17-18); C 21-23. After timely objection and further discussions, the Corporation Counsel again declined to comply, and this suit was filed on November 4, 2009. C 7-8 (¶¶19-24).

Proceedings Below.

On December 23, 2009, the Corporation Counsel moved to dismiss all counts of the complaint pursuant to 735 ILCS 5/2-619 and 5/2-615. Following briefing and a hearing held on April 21, 2010, Circuit Court of Cook County Judge Nancy Arnold granted the motion to dismiss and dismissed the complaint with prejudice.

On April 29, 2011, the First Judicial District of the Appellate Court reversed and remanded the trial court's decision. A 1–18. The Appellate Court determined that it had jurisdiction, distinguishing the Corporation Counsel's primary authority, *Tanner v. Solomon*, 58 Ill. App. 2d 134 (1965), by explaining that in this instance "we do not have one individual suing another individual from the same body but instead have the head of one municipal office suing the head of a different municipal office. While they are both departments within the same municipal corporation, we have considered analogous situations in the past and are willing to do so again." A 7. The Court also determined that the Inspector General was entitled to hire a private attorney and sue to enforce the subpoena served on the Corporation Counsel, finding *Burnette v. Stroger*, 389 Ill. App. 3d 321 (1st Dist. 2009), to be "instructive," and referring to the "unique role" of the Inspector General and his job of "investigat[ing] the performance of governmental officers, employees, functions and programs" in order to "detect and prevent misconduct, inefficiency and waste within the programs and operations of city government." A 13 (citing MCC § 2-56-030).

The Court further explained:

> In the case at bar, the Inspector General's investigation is being frustrated by the Corporation Counsel's refusal to comply with a subpoena. Without the ability to bring an action to enforce the subpoena, the Inspector General has no means to challenge the Corporation Counsel's refusal other than asking the mayor to resolve the dispute. The ordinance creating the IGO could not have been designed to tie the Inspector General's hands in this way because in doing so its investigative process would be meaningless. The IGO was created "to detect and prevent misconduct, inefficiency and waste within the programs and operations of the city government." Chicago Municipal Code §2-56-030. To achieve its goals, the Inspector General must be allowed to bring an action in the circuit court to enforce a subpoena against the Corporation Counsel to further its investigative duties.
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> A 14 (citations omitted).

Finally, the Court concluded that there was no evidence in the record to determine whether the trial court's finding of privilege was correct, and remanded for the purpose of an *in camera* inspection of the unredacted documents to determine whether they were privileged and whether the privilege applied as to the IGO. The Corporation Counsel neither filed a petition for rehearing nor a Rule 316 Certificate of Importance with the Appellate Court.

ARGUMENT

I. RULE 315(a) FACTORS ARE NOT PRESENT HERE.

A. The Appellate Court's Decision is Confined to the IGO's "Unique Role," and to Subpoena Enforcement Actions Against the Corporation Counsel Only.

Compounding its failure to make clear the narrowness of the ruling below, the Petition – in hyperbolic terms ("invites chaos in municipal government statewide," P 8; "wreak havoc in the affair of municipalities across Illinois," P 12) – grievously misstates

the implications of the ruling, a matter that bears directly on the ruling's "general" importance under Supreme Court Rule 315. As we now show, the Appellate Court's opinion addresses only the "narrow question" of whether the Inspector General – who plays a "unique role" in City government (A 13) and holds "independent investigative duties" (A 15) – "was entitled to hire a private attorney to sue to enforce the subpoena served on the Corporation Counsel," "not purport[ing] to resolve any broader questions involving a right of the Inspector General to hire an attorney in any other circumstance...." A 8.

First, the Appellate Court's opinion is specifically confined to the unique characteristics of the City of Chicago Inspector General's Office, unique because – unlike any other municipal office within the City of Chicago – it possesses the following independent characteristics conferred upon it by the City Council:

1) A fixed term of office. (MCC § 2-56-020, -130.)

2) Removal from office only for cause. (MCC § 2-56-020, -130.)

3) Broad discretionary powers to investigate and root out misconduct. (MCC §§2-56-020, -130, and -030.)

4) A duty to cooperate with the Inspector General imposed upon all city employees and others (including the imperative that each department's "premises, equipment, personnel, books, records and papers shall be made available as soon as practicable to the inspector general"). (MCC § 2-56-090.)

5) The power to undertake investigations "on the inspector general's own initiative." (MCC § 256-030(b).)

6) The power to conduct public hearings "at his discretion" (including administering oaths and examining witnesses under oath). (MCC §2-56-030(g).)

7) The power to issue subpoenas. (MCC § 2-56-030(h).)

8) Making it a crime for any person not to comply with a subpoena issued by the inspector general or otherwise to "knowingly interfere with or obstruct one of his investigations." (MCC § 2-56-140.)

9) The responsibility for the "operation and management of the office of inspector general." (MCC § 2-56-020.)

The significance of this statutory independence is that the ruling below does not apply to municipal offices that do not possess these characteristics and do not therefore play the "unique role" the Inspector General does in City government. A 13. One illustration (only) is the head of the Department of Streets and Sanitation, who serves at the pleasure of the mayor, has no subpoena power, and whose ordinance does not speak of broad discretionary powers. MCC §2-100-010; -020; -030. (Given the independence and unique – and uniquely important – role of the Inspector General, there was no need for the Appellate Court to consider the posture of other agencies not before the Court.)

Second, the ruling below is carefully confined to the "limited situation where the Corporation Counsel is served with a subpoena by the Inspector General...." A 12. Since this Court's Rules of Professional Conduct ("RPC") clearly prohibit a lawyer from representing contending parties in the same litigation (RPC 1.7(b)(3) and Comment 23), the view that the Corporation Counsel, not the Inspector General, has the power to enforce the subpoena issued in this case leads inexorably to a violation of the RPC. That the City Council has made the Corporation Counsel the City's lawyer cannot of course affect the force of this Court's rules governing conflicts:

> If a lawyer's representation amounts to a conflict of interest, the courts have the power to remove the conflict, and the legislature has no power to give any lawyer a right which the supreme court tells the lawyer he may not have.

Suburban Cook County Reg'l Office of Educ. v Cook County Bd. 282 Ill. App. 3d 560, 576 (1st Dist. 1996) (hereafter *Suburban*). The Corporation Counsel's position here

amounts to nothing less than an effort to give a lawyer a right which this Court has said a lawyer may not have.[5]

Thus, the narrowness of the ruling below, cabined as it is by the unique role of the IGO in city government and limited to the one situation in which an unquestioned conflict of interest precludes the Corporation Counsel from acting as the lawyer for the Inspector General, deprives the ruling of "general" importance within the meaning of Rule 315.

B. The Appellate Court's Jurisdictional Holdings Do Not Conflict With Any Other Decision.

Neither does the ruling below conflict with any decision of the Supreme Court or of another division of the Appellate Court. The Corporation Counsel asserts that the ruling conflicts with two appellate court rulings: *Tanner v. Solomon*, 58 Ill. App. 2d 134 (1965); and *City of Chicago v. Beythel Outcast Church*, 375 Ill. App. 3d 317 (2007), but in fact the ruling conflicts with neither and, indeed, *Tanner* actually *supports* jurisdiction here.

In *Tanner*, "one member of a governmental body [was] suing the other members of that same body." 58 Ill. App. 2d at 135 (one member of a three-person fire and police

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[5] The Corporation Counsel emphasizes that she is the City's lawyer, authorized to conduct all the City's law business, but she fails to pay heed to the conflict of interest her view necessarily entails when applied in the circumstances here, or to the Illinois precedents, including *Suburban*, on the responsibility of the judiciary to resolve such conflicts even in the face of exclusive representational authority conferred by a legislature. In *Suburban*, the State's Attorney was not only authorized by statute to represent Cook County government, including the plaintiff Regional Office of Education, 282 Ill App. At 567, but was in fact the sole lawyer so authorized. *People ex rel. Kuntzman v. Nagano*, 389 Ill. 231, 248-49 (1945). Yet the appellate court specifically approved virtually the identical conflict-resolving procedure that has been followed here – employing outside counsel and then suggesting court appointment of that counsel – saying, "The procedure followed in this case was the proper one." *Suburban*, 282 Ill. App. 3d at 575.

commissioner board suing the other members). Here, the contending parties are two separate governmental departments, as the Appellate Court stressed. A 7. ("In the case at bar, we do not have one individual suing another individual from the same body but instead have the head of one municipal office suing the head of a different municipal office.") *Tanner* goes on to state that "[t]here are cases in which it has been held proper for one agency of government to resort to the courts to resolve a controversy with another government agency," 58 Ill. App. 2d at 137, and cites cases illustrating the general rule that "public officers, though not expressly authorized by statute have a capacity to sue commensurate with their public trusts and duties." *Mayor of Dearborn v. Dearborn Ret. Bd. of Trs.*, 315 Mich. 18, 23 N.W.2s 186, 189 (1946). Numerous other decisions evidence the generality of this rule. See cases cited in 67 C.J.S. *Officers* §§ 227, 322 (2010). Thus, far from conflicting with it, *Tanner* actually supports the ruling below.

The Corporation Counsel also conjures a conflict with dictum in *Beythel Outcast Church*. 375 Ill. App. 3d 317 (2007). In *Beythel*, the defendant moved to dismiss a City building code enforcement action on the ground that the City, as the titleholder of the building, did not join itself as a defendant to the suit. *Id.* *Beythel*'s holding, that the plaintiff City need not join itself as a defendant in these circumstances, obviously poses no conflict with a holding that the head of the "unique" office of Inspector General can enforce his subpoena served on the Corporation Counsel.

In sum, this case does not present any of the "character of reasons" described in Rule 315(a) that this Court typically considers when determining whether to grant a petition for leave to appeal.

II. THE APPELLATE COURT CORRECTLY HELD THAT THIS SUIT IS JUSTICIABLE , AND THAT THE INSPECTOR GENERAL HAD CAPACITY TO BRING IT

Much of the Petition attacks the merits of the Appellate Court's decision, P 13-20, relying heavily upon *Tanner*, which is incorrectly said to "establish[] that intra-governmental disputes like this one are nonjusticiable" (P 9), and upon a purported distinguishing of *Burnette v. Stroger*, 389 Ill. App. 3d 321 (1st Dist. 2009) (P 11-12, P 18-19).

In *Burnette,* the court rejected an argument almost exactly like the Corporation Counsel's. An appointed official of Cook County government, the public defender, sued the president of the County Board (the appointing officer) for actions the public defender viewed as interfering with the independence of his office, namely the unilateral layoff of 36 of his employees. The board president moved to dismiss on the ground that the public defender lacked "the power to institute civil litigation," *id.* at 324, because no statute "explicitly states that the public defender is an entity that can sue or be sued." *Id.* at 328. Holding that the public defender did have the requisite capacity to sue, the court said that it would make "no sense to create an entity that could not even defend its right to exist." *Id.*

Burnette is indistinguishable in principle from this case. There, as here, one agency of a unit of local government, headed by an appointed official, sued another agency of the same government for interfering with the independent functioning of his office. The legislative enactment in each case reflects an intention to create an office of local government possessed of independence – a fixed term of office, removability only for cause, and broad discretionary powers (there to provide legal services, here to

investigate and root out misconduct). *Compare* 55 ILCS 5/3 - 4004.2(c) and MCC §§ 2 - 56-020, -130, and -030.

But here there is far greater independence than in *Burnette*, for the Inspector General is expressly given the power to issue subpoenas. MCC § 2-56-040. In addition, there is no analogue in *Burnette* to the formidable duty to cooperate with the Inspector General that is imposed upon all city employees (including the imperative that each department's "premises, equipment, personnel, books, records and papers shall be made available as soon as practicable to the inspector general"). MCC § 2-56-090. Other IGO independent powers, stated above, include "responsibility for the operation and management of the office of inspector general," undertaking investigations "on the inspector general's own initiative," conducting public hearings "at his discretion" (including administering oaths and examining witnesses under oath), and making it a crime for any person not to comply with a subpoena issued by the inspector general or otherwise to "knowingly interfere with or obstruct one of his investigations." MCC §§ 2-56-020, -030(b) and (g), and -140.

The legislative intention is further made clear by three detailed paragraphs in which the Inspector General (not the Corporation Counsel) is not only specifically granted the power to issue subpoenas, but is empowered to make all manner of subpoena-related decisions – including setting response dates and receiving, considering, and negotiating over objections. MCC § 2-56-040. No fair reading of these paragraphs, which never refer to the Corporation Counsel, could lead to the view that the City Council wished – inconsistently with its intention to create an independent investigative

agency – to confer upon the Corporation Counsel the subpoena enforcement power crucial to the IGO's core function.

Indeed, the specific prohibition – "For seven days after receipt of a timely objection to a subpoena, the Inspector General shall take no action to enforce the subpoena . . ." – cannot possibly be fairly read otherwise than as contemplating that after seven days the Inspector General may take action to enforce. The Corporation Counsel reduces this ordinance language to a lexicographic distortion: that to "take action to enforce a subpoena" does not mean to file an enforcement action in court, but means instead to ask the Corporation Counsel to pursue enforcement.[6] Such an interpretation is inconsistent with this Court's admonition not to change the "plain meaning of the words actually adopted by the legislature." *U.S. Bank Nat'l Ass'n. v. Clark*, 216 Ill. 2d 334, 346 (2005).[7] It is thus the Corporation Counsel, not the Inspector General, who seeks to "amend" a City ordinance.

The Corporation Counsel's attempt to distinguish *Burnette* (P 11, P 18) is entirely unpersuasive. That *Burnette* involved a dispute within county rather than municipal government is irrelevant. Under the Illinois Constitution, Article VII ¶ 1, both counties

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6 In *IDPA v. Kessler*, 72 Ill. App. 3d 802 (1st Dist. 1979), the court in effect held that the Illinois Department of Public Aid, authorized by statute to issue but not expressly to enforce subpoenas, could nonetheless enforce its issued subpoenas in the circuit courts. The court noted that the absence from the statute of enforcement standards, criteria or procedures was not significant because a court acts as the actual enforcement entity. Kessler also spoke approvingly of the "procedures for judicial enforcement . . . taken by the IDPA in this case to enforce their subpoena," which were – exactly as here – the filing of an action in the circuit court. *Id.* at 803-04.

7 Even had the City Council specifically provided that the Corporation Counsel was to represent the Inspector General in subpoena enforcement actions against her own office (as the Corporation Counsel contends it intended), the ordinance would have run afoul of the RPC and *Suburban,* as discussed above.

and municipalities are "units of local government." Moreover, the legislature of a home rule unit of government such as the Chicago City Council possesses the same power to create an independent office of inspector general as the General Assembly possesses to create an independent office of public defender. *City of Evanston v. Create*, 85 Ill. 2d 101, 115 (1981).[8]

Far from being inconsistent with *Burnette*, *Tanner* fits comfortably with it, explaining (as we have already pointed out) that "[t]here are cases in which it has been held proper for one agency of government to resort to the courts to resolve a controversy with another government agency." 58 Ill. App. 2d at 137.

The ruling below is thus entirely consistent with other relevant decisions, while the Corporation Counsel's position that the Mayor will resolve any disputes between the two parties would not only "tie the Inspector General's hands," as the Appellate Court points out, but would cripple his ability to independently investigate misconduct within City of Chicago government, compromising irremediably the independent investigative and oversight duties of the IGO. A 14. As the Appellate Court correctly concluded, "[t]o achieve its goals, the Inspector General must be allowed to bring an action in the circuit court to enforce a subpoena against the Corporation Counsel to further its investigative duties." A 14. If the Inspector General is to retain any independence, the Appellate Court's correct decision as to jurisdiction and capacity must be undisturbed.

[8] Other matters mentioned in the *Burnette* opinion, for example, that other decisions had previously permitted public defenders to sue, are explicitly subordinated to the "more important[]", separate and free-standing argument that "it would make no sense to create an entity that could not even defend its right to exist." 389 Ill. App. 3d at 328.

CONCLUSION

For the reasons stated above, the City of Chicago Inspector General, by and through his counsel, respectfully requests that this Court deny the Petition for Leave to Appeal.

Respectfully submitted,

INSPECTOR GENERAL OF THE CITY OF CHICAGO

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July 22, 2011

SUPREME COURT RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this answer conforms to the requirements of Rules 341(a) and 315(d). The length of this answer, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of filing, and the certificate of service, is 15 pages.

By: _____
Alexander Polikoff, Attorney

CERTIFICATE OF FILING

I certify that I filed the Answer to the Petition for Leave to Appeal of respondent-appellant by placing the original and 19 copies in an envelope with sufficient postage affixed and directed to the person named below, at the address indicated, and by depositing that envelope in the United States mail on July 22, 2011.

By: _____
Alexander Polikoff, Attorney

Ms. Carolyn Taft Grosbell
Supreme Court Clerk
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CERTIFICATE OF SERVICE

I certify that I served the Answer to the Petition for Leave to Appeal of respondent-appellant by placing three copies in an envelope with sufficient postage affixed and directed to the person named below, at the address indicated, and by depositing that envelope in the United States mail on July 22, 2011.

By: _____
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