Does The Glomar Response Threaten the Freedom of Information Law (FOIL)?

Monday, January 29, 2018 | 6:30 - 8:30 p.m.
Fordham School of Law | Hill Faculty Conference Room (7-119)

CLE Course Materials
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Elizabeth K. Kimundi, Esq.,
Associate, Law Firm of Omar T. Mohammedi LLC

Elizabeth Kimundi is a senior associate at the Law Firm of Omar T. Mohammedi, LLC, where she handles complex multidistrict litigation, such as *In re 9/11 Litigation*. She is also an active civil rights litigator. She represents clients in cases involving violation of First Amendment rights in the context of religious freedom and the right to houses of worship. She also litigates Section 1983 cases involving use of excessive force by police officers. Additionally, Ms. Kimundi represents clients in employment discrimination cases before federal courts and before the New York City Commission on Human Rights. Ms. Kimundi also litigates Freedom of Information Law cases, against the City of New York. Ms. Kimundi’s appellate experience includes: the Appellate Division First Department, the New York State Court of Appeals and the United States Court for the Second Circuit.

In addition to being admitted to practice law in New York State, Ms. Kimundi is also on the list of Assistants to Counsel admitted to practice before the International Criminal Court, in Hague the Netherlands, and is also an Advocate of the High Court of Kenya. She obtained her LL.B from the University of Pune, India and her LL.M. from New York University School of Law (NYU Law).

Troy R. Mack, Ph.D
Veterans for American Ideals (VFAI)-NY/NJ

Troy Robert Mack works as Special Projects Manager in the City of Jersey City Department of Health and Human Services. Through this Americorps VISTA position, Mack manages a portfolio that includes growing the Jersey City Police Chaplain program; outreach to potentially underserved populations among Jersey City’s veteran and immigrant, refugee, and New American communities; and interagency efforts to reduce gun violence.

As a Mission Continues Fellow, Mack also serves as Project Lead and Northeast Regional Coordinator at Veterans for American Ideals (“VFAI”), a nonpartisan, nonprofit project of Human Rights First. By empowering veteran leadership in community education, civic engagement, and civil society, VFAI works to protect U.S. wartime allies, welcome refugees, and counter Islamophobia and other forms of religious bigotry.

Mack received his Ph.D. in Philosophical Studies from Drew University. A former U.S. Army Chaplain and Iraq War veteran, he is a graduate of the George C. Marshall European Center for Security Studies, the NATO School, and the U.S. Joint Special Operations University. His specialties include Modern Philosophy and Political Philosophy, with research interests in international relations, legal and political theory, and religious studies.

Mack has taught university courses and authored several works in these fields, including a chapter on Thomas Hobbes in the recently published *Philosophers on War*. Such scholarship contributed to Mack being selected for the New Jersey Council for the Humanities’ Public Scholars Project. Mack lives with his wife, Precious, in West New York, New Jersey.
Omar T. Mohammedi is the founder and managing partner of the Law Firm of Omar T. Mohammedi, LLC, established in 1998. Omar Mohammedi’s previous experience includes working at Shearman & Sterling, LLP and Anderson Kill & Olick, PC.

Mr. Mohammedi has litigated cases of national prominence and has been the lawyer in major court opinions. Mr. Mohammedi has successfully represented clients in high profile cases such as, *Amadou Diallo v. the City of New York et al.*, *Shqirat v. US Airways Group, Inc. et al* (known as the six Imams case) and *Stephanie Lewis v. Transit Authority et al*. Mr. Mohammedi has extensive experience in complex multi-district litigation (MDL) cases such as *In re 9/11 Litigation* and Appellate work.

In January 2017, Omar Mohammedi received the 2016-2017 attorney of the year award at the Academy of Muslim Achievement. The award was in recognition for his dedication, commitment and success as a prominent civil rights attorney handling various high profile cases on profiling, discrimination, religious establishment, as well as illegal surveillance issues by the NYPD.

In addition, Mr. Mohammedi has extensive experience in Islamic finance law, Islamic estate planning international trade and business law. He has advised various financial institutions, namely HSBC, and major international institutions on Islamic financial transactions such as Sukuk, Musharaka, Mudaraba, Ijara and Murabaha. Mr. Mohammedi has represented various clients in Islamic Estate Planning structures covering 30 million USD in assets.

Mr. Mohammedi counsels various business and individual clients on commercial and corporate matters, Islamic finance, real estate investment, buy/sell agreements, international trade, and investment. Mr. Mohammedi is counsel to various for-profit and non-profit institutions on financial structures such as charitable remainder trusts, pool income funds and modes of Islamic finance operations. He has advised major corporations and business councils on international business matters and legal issues in the Middle East and North Africa.
David Thompson
Partner Stecklow & Thompson

David Thompson is a partner at the boutique law firm, Stecklow & Thompson, located in SOHO in New York City. The firm provides outside general counsel and litigation services to individuals and businesses, and has a robust civil rights litigation practice. David Thompson graduated cum laude from the Benjamin N. Cardozo School of Law in 2007. While at Cardozo, he participated in the Alexander Fellowship program, working as a full-time student clerk in the chambers of the Hon. Judge Shira Scheindlin. Subsequently, Mr. Thompson was an associate at Kasowitz, Benson, Torres & Friedman, focusing on complex financial services litigation.
Mr. Mohammedi is a lecturer of Law at Fordham Law School where he teaches, *Introduction: Islamic Finance & Estate Planning and Conventional & Islamic Finance Law: A Comparative Study*.

Mr. Mohammedi is a former NYC Commissioner on Human Rights. He was appointed by Mayor Michael Bloomberg to become the first Muslim and Arab New York City Commissioner on Human Rights from October 2002 to December 2014. He enforced the New York City Human Rights Law through review and approval of Administrative Judges’ decisions. Mr. Mohammedi enforced judgments on Human Rights violations and proposed legislations to protect the Human Rights of civilians and minorities.


On July 15, 2015, Mr. Mohammedi received a proclamation from the Office of the Public Advocate in recognition for his 25 years of complex civil litigation services. The proclamation referred to Mr. Mohammedi’s successful representations of minorities against discrimination and profiling in high profile cases. The Public Advocate, Letitia James, honored Mr. Mohammedi for his professional achievements as a lawyer and advocate, which she deemed worthy of the highest respect and esteem in the legal community.


In May 2007, Mr. Mohammedi received awards from the New York State Senate, the New York City Council, the Office of the President of the Borough of Queens, and the Brooklyn Borough President for his 20 years of dedication and outstanding contributions as a lawyer, a commissioner, and leader in the State and City of New York.

In 2003, Mr. Mohammedi was featured in the New York Law Journal article “*Lawyers as leaders in their community and New York City*”. He was cited by Mayor Bloomberg as a successful lawyer and leader serving New York City.
Mr. Mohammedi holds three law degrees. He graduated Magna Cum Laude and earned the highest cumulative average from Fordham Law School. He is also a Law School graduate from Cambridge and Warwick University in England. He received a BA in Law from Tlemcen University, Algeria.

Mr. Mohammedi is fluent in Arabic, French and English.

Omar Mohammedi is the President and Founder of the Association of Muslim American Lawyers ("AMAL"). He is a member of the Advisory Board of Trustee: Tanenbaum Center for Religious Understanding and a Committee Member of the Citizen Union for Civic Engagement.
SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 2, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Andrias, Saxe, Richter, JJ.

630- Index 101559/13
631 In re Talib W. Abdur-Rashid,
   Petitioner-Appellant,
   -against-

New York City Police Department, et al.,
   Respondents-Respondents.
   - - - - -
In re Samir Hashmi,
   Petitioner-Respondent,
   -against-

New York City Police Department, et al.,
   Respondents-Appellants.
   - - - - -

New York Civil Liberties Union, Brennan Center
for Justice, Reporters Committee for Freedom of the
Press, Advance Publications, Inc., American Society of
News Editors, AOL-Huffington Post, Association of
Alternative Newsmedia, Association of American
Publishers, Inc., Bloomberg L.P., Buzzfeed, Daily News,
LP, the E.W. Scripps Company, First Look Media, Inc.,
Hearst Corporation, Investigative Reporting Workshop at
American University, the National Press Club, National
Press Photographers Association, the New York Times
Company, North Jersey Media Group, Inc., Online News
Association, the Seattle Times Company, Society for
Professional Journalists and Tully Center for Free
Speech,
   Amici Curiae.

____________________________
Judgment, Supreme Court, New York County (Alexander W. Hunter, J.), entered September 25, 2014, denying the petition brought pursuant to CPLR article 78 seeking to compel respondents New York City Police Department (NYPD) and NYPD Commissioner Raymond Kelly to disclose documents requested by petitioner Talib W. Abdur-Rashid pursuant to the Freedom of Information Law (FOIL) (Public Officers Law § 84 et seq.), and granting respondents’
motion to dismiss the proceeding, unanimously affirmed, without
costs. Order, same court (Peter H. Moulton, J.), entered on or
about November 17, 2014, which denied respondents’ motion to
dismiss the petition brought pursuant to CPLR article 78 seeking
to compel them to disclose documents requested by petitioner
Samir Hashmi pursuant to FOIL, and ordered respondents to submit
an answer to the petition, unanimously reversed, on the law,
without costs, the motion to dismiss granted, and the order to
submit an answer vacated. The Clerk is directed to enter
judgment dismissing the proceeding brought by petitioner Samir
Hashmi.

FOIL does not prohibit respondents from giving a Glomar
response to a FOIL request — that is, a response “refus[ing] to
confirm or deny the existence of records” where, as here,
respondents have shown that such confirmation or denial would
cause harm cognizable under a FOIL exception (Wilner v Natl. Sec.
Agency, 592 F3d 60, 68 [2d Cir 2009], cert denied 562 US 828
[2010] [interpreting the Freedom of Information Act [FOIA]]). Although petitioners contend that such a response is
impermissible in the absence of express statutory authorization,
the Glomar doctrine is “consistent with the legislative intent
and with the general purpose and manifest policy underlying FOIL”
(Matter of Hanig v State of N.Y. Dept. of Motor Vehs., 79 NY2d 106, 110 [1992] [internal quotation marks omitted]), since it allows an agency to safeguard information that falls under a FOIL exemption.

Although federal case law regarding FOIA is not binding on this Court, it is “instructive” when interpreting FOIL provisions (Matter of Lesher v Hynes, 19 NY3d 57, 64 [2012] [internal quotation marks omitted]), and the application of the Glomar doctrine to FOIA requests has been widely approved by federal circuit courts (see Wilner, 592 F3d at 68 [citing decisions of four other circuit courts upholding or endorsing the Glomar doctrine as applied to FOIA requests]). We have considered the differences between the two statutes, as identified by petitioners, amici curiae, and the Hashmi court (46 Misc 3d 712, 722-724 [Sup Ct, NY County 2014]), but find that they do not justify rejecting the Glomar doctrine in the context of FOIL.

Respondents’ invocations of the Glomar doctrine were not affected by an error of law (see Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y., 87 AD3d 506, 507 [1st Dept 2011], lv denied 18 NY3d 806 [2012]). Respondents met their burden to “articulate particularized and specific justification” for declining to confirm or deny the existence of the requested
records, which sought information related to NYPD investigations and surveillance activities (Matter of Gould v New York City Police Dept., 89 NY2d 267, 275 [1996] [internal quotation marks omitted]). In particular, respondents showed that answering petitioners’ inquiries would cause harm cognizable under the law enforcement and public safety exemptions of Public Officers Law § 87(2) (see § 87(2)[e], [f]; see generally Gould, 89 NY2d at 274-275).

The affidavits submitted by NYPD’s Chief of Intelligence establish that confirming or denying the existence of the records would reveal whether petitioners or certain locations or organizations were the targets of surveillance, and would jeopardize NYPD investigations and counterterrorism efforts. The records sought here are a subset of the records found properly exempt under FOIL in Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept. (125 AD3d 531, 532 [1st Dept 2015], lv denied 26 NY3d 919 [2016]). We see no reason to depart from this recent precedent.

By this decision, we do not suggest that any FOIL request for NYPD records would justify a Glomar response. “An agency resisting disclosure of the requested records has the burden of proving the applicability of [a FOIL] exemption” and must
submit “a detailed affidavit showing that the information logically falls within the claimed exemptions” and “the basis for [the agency's] claim that it can be required neither to confirm nor to deny the existence of the requested records” (Wilner, 592 F3d at 68 [internal quotation marks omitted]). In view of the heightened law enforcement and public safety concerns identified in the affidavits of NYPD’s intelligence chief, Glomar responses were appropriate here.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 2, 2016
Abdur-Rashid v. New York City Police Dept., 45 Misc.3d 888 (2014)

45 Misc.3d 888
Supreme Court, New York County, New York.

Talib W. ABDUR–RASHID, Petitioner, for a Judgment Pursuant to C.P.L.R. Article 78, v. NEW YORK CITY POLICE DEPARTMENT, and Raymond Kelly, In his official capacity as Commissioner of the New York City Police Department, Respondents.

Sept. 11, 2014.

Synopsis
Background: Petitioner sought Article 78 order directing city’s police department and its commissioner to provide records responsive to his Freedom of Information Law (FOIL) request. Respondents moved to dismiss petition.

[ Holding:] The Supreme Court, New York County, Alexander W. Hunter Jr., J., as a matter of first impression, held that respondents were entitled to issue Glomar-like response to individual’s FOIL request.

Motion granted.

West Headnotes (14)

[1] Records
⇒ In general; freedom of information laws in general
Purpose of the Freedom of Information Law (FOIL) is to shed light on government decision-making, which in turn permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence and abuse. McKinney’s Public Officers Law § 84 et seq.

[2] Records
⇒ Matters Subject to Disclosure; Exemptions

[3] Courts
⇒ Construction of federal Constitution, statutes, and treaties
When analyzing and deciding issues pertaining to Freedom of Information Law (FOIL) exemptions patterned after the federal Freedom of Information Act (FOIA), New York courts may look to federal case law for guidance. 5 U.S.C.A. § 552; McKinney’s Public Officers Law § 84 et seq.

[4] Records
⇒ In general; request and compliance
So-called “Glomar response” occurs when an agency responding to a Freedom of Information Act (FOIA) request refuses to confirm or deny the existence of the requested records if such confirmation or denial would cause harm cognizable under a FOIA exemption. 5 U.S.C.A. § 552.

[5] Records
⇒ In general; request and compliance
In order to invoke a Glomar response in response to a Freedom of Information Act (FOIA) request, thereby refusing to confirm or deny the existence of the requested records if such confirmation or denial would cause harm cognizable under a FOIA exemption, an agency must tether its refusal to one of nine FOIA exemptions by satisfying its burden of demonstrating with
reasonably specific detail that the information being withheld logically falls within the claimed exemption. 5 U.S.C.A. § 552 et seq.

Cases that cite this headnote

[6] Records
   ➔ Matters Subject to Disclosure; Exemptions
Government agencies may invoke the exemptions under the Freedom of Information Act (FOIA) independently, and courts may uphold agency action under one exemption without considering the applicability of the others. 5 U.S.C.A. § 552.

Cases that cite this headnote

[7] Records
   ➔ Evidence and burden of proof
To invoke the Freedom of Information Act's (FOIA) exemption for records or information compiled for law enforcement purposes, the government or agency bears the burden to demonstrate that a record is compiled for law enforcement purposes and that disclosure would effectuate one or more of the specified harms. 5 U.S.C.A. § 552(b)(7).

Cases that cite this headnote

[8] Records
   ➔ Investigatory or law enforcement records
Agencies properly invoke the Freedom of Information Act's (FOIA) exemption that protects records that could reasonably be expected to disclose the identity of confidential sources if the source provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. 5 U.S.C.A. § 552(b)(7)(d).

Cases that cite this headnote

[9] Records
   ➔ In general; request and compliance
When establishing a Glomar response to a Freedom of Information Act (FOIA) request, refusing to confirm or deny the existence of the requested records if such confirmation or denial would cause harm cognizable under a FOIA exemption, agencies submit affidavits that describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith. 5 U.S.C.A. § 552.

Cases that cite this headnote

[10] Records
   ➔ In general; request and compliance
Conclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not, standing alone, carry the agency's burden to establish a Glomar response to a Freedom of Information Act (FOIA) request, refusing to confirm or deny the existence of the requested records if such confirmation or denial would cause harm cognizable under a FOIA exemption. 5 U.S.C.A. § 552.

Cases that cite this headnote

   ➔ Classified secrets
On the issue of national security, courts reviewing an agency's Freedom of Information Act (FOIA) response must accord substantial weight to the agency's affidavit concerning the details of the classified status of the disputed record. 5 U.S.C.A. § 552.

Cases that cite this headnote

[12] Records
   ➔ In general; request and compliance
City police department and its commissioner could issue Glomar-like response to individual's request for records under Freedom of Information Law (FOIL), in same manner as federal agencies responding to Freedom of Information Act (FOIA) requests, thus refusing to confirm or deny existence of responsive records to individual's request for records with
respect to ongoing or contemplated investigative activity conducted by respondents, including surveillance of individual and his religious organization, on basis of FOIL's public safety and law enforcement exemptions; though there was no binding precedent in New York courts, permitting such response was consistent with similar appellate-court cases in other jurisdictions. 5 U.S.C.A. § 552; McKinney's Public Officers Law § 87(2)(e)(i, iv), (2)(f).

Cases that cite this headnote

[13] Records
.signals Investigatory or law enforcement records

Under the Freedom of Information Law (FOIL), the agency in question need only demonstrate a possibility of endangerment in order to invoke the public safety exemption. McKinney's Public Officers Law § 87(2)(f).

Cases that cite this headnote

[14] Records
.signals Agencies or custodians affected

Freedom of Information Act (FOIA) applies only to federal agencies, and not state agencies. 5 U.S.C.A. § 552.

Cases that cite this headnote

Attorneys and Law Firms


**872 Jeffrey S. Danowitz, Esq., Assistant Corporation Counsel, New York, for Respondents.

Opinion

ALEXANDER W. HUNTER JR., J.

*889 The application by petitioner for an order pursuant to CPLR Article 78, directing respondents to provide petitioner with records responsive to petitioner's Freedom of Information Law (“FOIL”) request 12–PL–106546 made pursuant to Public Officers Law (“POL”) §§ 84 et seq. is denied. The cross motion by respondents to dismiss the petition is granted.

This case presents an important issue of apparent first impression—whether a local New York State law enforcement agency responding to a FOIL request may refuse to confirm or deny the existence of responsive records by adopting the Glomar doctrine which permits federal agencies to neither confirm nor deny the existence of records requested pursuant to the federal Freedom of Information Act (“FOIA”). Petitioner asserts that he and the Mosque of Islamic Brotherhood, where he serves as Imam, are subjects of ongoing or contemplated investigative activity conducted by respondents. Accordingly, petitioner is requesting all records pertaining to respondents’ surveillance of petitioner and of the Mosque of Islamic Brotherhood. In response to petitioner's request, respondents assert that, in accordance with public safety and law enforcement exemptions, it is not required to disclose which *890 individuals or organizations are or have been the subject of ongoing or contemplated investigative activity.

On October 23, 2012, petitioner submitted a FOIL request to respondents' FOIL Unit for all records relating to any possible surveillance and/or investigation of petitioner and the Mosque of Islamic Brotherhood. The FOIL Unit acknowledged petitioner's request by letter dated November 13, 2012 and subsequently sent follow-up letters to petitioner dated December 12, 2012 and February 13, 2013 informing him that additional time was required to make a determination on the request. By letter dated June 28, 2013, respondent informed petitioner that his request was denied for facial insufficiency. According to the letter, petitioner not only failed to submit a certification of identity of a requester as required under POL §§ 87(2)(b) and 89(2), but also failed to include written consent to disclose records to petitioner's attorney pursuant to POL § 89(2)(c)(ii). The June 28, 2013 response went on to state that, regardless of the facial insufficiency of the request, the information sought by petitioner, if possessed by respondent, was exempt from FOIL disclosure pursuant to POL §§ 87(2)(e)(i), 87(2)(e)(iii), 87(2)(e)(iv), 87(2)(f), 87(2)(b) and 89(2)(b), 87(2)(g), and 87(2)(a).

On July 19, 2013, petitioner appealed respondents' determination by disputing the claim of facial insufficiency and maintaining that the June 28, 2013 response constituted a blanket denial which was not supported by facts or law. In a reply dated August 7, 2013, respondents denied petitioners appeal and again claimed that the request was
facially insufficient. Respondents also referred to a failure by petitioner to reasonably describe the records sought in the request, and cited to FOIL exemptions POL §§ 87(2)(a), (b), (e), (f), (g) and 89(2)(b). Petitioner was advised that he had four months to commence an Article 78 proceeding to review respondents’ determination. On November 26, 2013, petitioner filed the instant petition for relief pursuant to CPLR Article 78. On April 2, 2014, respondents filed a cross-motion to dismiss the petition pursuant to CPLR 7804(f). Oral argument was held on June 24, 2014.


Exemptions are narrowly construed and the agency seeking to prevent disclosure bears the burden of demonstrating that the requested material falls squarely within an exemption by articulating a particularized and specific justification for denying access. *Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v. Mills*, 74 A.D.3d 1417, 1418, 904 N.Y.S.2d 512 (3rd Dept.2010).


[4] One significant difference between FOIL and FOIA is the ability to issue what is referred to as a Glomar response. A Glomar response may be asserted when an agency responding to a FOIA request refuses to confirm or deny the existence of the requested records if such confirmation or denial would cause harm cognizable under a FOIA exemption. *Wilner v. National Sec. Agency*, 592 F.3d 60 (2nd Cir.2009) (citing *Gardels v. CIA*, 689 F.2d 1100 [D.C.Cir.1982] ). The Glomar response takes its name from the Hughes Glomar Explorer, a ship that was the subject of the FOIA request at issue in *Phillippi v. CIA*, 546 F.2d 1009 (D.C.Cir.1976).

[5] [6] In order to invoke a Glomar response an agency must “tether” its refusal to one of nine FOIA exemptions. The burden is placed on the party resisting disclosure to demonstrate with *reasonably specific* detail that the information being withheld logically falls within the claimed exemption. *Wilner*, 592 F.3d at 73; *Amnesty International USA v. CIA*, 728 F.Supp.2d 479 (S.D.N.Y.2010). Agencies may invoke an exemption independently and courts may uphold agency action under one exemption without considering the applicability of the others. *Larson v. Dept. of State*, 565 F.3d 857, 862 (D.C.Cir.2009).

At issue in the instant petition are FOIL exemptions for records that fall within the following three categories: (i) POL §§ 87(2)(e)(i) records compiled for law enforcement purposes, which if disclosed, **would interfere with** law enforcement investigations; (ii) POL §§ 87(2)(e)(iv) records compiled for law enforcement purposes, which if disclosed, would reveal criminal investigative techniques or procedures; and (iii) POL §§ 87(2)(f) records, which if disclosed, could endanger the life or safety of a person. FOIA contains similar exemptions, found in 5 U.S.C. §§ 552(b)(7) (“exemption 7”).

[7] Federal FOIA’s exemption 7 applies to records or information compiled for law enforcement purposes. *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency*, 811 F.Supp.2d 713 (S.D.N.Y.2011). “Courts have generally interpreted exemption 7 as applying to records that pertain to specific investigations conducted by agencies, whether internal or external, and whether created or collected by the agency in other words, investigatory files.” *Id.* at 744. The government or agency bears the burden to demonstrate
that a record is “compiled for law enforcement purposes” and that disclosure would effectuate one or more of the specified harms. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 110 S.Ct. 471, 107 L.Ed.2d 462 (1989). Exemption 7 subdivisions (d)(e) and (f) are relevant to the instant case.

[8] Exemption 7(d) protects records that could reasonably be expected to disclose the identity of confidential sources, including a state, local or foreign agency or any private institution that furnished information on a confidential basis and any records compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation. 5 U.S.C. § 552(b)(7)(d). Agencies properly invoke exemption 7(d) if the source provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. *893 Halpern v. F.B.I.*, 181 F.3d 279 (2nd Cir.1999) (citing *U.S. Dept. of Justice v. Landano*, 508 U.S. 165, 113 S.Ct. 2014, 124 L.Ed.2d 84 [1993] ).

Exemption 7(e) allows nondisclosure when such records would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions and could reasonably be expected to risk circumvention of the law. 5 U.S.C. § 552(b)(7)(e).

And lastly, exemption 7(f) prevents disclosure of records or information if such disclosure could reasonably be expected to endanger the life or physical safety of any individual. 5 U.S.C. § 552(b)(7)(f). Exemption 7(f) has been invoked to protect individuals involved in law enforcement investigations and trials, as officials and as private citizens providing information and giving testimony. *American Civil Liberties Union v. Department of Defense*, 389 F.Supp.2d 547 (S.D.N.Y.2005).

[9] [10] [11] When establishing a Glomar response, agencies submit affidavits that “describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.” *Wilner*, 592 F.3d at 73. Conclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not, standing alone, carry the agency’s burden. *Larson v. Department of State*, 565 F.3d 857 (D.C.Cir.2009). On the issue of national security, courts must accord substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record. *Wolf v. CIA*, 473 F.3d 370 (D.C.Cir.2007). Although federal cases note that a court must accord “substantial weight” to the agency’s affidavits, this court only looks to federal cases for guidance in interpreting the requirement and is not required to give the same substantial weight to the affidavits. See *Davis v. United States Dept’ of Homeland Sec.*, 2013 U.S. Dist. LEXIS 91386, 14, 33 (E.D.N.Y. June 27, 2013).

[12] Respondents have invoked a Glomar-like response through the affidavit of Thomas Galati, Chief of the Intelligence Bureau for the New York City Police Department (“NYPD”), which tethers respondents’ refusal to disclose the existence of responsive records to three FOIL exemptions. Respondents meet their burden to issue a Glomar response, set by the federal courts, by describing generic risks posed by disclosure, including undermining counter-terrorism operations, compromising the intelligence capabilities of the NYPD, and disclosing sources of the information of the NYPD. See *Asian Am. Legal Def. & Educ. Fund v. New York City Police Dept.*, 41 Misc.3d 471, 476, 964 N.Y.S.2d 888 (N.Y.Sup.Ct.2013).

Respondents have demonstrated that petitioner is requesting records which may contain source revealing information that could potentially jeopardize the sources and methods used by the NYPD Intelligence Bureau. Through Chief Galati’s affidavit, respondents claim that disclosing the existence of responsive records would reveal information concerning operations, methodologies, and sources of information of the NYPD, the resulting harm of which would allow individuals or groups to take counter-measures to avoid detection of illegal activity, undermining current and future NYPD investigations.

[13] Finally, respondents have established that even acknowledging whether or not responsive records exist could impair the lives and safety of undercover officers and confidential informants. “The agency in question need only demonstrate a possibility of endanger[ment]’ in order to invoke this exemption.” *Matter of Bellamy v. New York City Police Dept.*, 87 A.D.3d 874, 875, 930 N.Y.S.2d 178 (1st Dept.2011). Accordingly, the response provided by respondents falls under the public safety exemption.

[14] Nonetheless, neither the New York Court of Appeals nor the appellate divisions have ruled on the issue of whether a local agency, like the NYPD, has the ability to use
the federally accepted Glomar response to a FOIL request. Furthermore, the federal precedent is clear that FOIA applies only to federal and not state agencies. *Reed v. Medford Fire Dept.*, 806 F.Supp.2d 594, 607 (E.D.N.Y.2011) citing *Grand Cent. Partnership, Inc. v. Cuomo*, 166 F.3d 473 (2nd Cir.1999). Respondents are correct that FOIL is patterned after FOIA, but federal and New York state case law demonstrate that FOIA is not intended for state agencies. It should follow that when a local agency such as the **NYPD** is replying to a FOIL request, the Glomar doctrine is similarly inapplicable. Moreover, the Second Circuit “has explicitly stated that it is beyond question that FOIA applies only to federal and not to state agencies.” *Reed v. Medford Fire Dept.*, 806 F.Supp.2d 594, 607 (E.D.N.Y.2011) citing *Grand Cent. Partnership, Inc. v. Cuomo*, 166 F.3d 473 (2nd Cir.1999).

However, in a case of apparent first impression on these very narrow issues involving three (3) FOIL exemptions applied to the **NYPD** unique facts and circumstances of this Article 78 proceeding, this court looks to the holdings of other jurisdictions for guidance since the current issues have never been squarely decided and, thus, there is no precedent to follow. Respondents have sufficiently demonstrated that applying the Glomar doctrine to petitioner's FOIL request is in keeping with the spirit of similar appellate court cases. Indeed, **876** an examination of prior court rulings with parallels to the instant petition, combined with well-reasoned legal arguments put forth by respondents, lead this court to conclude that respondents' decision not to reveal whether documents responsive to petitioner's FOIL request exist should not be disturbed as it has a rational basis in the law. Accordingly, it is hereby,

ADJUDGED that petitioner's application for an order pursuant to C.P.L.R. Article 78 is denied, without costs and disbursements to either party. The cross motion by respondents to dismiss the petition is granted.

**Parallel Citations**

46 Misc.3d 712
Supreme Court, New York County, New York.

Samir HASHMI, Petitioner,
v.
NEW YORK CITY POLICE DEPARTMENT,
and Raymond Kelly in his official capacity as Commissioner of the New York City Police Department, Respondents. For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Nov. 17, 2014.

Synopsis
Background: Requester filed article 78 proceeding challenging decision of New York City Police Department denying his request for surveillance and investigation records under New York's Freedom of Information Law (FOIL). The Department moved to dismiss.

[ Holding: ] The Supreme Court, New York County, Peter H. Moulton, J., held that Glomar response, neither admitting nor denying the existence of records requested under the federal Freedom of Information Act (FOIA), was not available as response to plaintiff's request.

Motion denied.

West Headnotes (9)

[1] Records
   ⇒ In general; freedom of information laws in general
   The purpose of the New York Freedom of Information Law (FOIL) is to further governmental transparency and protect the public's right to know. McKinney's Public Officers Law § 84 et seq.

Cases that cite this headnote

[2] Records

[3] Records
   ⇒ Matters Subject to Disclosure; Exemptions
   Any New York Freedom of Information Law (FOIL) exemptions are interpreted narrowly. McKinney's Public Officers Law §§ 87(2), 89(2).

Cases that cite this headnote

[4] Records
   ⇒ Evidence and burden of proof
   The burden on proving any exemption under the New York Freedom of Information Law (FOIL) rests with the respondent agency. McKinney's Public Officers Law §§ 87(2), 89(2).

Cases that cite this headnote

[5] Records
   ⇒ In camera inspection; excision or deletion
   If a court is unable to determine from the parties' papers whether withheld documents fall within the claimed exemptions, under the New York Freedom of Information Law (FOIL), it must conduct its own inspection of the withheld documents in camera and order disclosure of any non exempt, appropriately redacted material. McKinney's Public Officers Law §§ 87(2), 89(2).

Cases that cite this headnote

[6] Records
   ⇒ In general; request and compliance
   In litigation, the defendant agency claiming an exemption under the federal Freedom of Information Act (FOIA) bears the burden of demonstrating why the information is exempt.
Information Act (FOIA) is typically required to provide the plaintiff requester with a detailed affidavit, called a Vaughn Index, which describes the contents of each withheld document, while shielding exempt information, and explaining the statutory basis for its exemption. 5 U.S.C.A. § 552.

Cases that cite this headnote

[7] Records

☞ In general; request and compliance

A federal agency may issue a Glomar response, which neither admits nor denies the existence of information requested under the federal Freedom of Information Act (FOIA), if an answer to the inquiry confirming or denying the existence of responsive documents would cause the harm cognizable under an FOIA exemption. 5 U.S.C.A. § 552.

Cases that cite this headnote

[8] Records

☞ In general; request and compliance

A Glomar response, neither admitting nor denying the existence of records requested pursuant to the federal Freedom of Information Act (FOIA), must be tethered to one of the nine FOIA exemptions. 5 U.S.C.A. § 552(b).

Cases that cite this headnote

[9] Records

☞ In general; request and compliance

Glomar response, neither admitting nor denying the existence of records requested under the federal Freedom of Information Act (FOIA), was not available as a response to request for surveillance and investigation records from the New York Police Department pursuant to the New York Freedom of Information Law (FOIL). 5 U.S.C.A. § 552; McKinney’s Public Officers Law § 84 et seq.

Cases that cite this headnote

Attorneys and Law Firms

**597** Jeffrey S. Dantowitz, Esq., Assistant Corporation Counsel, for respondent NYPD.


Opinion

PETER H. MOULTON, J.

*713* In this Article 78 proceeding petitioner Samir Hashmi seeks to obtain records from the New York City Police Department (“NYPD”) pursuant to the state’s Freedom of Information Law (Public Officers Law § 84 et seq., commonly referred to as “FOIL”). The records sought in Hashmi’s October 2012 FOIL request pertain to alleged surveillance and investigation by the NYPD of Hashmi, and of the Rutgers University Muslim Student Association where he served as treasurer while enrolled as a student at Rutgers. The request was prompted by a series of newspaper articles by the Associated Press that concerned NYPD surveillance of various Muslim individuals, groups and Mosques in New York, New Jersey and Connecticut.

The NYPD responded to Hashmi’s FOIL request by refusing to state whether or not it had records in its possession responsive to the request. According to the NYPD, the mere disclosure of the existence of such documents would “cause substantial harm to the integrity and efficacy of NYPD’s investigations of terrorist activities and could endanger the safety of people working undercover, or who otherwise provide information to the NYPD.”

Information that might disclose non-routine law enforcement techniques, or reveal the identities of undercover operatives or others providing confidential information to the police, are types of documents that are specifically exempt from FOIL disclosure. (See POL §§ 87[2][e][iii], [iv].) However, in order to invoke these and other exemptions, FOIL provides that a law enforcement agency must first acknowledge the existence of responsive documents. Frequently, it is necessary for a court to conduct an in camera inspection of responsive documents for which an exemption is claimed in order to determine whether the agency has properly invoked that exemption.

**598** Here the NYPD seeks to avoid that process on the ground that its mere acknowledgment of the existence of
the documents sought by Hashmi would impair its ability to combat terrorism, even if the content of the documents would be exempt from disclosure under exceptions set forth in FOIL.

*714 In making this argument the NYPD asks this court to adopt the Glomar doctrine, a common law exception to disclosure that federal courts have engrafted onto the federal Freedom of Information Act (5 U.S.C. § 552, commonly referred to as “FOIA”). The Glomar doctrine was first adopted in two cases involving FOIA requests that sought information about the CIA’s use of Howard Hughes' salvage ship the “Glomar Explorer” in recovering a Soviet nuclear submarine. In *Phillippi v. CIA*, 546 F.2d 1009 (D.C.Cir.1976) and *Military Audit Project v. Casey*, 656 F.2d 724 (D.C.Cir.1981) the D.C. Circuit allowed the CIA and Department of Defense to neither confirm nor deny the existence of documents involving the use of the Glomar Explorer.

Before the court is respondents' motion to dismiss the petition. As discussed at greater length below, respondents argue that this court should adopt the federal Glomar doctrine in evaluating Hashmi's FOIL request and let stand the NYPD's denial of petitioner's request.

**BACKGROUND**

In a series of articles in 2011–12, the Associated Press revealed that the NYPD had engaged in extensive surveillance of Muslims, including Muslim university and college students, in New York, New Jersey, and Connecticut. The articles stated that Rutgers University was one of the schools where Muslim students were subject to NYPD surveillance.  

Hashmi alleges that he was a student at Rutgers University from 2006 to 2011. He alleges that as a member of the Rutgers Muslim Students Association, he condemned terrorism while raising awareness about Islam. He contends that he has never been charged with a crime, and has done nothing to warrant surveillance by the NYPD. There is nothing in the record before the court that contradicts those statements, Hashmi asserts in *715 his affidavit that the NYPD “spied” on him “for no basis except that I am a Muslim.”

Hashmi submitted his FOIL request to the NYPD on October 23, 2012. He sought seven overlapping categories of documents:

1. All records related to any investigation of Samir Hashmi, between 2006–2012, including the results of those investigations.

2. All records related to Samir Hashmi relied upon by the NYPD that led to any report being filed.

3. All records related to the surveillance of Samir Hashmi by the NYPD.

4. All records related and relied upon on the surveillance [sic] of Samir Hashmi used by the NYPD.

5. All directives and/or memoranda sent or received by the NYPD related to surveillance of Samir Hashmi from 2006–2012.

6. All directives and/or memoranda sent or received by the NYPD related to surveillance of the Rutgers Muslim Student Associations from 2006–2012.

7. All directives and/or memoranda sent or received by the NYPD related to the surveillance of Samir Hashmi, as Treasurer for Rutgers Muslim Student Association from 2006–2009.

In a letter dated November 13, 2012, a NYPD Records Access Officer acknowledged receipt of Hashmi's request, and estimated that the department would respond in twenty business days.

More than six months later the NYPD denied Hashmi's request in a letter dated June 28, 2013. The letter stated that Hashmi's request did not include a certification of Hashmi's identity. The NYPD also noted that Hashmi had not consented to the release of his records to his attorney.

The NYPD's denial went on to state that even if Hashmi's request had been accompanied by a certification of identity, the information sought was “on its face, information that is exempt from FOIL disclosure.” The denial explicitly did not admit that records responsive to Hashmi's request were in the NYPD's possession. Instead, the denial stated conditionally that if such records were in the NYPD's possession they would be protected by several FOIL exemptions set forth in the denial:

*716 1. Disclosure of the records would interfere with law enforcement investigations or pending judicial proceedings. POL § 87(2)(e)(i).
2. Disclosure of the records would identify a confidential source or confidential information relating to a criminal investigation. POL § 87(2)(e)(iii).

3. Disclosure of the records would reveal non-routine criminal investigative techniques or procedures. POL § 87(2)(e)(iv).

4. Disclosure of the records would endanger the life or safety of any person. POL § 87(2)(f).


6. Disclosure of the records would reveal protected pre-decisional inter-agency or intra-agency materials. POL § 87(2)(g).

7. Disclosure of the records would violate state or federal statutes that specifically exempt such documents from disclosure. POL § 87(2)(a).

Hashmi took an administrative appeal of the NYPD's denial. In a letter dated August 7, 2013, the Records Access Appeals Officer denied the appeal. The August 7th letter reiterated the objection that Hashmi's identity had not been properly certified in the request. It also stated that the records requested had not been properly identified “in a matter that would evoke a path that could lead to the retrieval of responsive records with reasonable efforts.” The denial letter faulted, inter alia, the breadth of the records sought, and Hashmi's failure to identify the NYPD unit that may have been involved in the alleged surveillance.

The NYPD's primary reason for the denial was that the records sought, if they existed, would be exempt from disclosure under the FOIL provisions cited by the Records Access Officer that are set forth above. Consistent with its position in the instant motion to dismiss, the NYPD did not state whether or not it had any documents responsive to the request.

As these administrative challenges progressed, the NYPD's Muslim Surveillance program became an issue in the 2013 mayoral race and media outlets carried stories concerning the candidates' positions with respect to the program. After his election, Mayor Bill De Blasio disbanded the NYPD unit that conducted the surveillance.

Hashmi brought this Article 78 proceeding to challenge the NYPD's denial of his FOIL request. Respondents moved to dismiss the petition. That motion is now before the court.

**DISCUSSION**

**A. New York State's Freedom of Information Law**


The “narrowly constructed” categories of FOIL exemptions are collected at POL §§ 87(2), 89(2). (Matter of Fink v. Lefkowitz, 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463 [1979].) The burden on proving any exemption rests with the respondent agency. (Markowitz, supra, at 50–51, 862 N.Y.S.2d 833, 893 N.E.2d 110.) If a court is unable to determine from the parties' papers whether withheld documents fall within the claimed exemptions, it must conduct its own inspection of the withheld documents in camera and order disclosure of any non exempt, appropriately redacted material. (Matter of Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 133, 490 N.Y.S.2d 488, 480 N.E.2d 74 [1985].)

**B. The Federal Freedom of Information Act and the Glomar Doctrine**

In general, FOIA's procedures are similar to FOIL's: an individual or entity submits requests to a government agency and receives one of three responses. First, the agency may identify responsive records and release them. Second, it may determine that there are no responsive records and inform the requester of that fact. Third, it may identify responsive records but determine that all or part of the records are exempt from disclosure under one of
FOIA's nine statutory exemptions, which are listed below. If
an agency denies a FOIA request, there is the opportunity
for administrative and then judicial review of the denial.
In litigation, the defending agency is typically required to
provide the plaintiff requester with a detailed affidavit, called
a Vaughn Index, \[6\] which describes the contents of each
withheld document (while shielding exempt information)
and explaining the statutory basis for its exemption. The
Vaughn Index thus provides the plaintiff requester with some
information to contest the agency's basis for withholding
documents or portions of documents, and allows the agency
to carry its burden of proof. \textit{In camera} inspection of
the documents in question is **601 often necessary to
determine the validity of the claimed exemptions.

[7] The Glomar doctrine allows an agency to depart from
this usual procedure. As noted above, the Glomar doctrine
has as its premise that the existence or non-existence of
documents is itself a fact protected by the exemptions to
disclosure stated in FOIA, the federal analog of FOIL. A
federal agency may issue a Glomar response if an answer
to a FOIA inquiry confirming or denying the existence
of responsive documents would cause the harm cognizable
under a FOIA exemption. (See \textit{Center for Constitutional
Rights v. CIA}, 765 F.3d 161, 164 n. 5 [2d Cir.2014].)

Because the agency does not wish to acknowledge the
existence of the requested documents, it does not prepare
a Vaughn Index. For the same reason there is no \textit{in camera}
inspection of documents by the court—since the
agency's position is that the documents may or may not
exist. Instead the agency meets its burden by submitting an
affidavit showing that the requested material, if it exists,
logically would fall within the claimed exemptions. The
affidavit must also set forth the harm that would ensue from
merely acknowledging the existence of the requested records.
(\textit{Wilner v. National Security Agency}, 592 F.3d 60, 68 [2d
Cir.2009].) When an agency asserts a Glomar response, the
discussion of exemption is more abstract, and not anchored
*719 to any particular document. Because of the alleged
sensitivity of the request, sometimes the agency's affidavits
are submitted to the court \textit{in camera}, which of course gives
the plaintiff no chance to respond. (Note, “[W]e Can Neither
Confirm Nor Deny the Existence or Nonexistence of Your
Request”: Reforming the Glomar Response Under FOIA”
“85 NYULR 1381, 1391.) The reviewing court must accord
“substantial weight” to the agency's affidavit(s). (\textit{Wilner,
supra, at 68.})

[8] A Glomar response must be “tether[ed]” to one of the
nine FOIA exemptions. (\textit{Id.}) Those exemptions are set forth
at 5 U.S.C. § 552(b):

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established
by an Executive order to be kept secret in the interest
of national defense or foreign policy and (B) are in fact
properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and
practices of an agency;

(3) specifically exempted from disclosure by statute (other
than section 552b of this title), if that statute—(A)(i)
requires that the matters be withheld from the public in
such a manner as to leave no discretion on the issue; or
(ii) establishes particular criteria for withholding or refers
to particular types of matters to be withheld; and (B) if
enacted after the date of enactment of the OPEN FOIA Act
of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information
obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters
which would not be available by law to a party other than
an agency in litigation with the agency;

(6) personnel and medical files and similar files the
disclosure of which would constitute a clearly unwarranted
invasion of personal privacy;

*720 (7) records or information compiled for law
enforcement purposes, but only to the extent that the
production of such law enforcement records or information
(A) could reasonably be expected to interfere with
enforcement proceedings, **602 (B) would deprive a
person of a right to a fair trial or an impartial adjudication,
(C) could reasonably be expected to constitute an
unwarranted invasion of personal privacy, (D) could
reasonably be expected to disclose the identity of a
confidential source, including a State, local, or foreign
agency or authority or any private institution which
furnished information on a confidential basis, and, in
the case of a record or information compiled by
criminal law enforcement authority in the course of a
criminal investigation or by an agency conducting
a lawful national security intelligence investigation,
information furnished by a confidential source, (E)
would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Section 552(b) goes on to state that an agency should redact exempt information if it is “reasonably segregable” and produce the redacted document(s).

C. The NYPD's Proposal to Engraft the Glomar Doctrine into FOIL

The NYPD argues that it must have the option of submitting a Glomar response to certain types of requests. Otherwise, the existence of its surveillance and other anti-terrorist strategies will be revealed and therefore undermined. While it would appear that details concerning surveillance techniques and strategies would almost certainly fall under one of FOIL's law enforcement exemptions, and that therefore the content of those techniques and strategies—would not be revealed, the NYPD asserts that it would be harmful to go through the usual FOIL procedure of vetting the claimed exemption. According to the NYPD the mere acknowledgment of documents concerning surveillance would reveal the targets and scope of its anti-terrorism surveillance operations. Individuals and entities could know whether or not they are the subject of surveillance and adjust their activities accordingly.

The NYPD also correctly points out that the Glomar doctrine is effective only where whole categories of requests receive Glomar responses, whether or not there are actually documents responsive to those categories of requests. For example, the doctrine is not effective if it is only invoked where there has been surveillance of the person or entity requesting information. Were the NYPD to invoke the Glomar doctrine only when it had responsive records that it wanted to conceal, and give a “no record” response when it had no such records (or a Vaughn Index when it was willing to at least acknowledge exempt records), then requesters would see a Glomar response as nothing more than a governmental admission that records exist which the government wants to cover up.

The NYPD emphasizes the urgency of its anti-terrorism initiatives by stating the undeniable fact that New York City is a terrorist target. Two lethal attacks on the World Trade Center, and other, thwarted acts of terrorism have confirmed that grim reality. The NYPD submits the affidavit of Thomas Galati, who is the Chief of Intelligence of the NYPD's Intelligence Bureau. Chief Galati points to twenty-seven terrorist plots that law enforcement has disrupted since September 11, 2001. The NYPD argues that the individuals engaged in those plots could have found out if they were under surveillance by submitting a FOIL request. A response, even one that asserted an exemption that would suppress any detail about the surveillance, would still notify the individuals that they were being watched, and then cause them to alter their behavior to evade detection. The NYPD does not state whether it is aware of any instance of this use of FOIL by terrorists.

Of course, the surveillance of Muslims by law enforcement in the United States has long been acknowledged in the press, which would appear to provide ample notice to potential terrorists. The specific program that gave rise to Hamshi's FOIL request has been a particular focus of press attention. Only where senior executive branch officials, or an agency itself, publicly acknowledge the existence of requested documents can a Glomar response be defeated. (See The New York Times Co. v. U.S. Dep't of Justice, 762 F.3d 233 [2d Cir.2014].) However this “public acknowledgment” attack on a Glomar response has historically seen little success in federal court. (See Becker, Piercing Glomar: Using the Freedom of Information Act and the Official Acknowledgment Doctrine to Keep Government Secrecy in Check, 64 Administrative Law Review 673 [2012].)

The NYPD urges this court to adopt Glomar—just as federal courts have—essentially as a common law amendment to a
In the vast majority of Glomar cases, the invocation of the doctrine engraft the federal doctrine onto the state statute. Differences in the statutory exemptions listed in FOIA parties to a lawsuit. The court, the legislature is not limited to the record presented by the procedures used to vet a Glomar response, outlined above, which ensure that the decision to approve or deny a Glomar response is made with very little information, and with almost no useful input from the person or entity seeking the documents. A Glomar response virtually stifles an adversary proceeding.

Additionally, the Glomar doctrine has been shaped by more than thirty years of judicial precedent. It may be that the State Legislature would not choose to adopt wholesale that body of law. For example, the NYPD has indicated in its papers and at oral argument that it seeks a Glomar doctrine in state law that mimics the federal court's very limited view of “public acknowledgment” waiver. As noted above under FOIA, an agency, or the executive, must publicly acknowledge the existence of responsive documents before a Glomar response can be defeated. Under this very narrow “public acknowledgment” doctrine, press reports and even governmental statements acknowledging the existence of a given program, are not sufficient to effect waiver of a Glomar response. Therefore, the extensive press reports—and book—about the Muslim surveillance program, the mayoral candidates' reactions to the program, and Mayor De Blasio's well-publicized decision to disband the NYPD unit that had conducted the surveillance, all would be no impediment to the NYPD stating that it cannot confirm nor deny the existence of documents concerning the program. The legislature might strike a different balance on the question of waiver. Unlike a court, the legislature is not limited to the record presented by parties to a lawsuit.

Differences in the statutory exemptions listed in FOIA and FOIL also raise questions as to whether a judge should engraft the federal doctrine onto the state statute. In the vast majority of Glomar cases, the invocation of the doctrine is tethered to FOIA exemptions 1 and 3. FOIA exemption 1 protects “classified documents” designated by “Executive order.” Municipal governance does not include an analogous category of documents. FOIA exemption 3 relates to documents “specifically exempted from disclosure by statute.” FOIA exemption 3 is most often used in Glomar responses in conjunction with legislation that created the federal government's national security apparatus. For example, two statutes frequently invoked in conjunction with exemption 3 in Glomar responses are the National Security Act of 1947, which exempts from disclosure “intelligence sources and methods,” (50 U.S.C. § 3024–1(i)(1)) and the Central Intelligence Agency Act of 1949, which requires the CIA director to protect intelligence sources or methods. These types of documents have no analogs in the NYPD's own records.

Federal decisions exist that tether a Glomar response to FOIA exemption 7, which does have an analog in FOIL's law enforcement exemptions. (see, e.g., people for the ethical treatment of animals v. national Institutes of Health, 745 F.3d 535; Platsky v. FBI, 547 Fed.Appx. 81.) However, the fact that the Glomar doctrine has arisen, and has been shaped, by the federal government's preeminent role in "national defense [and] foreign policy" (5 U.S.C. § 552(b)(1)) casts doubt on whether a judge should apply the doctrine to the NYPD.

Finally, there is nothing in the record before the court that indicates the NYPD's work has been compromised by its inability to assert a Glomar response. To the contrary, case law demonstrates that the NYPD has been able to protect sensitive information very well within the existing procedures that FOIL currently provides. (See, e.g., Matter of Bellamy v. New York City Police Department, 87 A.D.3d 874, 930 N.Y.S.2d 178 [1st Dep't 2011]; Matter of Legal Aid Society v. New York City Police Department, 274 A.D.2d 207, 713 N.Y.S.2d 3 [1st Dep't 2001]; Matter of Asian American Legal Defense and Educ. Fund v. New York City Police Dep't, 41 Misc.3d 471, 964 N.Y.S.2d 888; Urban Justice Center v. New York City Police Dep't, 2010 WL 3526045, 2010 N.Y. Misc. Lexis 4258.) Crucially, these existing procedures provide some modicum of oversight by allowing the requester to formulate arguments in opposition to a claim of exemption, and by allowing a court to actually view responsive documents to ensure they fall within an exemption.

Since the September 11 attacks the NYPD has worked tirelessly in protecting New York City. This court's decision does not reflect any judgment of the NYPD's work. The
court is instead concerned with oversight of governmental functions as embodied by FOIL. The legislature created FOIL to give New York's citizens some insight into the functioning of their government. In doing so, it set up safeguards to protect against the disclosure of documents that could interfere with the proper operation of law enforcement. Engrafting the Glomar doctrine onto FOIL would change this balance between the need for disclosure and the need for secrecy. Secrecy is a necessary tool that can be used legitimately by government for law enforcement and national security, but also illegitimately to shield illegal or embarrassing activity from public view. It is a legislative function to write a statute that strikes a balance embodying society's values.

CONCLUSION
For the reasons stated, respondents' motion to dismiss is denied. Respondents shall answer the petition pursuant to CPLR 7804(f). This constitutes the decision and order of the court.

Parallel Citations

Footnotes
1 Respondents' Memorandum of Law in Support of Motion to Dismiss at 6.
3 Affidavit of Samir Hashmi dated March 25, 2014, ¶ 19.
8 For the reasons stated in this opinion, this court is not persuaded by Abdur-Rashid v. New York City Police Dept', 45 Misc.3d 888, 992 N.Y.S.2d 870, which was recently decided in New York State Supreme Court.
A journalist brought an action against the Central Intelligence Agency seeking production, under the Freedom of Information Act, of all records relating to alleged efforts of the CIA to convince the news media not to make public what they had learned about secret operations conducted by the United States by use of a vessel publicly listed as a research ship owned and operated by a private corporation. The United States District Court for the District of Columbia, Oliver Gasch, J., held that the materials requested were exempt from production by provisions of the National Security Act of 1947 and denied the journalist’s motions to have her counsel participate in any in camera examination of affidavits filed by the Agency, and the journalist appealed. The Court of Appeals, J. Skelly Wright, Circuit Judge, held, inter alia, that the Agency should be required to provide a public affidavit explaining in as much detail as possible the basis for its claim that it could be required neither to confirm nor to deny the existence of the requested records. The journalist would then be allowed to seek appropriate discovery when necessary to clarify Agency’s position or to identify procedures by which that position was established, and only after issues had been identified by such process would district court, if necessary, consider arguments or information which Agency was unable to make public. 5 U.S.C.A. §§ 552, 552(a)(4)(B), (b)(1, 3); National Security Act of 1947, § 102(d)(3), 50 U.S.C.A. § 403(d)(3); Central Intelligence Agency Act of 1949, § 7, 50 U.S.C.A. § 403g; Executive Order No. 11652, 50 U.S.C.A. § 401 note.

Reversed and remanded for further proceedings.

MacKinnon, Circuit Judge, dissented and filed opinion.

West Headnotes (4)

[1] Records
   In Camera Inspection; Excision or Deletion

Freedom of Information Act contemplates that courts will resolve fundamental issues in contested cases on basis of in camera examinations of relevant documents. 5 U.S.C.A. § 552(a)(4)(B). 51 Cases that cite this headnote

[2] Records
   Agencies or Custodians Affected

Where, in action by journalist under Freedom of Information Act to obtain records of Central Intelligence Agency, Agency adopted position that it could be required neither to confirm nor to deny the existence of requested records, Agency would be required to provide public affidavits explaining in as much detail as possible the basis for its claim; journalist would then be allowed to seek appropriate discovery when necessary to clarify Agency’s position or to identify procedures by which that position was established, and only after issues had been identified by such process would district court, if necessary, consider arguments or information which Agency was unable to make public. 5 U.S.C.A. §§ 552, 552(a)(4)(B), (b)(1, 3); National Security Act of 1947, § 102(d)(3), 50 U.S.C.A. § 403(d)(3); Central Intelligence Agency Act of 1949, § 7, 50 U.S.C.A. § 403g; Executive Order No. 11652, 50 U.S.C.A. § 401 note. 148 Cases that cite this headnote

[3] Records
   Classified Secrets

If Central Intelligence Agency could demonstrate, in action for production of documents under Freedom of Information Act, that release of requested information could reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods, it was entitled to invoke statutory protection accorded by section of National Security Act of 1947 providing that director of Central Intelligence Agency shall be responsible for protecting intelligence sources and methods from unauthorized disclosure. 5 U.S.C.A. § 552(a)(4)(B), (b)(3); National Security Act of 1947, § 102(d)(3), 50 U.S.C.A. § 403(d)(3); 5 Cases that cite this headnote

47 Cases that cite this headnote

[4] **Records**

Agencies or Custodians Affected


39 Cases that cite this headnote

*1010 **244* Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 75-1265).

**Attorneys and Law Firms**

Mark H. Lynch, Washington, D. C., with whom Larry P. Ellsworth and Alan B. Morrison, Washington, D. C., were on the brief, for appellant.


Before WRIGHT and MacKINNON, Circuit Judges, and WEIGEL, District Judge.

**Opinion**

Opinion for the court filed by Circuit Judge J. SKELLY WRIGHT.

Dissenting opinion filed by Circuit Judge MacKINNON.

J. SKELLY WRIGHT, Circuit Judge:

This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1970), as amended (Supp. V 1975), in which plaintiff-appellant seeks to compel the Central Intelligence Agency to disclose certain records alleged to be in its possession concerning its relationship with the Hughes Glomar Explorer.

In March 1975 several news organizations published stories purporting to describe a secret operation conducted by the United *1011 **245* States. The central figure in these stories was the Hughes Glomar Explorer, a large vessel publicly listed as a research ship owned and operated by the Summa Corporation. According to the stories, the ship's actual owner and operator was the Government of the United States.

Following publication of these stories, other stories described the alleged efforts of the CIA to convince the news media not to make public what they had learned about the Glomar Explorer. The latter stories interested appellant, a journalist, and she filed a FOIA request for all Agency records relating to the reported contacts with the media.

That request was denied on two grounds. First, the Agency claimed that “any records that might exist which reveal any CIA connection with or interest in the activities of the Glomar Explorer; and, indeed, any data that might reveal the existence of any such records * * * ” would be classified and therefore exempt from disclosure. App. 8; see 5 U.S.C. § 552(b)(1).

Second, the Agency stated that the fact of the existence or non-existence of the records you request would relate to information pertaining to intelligence sources and methods which the Director of Central Intelligence has the responsibility to protect from unauthorized disclosure in accordance with section 102(d)(3) of the National Security Act of 1947 (50 U.S.C. § 403(d)(3) (1970)). * * * *

App. 9. Accordingly, the Agency asserted that the information was covered by FOIA’s exemption for information “specifically exempted from disclosure by statute.” 5 U.S.C. § 552(b)(3). Plaintiff’s administrative *1012 **246* appeal was rejected by the Agency on the ground that existence or nonexistence of the requested records was itself a classified fact exempt from disclosure under Sections (b)(1) and (3) of FOIA. * * * The basis for this action was the Agency’s determination “that, in the interest of national security, involvement by the U.S.
Government in the activities which are the subject matter of your request can neither be confirmed nor denied.” App. 11.

Appellant filed her complaint in the District Court two and a half months later. She then moved to require the Agency to provide a detailed justification for each document claimed to be exempt from disclosure. See Vaughn v. Rosen, 157 U.S.App.D.C. 340, 484 F.2d 820 (1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974). The Government responded with a motion to dismiss or for summary judgment and a motion for leave to submit all material related to the case to the court in camera. The first motion was supported by two sealed affidavits, one classified secret and the other top secret. The second motion was accompanied by a public affidavit in which the Deputy Under Secretary for Management of the Department of State affirmed “that the information relevant to the United States Government case has been classified * * * on the ground that public disclosure would damage the national security, including the foreign relations of the United States.” App. 26. The District Court refused to examine all of the material in camera but did consider the two sealed affidavits. On December 1st the court granted the Agency’s motion for summary judgment on the ground that

(it) appears to the Court that the provisions of 50 U.S.C.A. ss 403(d)(3) and 403g* are applicable to this situation. Therefore, any materials which the defendants may have that fit the description of materials requested by the plaintiff are exempt from disclosure under the provision of the third exemption of the Freedom of Information Act. 5 U.S.C. s 552(b)(3). * * *

App. 2. In the same order the court denied appellant’s motions to have her counsel participate in any in camera examination and to require the Agency to provide a Vaughn index.

Thus we are dealing with a case in which the Agency has refused to confirm or deny the existence of materials requested under the FOIA, and its refusal has been upheld by the District Court. In effect, the situation is as if appellant had requested and been refused permission to see a document which says either “Yes, we have records related to contacts with the media concerning the Glomar Explorer ” or “No, we do not have any such records.” On appeal appellant does not assert that the Government may never claim that national security considerations require it to refuse to disclose whether or not requested documents exist. Reply br. at 9. Rather, her principal argument, and the only question we decide, is that the Agency should have been required to support its position on the basis of the public record.

[1] It is clear that the FOIA contemplates that the courts will resolve fundamental issues in contested cases on the basis of in camera examinations of the relevant documents. See Department of the Air Force v. Rose, 425 U.S. 352, 378, 96 S.Ct. 1592, 1607, 48 L.Ed.2d 11 (1976); 5 U.S.C. 552(a)(4)(B), as amended (Supp. V 1975). Appellant maintains that this authority does not extend to in camera examination of affidavits, the procedure used below. In the peculiar context of this case we must reject this contention. When the Agency’s position is that it can neither confirm nor deny the existence of the requested records, there are no relevant documents for the court to examine other than the affidavits which explain the Agency’s refusal. Therefore, to fulfill its congressionally imposed obligation to make a de novo determination of the propriety of a refusal to provide information in response to a FOIA request the District Court may have to examine classified affidavits in camera and without participation by plaintiff’s counsel.

Before adopting such a procedure, however, the District Court should attempt to create as complete a public record as is possible. In camera examination has the defect that it “is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure.” Vaughn v. Rosen, supra, 157 U.S.App.D.C. at 345, 484 F.2d at 825. In the ordinary case we have attempted to remedy this defect by requiring a detailed public justification for any claimed right to withhold a document. That justification must be accompanied by an index which correlates the asserted justifications with the contents of the withheld document. The detailed justification and index can then be subjected to criticism by the party seeking the document. If in camera examination of the document is still necessary, the court will at least have the benefit of being able to focus on the issues identified and clarified by the adversary process. See id., 157 U.S.App.D.C. at 346-348, 484 F.2d at 826-828. Congress has specifically approved these procedures. S.Rep. No. 93-854, 93d Cong., 2d Sess. 14-15 (1974).

[2] Adapting these procedures to the present case would require the Agency to provide a public affidavit explaining in as much detail as is possible the basis for its claim that it can be required neither to confirm nor to deny the existence of the requested records. The Agency’s arguments should then be subject to testing by
appellant, who should be allowed to seek appropriate discovery when necessary to clarify the Agency's position or to identify the procedures by which that position was established. Only after the issues have been identified by this process should the District Court, if necessary, consider arguments or information which the Agency is unable to make public.

By supplemental memorandum appellees have now adopted in this court the rationale set forth in an affidavit submitted by Brent Scowcroft, Assistant to the President for National Security Affairs, as the basis for their continuing refusal to confirm or deny the existence of any of the records requested by appellant Phillippi. Scowcroft's affidavit was submitted in the case of Military Audit Project v. Bush, 418 F.Supp. 876 (D.D.C.1976), in which the plaintiff sought copies of the contracts for construction and operation of the Glomar Explorer. The Scowcroft affidavit, which was preceded in that case by a less informative affidavit from the Government, asserted that the requested documents could not be released, nor their existence confirmed or denied, because "(o)fficial acknowledgment of the involvement of specific United States Government agencies would disclose the nature and purpose of the Program and could, in my judgment, severely damage the foreign relations and the national defense of the United States." After the filing of the Scowcroft affidavit in the District Court, interrogatories propounded by the plaintiffs there were answered by Mr. Scowcroft.

Of course, the rationale that Mr. Scowcroft set forth and which appellees here seek to adopt differs significantly from the argument on which the Agency initially relied. Nevertheless, the Government suggests that the Scowcroft affidavit, which allegedly contains all the information that can possibly be made available, merely elaborates on the "basic proposition" the appellees have urged all along. Appellees' supplemental memorandum at 4. For this reason, we are told, remand would be futile.

We reject this conclusion for two reasons. First, we are not convinced that appellant, through appropriate discovery and memoranda, will be unable to convince the District Court to reject the Agency's position. Second, and more important, the course the Government urges us to take is inappropriate. Even if the Agency prevails on remand on the basis of the arguments made to the Military Audit Project court, we cannot sustain summary judgment for the appellees here on the basis of documents filed in a separate case concerned with different, although related, issues. Plaintiffs are entitled to an opportunity to conduct their own litigation.

[3] [4] The judgment of the District Court is reversed and the case is remanded for further proceedings in conformity with this opinion. 14

*1016 **250 So ordered.

MacKINNON, Circuit Judge (dissenting):

The foregoing opinion would treat this demand on the Central Intelligence Agency (CIA) for "all records" of a certain character "relating to the activities of the Glomar Explorer. . . ." (App. 7) as though it were a normal request under the Freedom of Information Act (FOIA). But it is not. By statute the CIA is specifically exempt from "any other law" which would require it to disclose any of the "functions . . . of (its) personnel." This is not a discretionary statute and the exemption is not from disclosure after some involved procedure, but is an exemption "from . . . the provisions of any other law" which would so require.

Appellant seeks to use the FOIA as the base for her demand but the disposition of her request is controlled by the specific provisions of the CIA statute. The Act establishing and controlling its operations provides that the CIA shall be exempted from . . . the provisions of any other law which requires the publication or disclosure of the . . . functions . . . of personnel employed by the Agency.

The Freedom of Information Act recognizes this special statute when it provides that its general requirements that certain agencies make available to the public certain information: does not apply to matters that are--

(3) specifically exempted from disclosure by statute.


Thus, when the foregoing opinion attempts to apply FOIA procedures to appellant's request by its assertion: "It is clear the FOIA contemplates that the courts will resolve fundamental issues in contested cases on the basis of in camera examinations of the relevant documents," p. 243 of 178 U.S.App.D.C., p. 1012 of 546 F.2d, supra, it fails to recognize the "exempt" status of the Agency, created, not only by the FOIA which recognizes the special status
of the CIA, but created primarily by its own separate special statute.

Since the CIA is thus specifically exempted from the FOIA by the Act creating it, the CIA need only assert this fact when it refuses “the publication or disclosure of the . . . functions . . .” etc. requested. Once the court determines that fact nothing further is necessary. As Justice Stewart said in his concurring opinion in FAA Administrator v. Robertson, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975), which involved a factual situation less favorable to the exemption than the CIA statute:

(T)he only question “to be determined in a district court’s de novo inquiry is the factual existence of such a statute, regardless of how unwise, self-protective, or inadvertent the enactment might be.” EPA v. Mink, supra, (410 U.S. 73) at 95 n. (93 S.Ct. 827, at 840, 35 L.Ed.2d 119.) 422 U.S. at 270, 95 S.Ct. 2140, 2149. Justice Marshall also concurred in the opinion by Justice Stewart.

The procedural aspects of the Freedom of Information Act thus need not be complied with by the CIA because when the Act provides that the Agency is “exempted from the . . . provisions of any other law . . .”, etc., it means the entire law.

In this case, it is clear that complying with appellant’s request could result in the “publication and disclosure of the . . . functions ” of the Agency in a highly secret activity definitely related to national security. That is precisely the type of information the Act was designed to protect. The information here requested from the Agency was plainly not information that it was required to publish or disclose. On the facts here present the Agency was permitted to rest on the showing made on the factual existence of the statute and it was not required to indulge in any elaborate procedure to over-prove the obvious.

FAA Administrator v. Robertson, supra, held that the Federal Aviation Administration, by virtue of the subsection (3) exemption of the Freedom of Information Act, was not required to comply with the demand that it produce certain Systems Worthiness Analysis Program Reports made by the airlines to the FAA as part of its safety program. Its claim of exemption was based on 49 U.S.C. s 1504 (1970), which provides:

Any person may make written objection to the public disclosure of information contained in any . . . report . . . filed pursuant to the (FAA Act) . . . . Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public.

Robertson held that this discretionary statute satisfied the terms of subsection (3) of the FOIA.

Following the Robertson decision, the 94th Congress amended subsection (3) to read as follows:

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.


This amendment does not become effective until 180 days after the date of its enactment, so it is not controlling here; but it is important to note because it plainly indicates that, even after it does become effective, the CIA exemption will still continue. In fact, it will even be strengthened because exemption (3) will then specifically exempt from disclosure all matter in those instances where the statute . . . requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue . . . .

(Emphasis added). The CIA statute is such a statute because it is not couched in discretionary terms, but specifically “leave(s) no discretion” that the Agency shall be exempted from . . . the provisions of any other law which require the . . . disclosure of the . . . functions . . . of personnel employed by the Agency.


That the present request would violate this statute, both as
presently interpreted and as it would be interpreted after the 1976 amendment, is too clear to require further discussion. The CIA statute was designed specially to prevent what my colleagues’ opinion would require disclosing top secret information in order to protect it from disclosure. It is sufficient that the agency has pointed to the applicable statute.

I respectfully dissent.

Footnotes


1 Plaintiff requested all records relating to the Director’s or any other agency personnel’s attempts to persuade any media personnel not to broadcast, write, publish, or in any other way make public the events relating to the activities of the Glomar Explorer, including, but not limited to, files, documents, letters, memoranda, travel logs, telephone logs or records of calls made, records of personal visits, or any other records of any kind of communications. App. 7.

2 5 U.S.C. s 552(b)(1) exempts from disclosure matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order. The classification system is established by Executive Order 11652, 3 C.F.R. at 339 (1974).

3 50 U.S.C. s 403(d)(3) provides, in relevant part, (t)hat the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.

4 It is important to note that Congress has been peculiarly sensitive to expansive judicial interpretations of the exemptions to the FOIA. Through various amendments it has sought to insure that these exemptions not provide means by which government agencies could eviscerate the policy of the Act. In fact, in response to two different Supreme Court decisions amendments have recently been enacted which narrow the scope of each of the exemptions on which the Agency here seeks to rely. After the decision in Environmental Protection Agency v. Mink, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119, (1973), in which the Supreme Court construed the s 552(b)(1) (i. e., “Executive order”) exemption broadly and denied the plaintiffs access to the information they sought, Congress moved promptly to overrule the decision and limit the exemption. See 5 U.S.C. s 552(a)(4)(B) (Supp. V 1975); 5 U.S.C. s 552(b)(1) (Supp. V 1975); S.Rep. No. 854, 93d Cong., 2d Sess. 13-15 (1974). Even more recently, in the Government in the Sunshine Act, Congress limited the s 552(b)(3) exemption to the FOIA as follows: (b) This section does not apply to matters that are (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.() Pub.L. 94-409, s 5(b), 94th Cong. (Sept. 13, 1976). Specifically, in the discussion of the amendment in the final Conference Report it is stated, “The conferees intend this language to overrule the decision of the Supreme Court in Administrator FAA v. Robertson, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975)” a decision on which the dissent relies and in which s 522(b)(3) was construed broadly with respect to an exemption statute not involved in this case. See S.Rep. No. 94-1178, 94th Cong., 2d Sess. 25 (1976); H.R.Rep. No. 94-1441, 94th Cong., 2d Sess. 25 (1976). This latest amendment shows plainly that Congress is determined that the exemptions to the FOIA should be interpreted narrowly.

5 The Agency based its claim to an exemption under s 552(b)(3) entirely on 50 U.S.C. s 403(d)(3), supra note 3.

6 50 U.S.C. s 403g provides, in relevant part, that (i)n the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from * * * the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel
employed by the Agency * * *
So far as appears from the public documents in this case, the Agency never asserted the relevance of this provision.

7 Since the “document” the Agency is currently asserting the right to withhold is confirmation or denial of the existence of the requested records, we stress that we are not requiring, at this stage, the Vaughn index requested by appellant. If the District Court should decide on remand that the Agency’s refusal to confirm or deny the existence of the requested records is unjustified, the standard Vaughn procedures, including preparation of a detailed index to the requested records, if any, would then apply.

8 Affidavit of Brent Scowcroft, Assistant to the President for National Security Affairs, in appellees’ supplemental memorandum at 4a.

9 The Government was forced to retreat from its original refusal to confirm or deny any involvement with the Glomar Explorer by its disclosures in a tax case in Los Angeles. See United States v. County of Los Angeles, Civil Action No. CV 75-2752-R, C.D.Cal.

10 Affidavit of Brent Scowcroft, supra note 8, appellees’ supplemental memorandum at 3a. Mr. Scowcroft maintains that only the fact that the Government owns the Glomar Explorer can be or has been disclosed. He asserts that disclosure of the alleged “fact that the United States was the sponsor of the activity involving the Hughes Glomar Explorer” would damage our national security and foreign relations. * * *
Brent Scowcroft’s Answers to Plaintiffs’ Interrogatories, Answer to Interrogatory No. 22, filed in Military Audit Project v. Bush, 418 F.Supp. 876 (D.D.C.1976) (emphasis in original). Yet documents released by the Government in United States v. County of Los Angeles, supra note 9, indicate that the vessel was to be operated in a “recovery program” conducted for the United States under “commercial” cover.” Appellant’s reply br. at Add. B-20; see id. at B-18 (United States to indemnify agent for liability “arising out of operational performance under this Agreement”); id. at B-25 (“WHEREAS the Sponsor (the United States Government) desires to enter into a covert contract with the Contractor for the delivery of the integrated system and the operation thereof to perform the mission and WHEREAS due to necessity for cover purposes to operate the mission under the guise of an overt commercial deep sea mining project * * * ”); id. at B-26, B-29. See also id. at B-35 (affidavit of Summa Corporation official, filed in support of Government’s motion for summary judgment, stating that “the United States Government has had and exercised full control and direction of the Hughes Glomar Explorer”); id. at B-38 to B-39 (affidavit of Global Marine Inc. official, filed in support of Government’s motion for summary judgment, stating that vessel has been under dominion and operational direction of United States Government from its launch until present time); id. at B-41 to B-42 (affidavit of ship’s master, filed in support of Government’s motion for summary judgment, stating that vessel had been used only in performance of a United States Government classified project).

11 The Government states this proposition to be: “there is a difference in international affairs between rumor and speculation and official confirmation of governmental involvement in a particular activity.” Appellees’ supplemental memorandum at 4. As so stated, this proposition resembles the original stand taken by the Agency. It is clear, however, that avoiding “official confirmation of governmental involvement” with the Glomar Explorer is no longer possible. See note 10 supra.

12 As we have indicated, on remand appellees will be asked to submit a public justification, which is as detailed as is possible, for refusing to confirm or deny the existence of the requested records. Appellant will then have the opportunity to test that justification through appropriate discovery. Assuming that the Government provides no more information than is contained in the public affidavits submitted in Military Audit Project, appellant’s discovery would presumably focus on the less than self-evident relationship between confirmation or denial of the existence of records relating to contacts between the Agency and the media and the disclosure, beyond that already officially made, of “the nature and purpose of the Program.” For example, appellant might seek to learn the process by which it was determined that confirming or denying the existence of records relating to media contacts by the Agency would indicate more about the nature of the project than do the documents filed in United States v. County of Los Angeles. See note 10 supra. Alternatively, appellant might inquire as to the process by which it was determined that confirming or denying the existence of the requested records would constitute greater “official acknowledgement of the involvement of specific United States Government agencies,” see pp. - - - - of 178 U.S.App.D.C., p. 1013 of 546 F.2d supra, than has already taken place. For example, Mr. Scowcroft has indicated that a “senior official” of the Central Intelligence Agency was on the National Security Council committee which determined to declassify some information related to the Glomar Explorer. Brent Scowcroft’s Answers to Plaintiffs’ Interrogatories, supra note 10, Answer to Interrogatory No. 17. Moreover, the Director of Central Intelligence has a statutory responsibility to protect intelligence sources and methods from unauthorized disclosure. 50 U.S.C. s 403(d); see note 14 infra. That responsibility is apparently not limited to keeping Agency-sponsored activities secret. Appellant might inquire how it was determined that confirmation or denial of contacts with domestic news media, undertaken pursuant to the Director’s statutory responsibility, would disclose “the involvement of specific United States Government agencies” in the project which the Director sought to keep from being publicized.

13 Indeed, the Agency itself might change its position if required to defend that position in public to the extent consistent with the national security. It has already revised its rationale for withholding information once during the pendency of this litigation, and its actions appear to conflict with its currently stated position. See note 10 supra.
The District Court’s order relied on the third exemption to the FOIA and on 50 U.S.C. §§ 403(d)(3) and 403g. Appellant contends that § 403(d)(3) is not a statutory authorization to withhold information within the meaning of 5 U.S.C. § 552(b)(3). We reject this argument. See S.Rep. No. 93-854, 93d Cong., 2d Sess. 16 (1974); H.R.Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974). If the Agency can demonstrate, see 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975), that release of the requested information can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods, it is entitled to invoke the statutory protection accorded by 50 U.S.C. § 403(d) and 5 U.S.C. § 552(b)(3).

We understand the District Court’s citation of 50 U.S.C. § 403g also to be a reference to the Agency’s authority and responsibility to prevent unauthorized disclosures of intelligence sources and methods. See S.Rep. No. 93-854, supra, at 16; H.R.Rep. No. 93-1380, supra, at 12. In its brief, however, the Agency suggests that § 403g’s reference to withholding information about the “functions * * * of personnel employed by the Agency,” see note 6 supra, allows the Agency to refuse to provide any information at all about anything it does. See appellees’ br. at 26-29. This argument, on which our dissenting colleague relies, would accord the Agency a complete exemption from the FOIA. We do not think that § 403g is so broad. Cf. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1367 (4th Cir.), cert. denied, 421 U.S. 992, 95 S.Ct. 1555, 43 L.Ed.2d 772 (1975).

Section 403g is intended “further to implement the proviso of section 403(d) * * * that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure * * *.” This limited purpose is explicitly recognized in the congressional reports cited above, and there is no indication that the section is to be read as a provision authorizing the Agency to withhold any information it may not, for some reason, desire to make public. Moreover, the wording of the section strongly suggests that the authority it confers is specifically directed at any statutes that would otherwise require the Agency to divulge information about its internal structure. The legislative history of the section supports this limited interpretation. See S.Rep. No. 106, 81st Cong., 1st Sess. 4 (1949); H.R.Rep. No. 160, 81st Cong., 1st Sess. 5 (1949). Finally, we note that the Agency itself apparently considered § 403g a limited provision inapplicable to this case, since it did not assert the section as a basis for denying appellant’s FOIA request in either its administrative responses to appellant or its filings with the District Court.

On remand the District Court may also consider the applicability of the FOIA’s first exemption, which applies to classified information. The Agency claimed this exemption in its first response to appellant and at all subsequent stages of this proceeding. Since information which could reasonably be expected to reveal intelligence sources and methods would appear to be classifiable, see Executive Order 11652, supra note 2, 3 C.F.R. at 340, and since the Agency has consistently claimed that the requested information has been properly classified, inquiries into the applicability of the two exemptions may tend to merge.

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1. 50 U.S.C. § 403g (1970) provides:
   In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of section 654 of Title 5, and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency: Provided, That in furtherance of this section, the Director of the Bureau of the Budget shall make no reports to the Congress in connection with the Agency under section 947(b) of Title 5.

2. Id. (emphasis added).

3. 5 U.S.C. § 552(b) (1970), as amended (Supp. V, 1975) provides:
   (b) This section does not apply to matters that are
   (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
   (2) related solely to the internal personnel rules and practices of an agency;
   (3) specifically exempted from disclosure by statute. . . .
   (Emphasis added). Subsection (b)(1)(A) also furnishes a ground for exemption in this case but that exemption is less broad and might involve a more elaborate showing than is required under subsection (b)(3).


5. Id.

6. The Agency’s reply of May 21, 1975, denying appellant’s request stated:
   Mr. Duckett has determined that, in the interest of national security, involvement by the U.S. Government in the activities which are the subject matter of your request can neither be confirmed nor denied. Therefore, he has determined that the fact of the existence or non-existence of any material or documents that may exist which would reveal any CIA connection or interest in the activities of the Glomar Explorer is duly classified Secret in accordance with criteria established by Executive Order 11652. Acknowledgement of the existence or non-existence of the information you request could reasonably be expected to result in the compromise of important intelligence operations and significant scientific and technological developments relating to the national
security, and might also result in a disruption in foreign relations significantly affecting the national security. (J.A.11).

The complaint also asserted:

He (the Agency) further alleged that the fact of the existence or non-existence of such records would relate to information pertaining to intelligence sources and methods which the Director of Central Intelligence has the responsibility to protect from unauthorized disclosure in accordance with section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. s 403(d)(3), and therefore such records fall within exemption 3 of the FOIA, 5 U.S.C. s 552(b)(3). (J.A.14).

7 It is not necessary here to discuss the applicability of (3)(B).
A Legal Theory of the Glomar Response and Its Contextual Constraints

By Troy Robert Mack, Ph.D.

Introduction: Structures of Law

This essay is an attempt to explore and highlight some of the issues of fundamental jurisprudence inherent in discussion of the Glomar response and, especially, any justification of its use outside of the federal and national levels. As such, this essay will not be a survey of the potential specific statutory disputes that arise when a Glomar response is issued. Neither is this a theory of a case involving an assertion of a Glomar response, nor will we be tracking the legacy of the Glomar response as it has been referenced in case history. Our focus herein is to examine what is integral to the Glomar response itself, such that its issuance becomes a matter of significant legal concern for a democracy’s enabling structures of law.

This notion of structures of law is peculiar. That law is institutional in its nature is presumably self-evident. Karl Llewellyn’s characterization seems sufficient for our purposes, “The law then, the interference of officials in disputes, appears as the means of dealing with disputes which do not otherwise get settled.” Llewellyn’s framing presumes the existence of officials, implicating political systems out of which officials arise and, beyond such, the vast social phenomena resourcing and contending against the same. We agree that it is helpful to think, “of the law as a part of your environment, like the weather, or the party system. As long the officials are present and capable of being called upon, you must reckon with them.”

This existential aspect of the law, that law fundamentally is, remains always in dynamic tension with the fact that any specific legal regime exists only (1) as a construct of human artifice, (2) to facilitate human intervention, (3) in human experiences. Even if one entertains theories of natural law or law as emanating holistically from a people, the rendering of any legal principle into an actionable rule involves a constructive project to which both reason and will are applied. The institutionalization of power requires a channeling of these essential human resources both along and into delineated trajectories. An institution is a terminus of a logical, if not chronological, progression. It presumes a structure, apprehended even if the structure itself is not articulable.

It is not just that law is institutionalized into the processes of the State, such that an agent of the State might interfere in disputes. Enabling any official’s institutional expression of power, grounded as it is in the State’s monopoly of force, is a preceding conceptual structure that apprehends and renders sensible just when, where, how, and other specifics of whether an official could interfere. This conditional is, of course, aspirational in nature. Individual agency to act remains. Yet, the sensibleness of the act is what matters here: is the official’s act most accurately described as an act of one operating as extension (and logical progression) of the related institution, or is the act that of a rogue actor?

2 Llewellyn, p. 15.
3 Consider Thomas Aquinas’ discussion of law in Summa Theologica. While law exists both to bind and to be read, the resources out of which any specific law arises extend beyond the merely linguistic or quantifiable.
Such questions are not simply appropriate for analysis of specific actors, but also for whether a legal action or activity is reconcilable with the law. The institutionalization of the rule refers back to its originating principle’s structure of meaning. Analysis of this referential move is a component of constitutional theory, any theory of precedent, and integral to discussing the role and scope of judicial review within a democracy.  

**The Glomar Response and Democratic Commitments**

Perhaps this is enough talk on the origins of law and constitutionalism. There is a joke among legal scholars that few students in law school, if any, choose to take Advanced Jurisprudence or Constitutional Law II. How does the above relate to the Glomar response, especially in the context of municipal law enforcement? Moving forward to address this question, it is sufficient to have brought to the forefront of thought the peculiar relationship between law’s intentional institutionalization in specific legal regimes, and those preceding, enabling structures upon which codes and statutes depend at the very least for consistency, if not also authority or legitimacy.

With such terms as “consistency,” “authority,” and “legitimacy” now informing our conversation, we need to briefly explore the relationships shared between the law and the State. That which defines a State is its capacity to rule. Such is what distinguishes “state” from the geographic or organizational category of “city,” as well as from the economic, ethnic, linguistic, or religious category of “nation,” so that it adds to those categories in the creation of new terms: “city-state” and “nation-state.” The State is the power of populations to exist and identify as distinct from other masses of humanity, institutionalized into a force that possesses (among other traits) duration.

As guarantor of the law over this duration of time, if the State is to rule, it must be consistent. The State presumably avoids, and must avoid, contradiction, so that its rule continues undisturbed. This existential, and inescapably, political constraint impacts jurisprudence in that the law must extend into the future with continuity, even as the principles from which the law (in and through the form of various legal constructs) arises are read into a mythologized past.

For democracies, their rule must refer back to democratic principles. Of course, precise criteria for and enumeration of what the concept, “democratic principles,” can mean has been the subject of debate at least since the European Renaissance(s) and certainly since the Glorious, American, and French revolutions. However, whatever the above entails, democratic principles at least include commitments to government accountability, responsiveness, and transparency.

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4 Law students will remember Hugo Black’s dissent in *In re Winship*, as well as debates on substantive due process.
5 A Hobbesian framework is admittedly in mind here, but this essay’s arguments can be supported by a broad range of bibliographic resources contributing to state theory. That we also recommend Max Weber’s *Politics as Vocation* is almost cliché, but his text truly is of such significance in talk of the state that it remains practically indispensable.
6 Georges Sorel’s social theory of myth, outlined in his *Reflections on Violence*, is recommended here.
7 Contrast the English Bill of Rights, the U.S. Bill of Rights, and the French Declaration of the Rights of Man for similarities. It is beyond this essay’s scope to make the case that these alleged similarities are not simply a byproduct of shared cultural resources and a continuity of bibliographical reference, but rather the inescapable logical result of relating certain premises. Such is noted here to recommend further opportunities for consideration.
These commitments are understood to be of such essential, existential import to democracies that the government’s interest, in the person of the agent of the State, is differentiated from those core commitments out of which the State itself, as constitutional-legal order, is said to arise. While a democracy would not exist without its population, the provocative claim here is that the abandonment of its principles would just as surely attest to a democracy’s demise. The radical nature of this claim must never be underappreciated: the State has an interest that is in dynamic tension with, and perhaps must at times defy, concessions to prioritizing physical security.

The Glomar response embodies so many of the issues at the core of this dilemma, in which a democracy’s rule might allegedly be at odds with its security. Both are integral to the survival of a democracy qua democracy. The Glomar response’s underlying theory, when considered contextually, can be charitably interpreted as a nuanced attempt to balance these competing interests. This is not to say the Glomar response resonates with democracy’s ideals; only that it is also not necessarily impossible to reconcile issuance of such with democratic commitments.

While a government’s failure to acknowledge the existence of information is admittedly and intensely problematic, it is not prima facie absolutely incompatible with the very possibility of democracy. The contexts within which such a response is issued, should it be asserted by agencies located within complex matrices of democratic oversight and representation, might mitigate or at least challenge opposition to what is otherwise a rather blatant rebuttal of the alleged freedom of and to information. Absent such a context, as when moving from a strictly federal framework of national security to assertion at the local level in relation to matters of municipal law enforcement, arguments for the Glomar response’s appropriateness within a democracy lose even this contextual defense. Bereft of such, a Glomar response then risks undermining the State as a democratic constitutional-legal order.

The Glomar Response’s Risks

This is not a history paper, so its reader’s awareness of the Glomar response’s origin story will be presumed. Of interest to us is not the Glomar response’s origin in American history, but its origin within a context of the United States’ national security infrastructure. This institutional location, with its systems of checks and balances, must be heard as integral to any underlying theory upon which a Glomar response’s reconcilability to democratic commitments depends.

The original Glomar response was issued by federal agencies located within the executive branch, addressing matters of national import, such that both the persons and specifics involved were available to (and presumably known by) a variety of offices including in those held by democratically elected legislators. National security, as a function of government, though expressly located in the executive, nonetheless at that time received and continues to receive

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8 Though the topic is beyond the scope of this essay, readers are encouraged to consider how government might be differentiated from the State. Carl Schmitt’s account of such in *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* could facilitate such a conversation.

9 It very well could be, but the point here is that there is at least an argument to be made provided a context of overarching democratic oversight and representation. Absent such an infrastructure, one can presumably dismiss the Glomar response’s appropriateness for and within a democracy.
significant oversight by Congress. This tie to legislative oversight, whereby an elected legislator either has the information, or presumably has access to the same, about which a Glomar response is noncommittal, is itself significant to how we understand the Glomar response and its theory.

A critical problem with the Glomar response is its affront to the alleged freedom of information. Citizens are understood to have a reasonable and compelling interest in their government’s actions. Government accountability is linked to this expectation of transparency. The citizenry’s ability to remain sovereign, as well as express their sovereignty by serving as an educated electorate, logically depends on access to resources with which to test and verify officials’ claims. Furthermore, democratically significant avenues through which to hold officials accountable, via an independent press and recourse to courts, depend on robust commitments to the freedom of information. Legal constructs such as a Freedom of Information Law (“FOIL”) are indispensable to empowering investigative journalism and discovery proceedings, respectively.

This commitment to transparency is held to such an extent as to justify ensuring that citizens are presumed to have access to government communications, documents, and systems only except insofar as another competing public good might conflict with this expectation. This principle, that transparency is a public good intrinsic to the health of any democratic government, is held to be operative regardless of the character or social location of the citizen issuing the request for information. The purposes to which the information shall be leveraged are also irrelevant to whether or not information should be released, except in the most narrow and clearly enumerated cases. In such limited cases, then and only then is the public good that is understood to be self-evident in guaranteeing free access to information subordinated to what is ostensibly a pursuit of a competing public good.

The Glomar response adds an additional, pernicious complication to this process of navigating and prioritizing public goods. If at stake was an outright denial of access to information, then at least it would be affirmed that (1) the information in dispute existed, (2) the government was in possession of such information, and (3) the act of denial itself would (again, ostensibly) affirm that some process occurred by which consideration of the public’s interest was debated. Even in the face of such denial, a diligent actor could thus conceivably pursue research into the matter.

Of course, this observation remains precisely the concern to which the Glomar response exists to address. Confounded by the Glomar response’s refusal to confirm or deny the very existence of information, the citizenry gains no certainty whatsoever regarding the government’s interest in, position on, or relation to presumably a matter of import, except insofar as can be vaguely implicated by the government’s recourse to this tactic. The move not only limits access to the specific information requested, but also inhibits follow-up and pursuit of additional leads and opportunities beyond the government’s purview. In asserting a Glomar response, a government not only functionally denies information about a topic, but functionally restricts the public’s

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10 Consider limitations on the release of autopsy photographs held by a medical examiner, whereby restrictions on release might advance a narrow, clearly defined public good of ensuring against macabre sensationalism of a corpse. While such restrictions might warrant a challenge in pursuit of an allegedly just cause (for example, verifying cause of death in light of questionable government characterization), the existence of the restriction on information here seems at least somewhat reasonable and grounded in a clear and narrowly defined public interest.
capacity to pursue alternative sources. A Glomar response inhibits both the content and possibility of speech.

**The Glomar Response’s Federal and National Security Contexts**

In its original context, recourse to the Glomar response can yet be argued to be at least reasonable, if thoroughly distasteful. The above concern for both information and speech remains, especially as relates to democratic health and the public good. Yet, within the federal national security apparatus and infrastructure, there exist mechanisms by which these democratic commitments can be observed even in the presence of a Glomar response.

Inherent in the legislative oversight of national security architecture is the opportunity for representatives, directly elected by constituents, to engage with agents of the State from a position of access and authority. Via enforcement mechanisms that include subpoena power, contempt of Congress, and threat of perjury charges, someone understood to directly represent the interests of a specific group of citizens is empowered to gauge and liaise with the bureaucratic agencies for whom a Glomar response could be an option. While certainly removed from individual citizens’ and neighborhoods’ circles, the presence of legislative oversight within the overarching structure of the United States’ national security architecture at least provides the public the opportunity to challenge democratically accountable figures regarding that which the government’s bureaucracy will neither confirm or deny.

This is the case regardless of one’s specific elected representative. While members of Congress represent their respective districts and states, their participation on any particular committee still (at least in its aspiration) represents all. That only some members serve on committees overseeing intelligence and national security, for example, does not substantively undermine the above argument that legislative oversight provides citizens with a mechanism and opportunity within the constitutional-legal order through which to hold government to account in the wake of a Glomar response (and the harm such a response effects).

A specific person, that member of Congress to whom the citizen ostensibly has a connection via a theory of representative democracy, is here understood to be participatory in the issuance of the Glomar response. While the citizen’s FOIL request might be stymied by a Glomar response, their representative is presumably able to engage the State bureaucracy in ways that can expand upon and nuance the situation. The citizen is thus, in some meaningful way, “in the room” and possessive of agency vis-à-vis this democratically elected representative. This member of Congress is ostensibly accountable to the electorate, rather than the State apparatus: the citizen, if underwhelmed by their representation, can vote their representative out of office. There is therefore at least some democratic accountability within the context of institutional, procedural relationships which deliberate upon and have recourse to a Glomar response at the federal level.

At least, such is the hope. The above is aspirational, yet intrinsic to democratic theory and its deployment. The member of Congress presumably serves as an expression of democratic commitments to accountability, responsiveness, and transparency within the federal government and thus the national security context. This representative may foreseeably be held accountable
by constituents for the representative’s actions (or inaction) during and after deliberations out which arises a Glomar response and its related risks.

This analysis of the Glomar response has explored democratic representation as a means of addressing the challenges to democratic accountability, responsiveness, and transparency it finds inescapably present in the Glomar response. Such is not to say that the role of FISA courts and similar manifestations of the judiciary’s presence are unimportant or should be ignored when considering the Glomar response as a sensible recourse for agents of the State both (1) involved in national security and (2) operating at the federal level. It could appear mistakenly from the above that only the legislative branch supplies nuanced conditions, presence, and structures relevant to an analysis of the Glomar response and its risks.

Quite the contrary, it is important to observe that the judicial branch is also intimately involved in the regulation of the United States’ national security architecture and overarching infrastructure. The judiciary’s presence in this vast, interlocking and interdependent system of checks and balances emphasizes that multiple expressions of democratic commitments (not least, the rule of law) are essential elements of that context from which the Glomar response originally arose. Within such infrastructure, there both have existed and continue to exist opportunities for democratic engagement, all of which might complicate assessment of, if not fully mitigate or relieve, any harm inherent to a Glomar response’s undemocratic nature.

It remains difficult to conceive of when a Glomar response is ever convincingly appropriate within a democratic system, let alone preferable over outright denial of access to whatever information was requested. The public good affirmed by free access to information seems almost unassailably clear. Yet, we concede a reasonable argument (if not a compelling one) exists for assertion of the Glomar response in its original context located within the national security architecture operating at the federal level, given that established, overarching infrastructure’s systems of checks, balances, and legislative (let alone judicial) oversight.

None of that infrastructure, nor any analogue remotely resembling it, exists at a municipal level of government, leaving a Glomar response at that level to purely be a risk to democracy’s rule.

The Inappropriateness of the Glomar Response at the Municipal Level

All the abovementioned conditions, relationships, and structures, which collectively might nuance, mitigate, or relieve the Glomar response’s undemocratic nature and harm, are absent at the municipal level. Municipalities do not have systems of classification by which legislators, bureaucratic officials, and local courts can be vetted into and “read on” to controlled information. Nor are there resources dedicated to recreating at the local level a semblance of the interlocking and interdependent systems of checks, balances, interbranch oversight present in the federal national security architecture.

Even in a massive metropolis such as New York, the institutional infrastructure, legal framework, and relational dynamics necessary to facilitate (let alone robustly empower) democratic bulwarks against government overreach in these matters of information gathering, operations, and management do not exist sufficient to risk a Glomar response. This fact would be
dispositive regardless of the circumstances of any specific case in which a Glomar response (or any similar circumvention of FOIL) was considered. The mere existence of potential, unquantifiable, and vague risks to public safety alone, absent evidence of actual and immediate threat, does not constitute a counterbalancing public good sufficient to discount the demonstrable public good inherent in free access to information. The stymying of access to information, especially such as might be relevant to political speech, is correctly identified as a harm.11

A brief return to theory seems warranted. As noted early in this essay, perpetuation of rule involves more than mere provision of security. Security might be a requirement enabling, and perhaps necessarily preceding, the possibility of rule.12 Yet, security alone is insufficient to sustain a democracy. If prioritized in a way which holds concerns for public safety as beyond engagement over against all other public interests, the elevation of security as thoroughly dispositive public good risks necessitating a fundamental restructuring of that unique negotiation of rights intrinsic to any specific democracy’s constitutional-legal order. In seeking to secure the populace, unfettered pursuit of public safety might undo the fabric of democratic commitments, norms, and principles which binds the populace together as a coherent and functioning State.

With this observation in mind, it is enough to note that the context out of which a Glomar response is asserted must make sense, should such an undemocratic assertion be accepted as tolerable. “Sense” here intends that contextual elements around and informing the institutional issuance of a Glomar response must exist in some substantive way, as to respond to, mitigate, or relieve a Glomar response’s unavoidable infliction of harm. The citizen must be observed to exist, in some substantive way, within the institutional framework enabling the issuance of a Glomar response, so that democratic commitments to accountable, responsiveness, and transparency are sustained throughout the process. At the federal level as relates to the United States’ national security architecture, this essay has argued such seems to be the case.

Municipalities have no such framework for the citizen, via democratic representation, to currently inform and thereby “be present” at the municipal level. Without that presence, a Glomar response cannot be reconciled with a democracy’s enabling and establishing principles, its motive force, the law. In New York’s case, use of a Glomar response by the New York Police Department (“NYPD”) can only be interpreted as a rogue act (albeit perhaps well-intentioned), as it cannot sensibly be understood as an act extending from a commitment to democratic rule.

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11 Legislative histories of FOIL consistently affirm this characterization, as does case law. Such a notion was integral to Congress’ passing of 2016’s FOIA Improvement Act. The “Foreseeable Harm” rule, which was conceived prior to the FOIA Improvement Act and arguably informs that legislation’s substance, presumes government openness and citizens’ access to information. Here, it seems sufficient to note the United States’ legislative and judicial branches have both acknowledged that competing harms exist when information is stymied.

12 Hobbesian themes can again be heard in this essay’s observations. Consider that the Sovereign, though guarantor of the social contract, is limited in one (perhaps, given one’s reading of Hobbes, specifically only one) profoundly significant way: a Sovereign cannot sensibly act to contradict and thereby undo the very covenant out of which that Sovereign itself arises. The interpretative authority of the Sovereign is vast, but it has limits. Exploring how and by what means such limits are known and expressible within the commonwealth (1) established by a social contract and (2) secured by a Sovereign is beyond the scope of this essay. For now, it is enough to note that the Sovereign, the commonwealth, and the social contract come into existence simultaneously. A logical progression is shared between them, yet not a chronological one. Each therefore implicates, interrelates with, and justifies the other, to such an intimate extent that for one to undermine the others ruins all.
Note that the municipal chief executive cannot be understood to serve as the citizenry’s representative in deliberations on FOIL and the Glomar response. Continuing with the above example, the NYPD is itself an expression and extension of executive power. Despite being an elected official, the mayor cannot represent the citizenry sufficient to provide citizens “presence” in deliberations about a Glomar response due to this clear conflict of interest. At least ostensibly, municipal law enforcement is an extension of the mayor’s office. Any issuance of the Glomar response therefore implicates that office. The executive is not a disinterested party. Some form of legislative oversight is required to guarantee democratic accountability, responsiveness, and transparency in these matters, to provide a bulwark against executive overreach.

Staying with the example of New York, no framework of legislative oversight yet exists sufficient to assure New York’s citizens that New York City Councilmembers possess the access, authority, and punitive powers to check the executive and compel the NYPD to include municipal legislators in these deliberations. Citizens of New York thus have no means to democratically hold the NYPD accountable regarding assertions of a Glomar response. Legislators of the City of New York are not currently empowered to “be present” on constituents’ behalf in these matters, and their mayor has a conflict of interest arising from the relationship of chief executive to law enforcement. In this existing context of law enforcement at the municipal level, a Glomar response is categorically inappropriate.

Concluding Thoughts

Existence of interdependent and interlocking systems of checks and balances at the municipal level, which would need to explicitly include legislative oversight, could conceivably result in conditions wherein issuance of a Glomar response might be appropriate within the context of New York. More precisely, argument about the appropriateness of a Glomar response could move beyond this essay’s contextual challenge onward to a far more robust public debate: is New York the kind of place where a Glomar response is welcome? How citizens of the City of New York might then navigate their answer’s implications within state and federal constraints would require discussion, but at least the substance of the Glomar response’s risks would be candidly addressed.

This essay intentionally did not advocate one way or the other for whether a democracy should ultimately consider a Glomar response, or any similar assertion, an appropriate option for its government. That kind of argument will necessarily involve analysis of the fundamental negotiation of rights that both is itself, and is at the core of, any social contract. It seems helpful simply to note how intriguing it is that the Glomar response invites such a conversation.

A persuasive task will remain once the examination concludes. Beyond quantification of benefits and costs, the question will remain: how highly does one’s population value its security, to what degree does it prize its liberty, and what risks are acceptable to each within the society one’s population seeks to become? For the Glomar response is, like any expression of State power, not merely instrumental in nature. It is always performative, too. When asserted, a Glomar response is not solely instrumentally responding to a specific FOIL request, but also performatively affirming a relationship to, a perspective on, a point of view regarding FOIL, the alleged freedom of information, and how it both is and must be with the State and the citizenry itself.
The Glomar Response
And
New York State Freedom of Information Law (FOIL)

January 29, 2018

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- All state and city agency records are presumptively open for inspection.

- Access to the information should not be thwarted by being shrouded in cloaks of secrecy or confidentiality.
When an agency receives a FOIL request it has three options available to it. It can:

- provide a copy of the requested records, which may be redacted if necessary.
- Inform the requester that the requested records are exempt from disclosure and cannot be produced.
- Inform the requester that the requested records do not exist.
  - § 89(3)
Case Law Supports FOIL Open Government Theory

- FOIL “expresses this State’s strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies.”
  - Capital Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 562, 496 N.E.2d 665 (1986);
  - Gould v. New York City Police Dep't, 89 N.Y.2d 267, 675 N.E.2d 808 (1996)(same);
Settled Law

➢ It is well settled that all state and city agency records are presumptively available for public inspection unless the records/documents in question fall squarely within one of the specific and narrowly construed exemptions from disclosure set forth in N.Y. Pub. Off. Law § 87(2) and 89(2).
Exemptions Under FOIL

N.Y. Pub. Off. Law § 87 (2) and 89(2), provides sufficient exemptions to withhold any confidential and sensitive records.

- § 87 (2)(a) (state or federal statute exemption)
- § 87 (2)(b) and 89(2) (personal privacy exemption)
- § 87 (2)(c) (contract award or collective bargain exemption)
- § 87 (2)(d) (trade secrets exemption)
Exemptions Under FOIL (Continued)

- § 87 (2)(e) (law enforcement exemption)
- § 87 (2)(f) (life and safety of another exemption)
- § 87 (2)(g) (inter-agency and intra-agency exemption)
- § 87 (2)(h) (final administration exemption)
- § 87 (2)(i) (agency information technology assets exemption)

The two most commonly used FOIL exemptions are the Law enforcement exemption (§ 87 (2)(e)) and the privacy exemption (§ 87 (2)(b) and 89(2)).
FOX Law Enforcement Exemption

§ 87 (2)(e) prevent disclosure of records compiled for law enforcement purposes if disclosed, would:

(i) interfere with law enforcement investigations or judicial proceedings;
(ii) deprive the right to fair trial and impartial adjudication;
(iii) identify a confidential source or disclose confidential information relating to a criminal investigation;
(iv) reveal criminal investigative techniques or procedures, except routine techniques and procedures.
FOIL Privacy Exemption

§ 87 (2)(b) and 89(2) both prevent disclosure of records, if the disclosure would constitute an unwarranted invasion of personal privacy.

• Where applicable the confidential information may be deleted or redacted.

• Where deletion of redaction is not sufficient the records is withheld in its entirety.
New Response Introduced by the New York Police Department

• Since 2014 the New York Police Department ("NYPD") a city agency has resorted to responding to FOIL request by claiming it can “neither confirm nor deny” the existence of the requested records.

• This response is commonly known as the Glomar Response.

• It is a response available to federal agencies only, under very narrow circumstances, pursuant to the Federal Freedom of Information Act.
Federal Freedom of Information Act ("FOIA")

FOIA procedures are similar to FOIL:
When a federal agency receives a FOIA request it also has three response options.

– the agency identifies responsive records and release them.

– if there are no responsive records it inform the requester of that fact.

– If parts of or the entire requested records are exempt from disclosure under one of FOIA’s nine statutory exemptions, it withholds the exempt records/documents, and releases the non-exempt records.
Vaughn Index

- In the event of litigation a federal agency may justify record withholding under a FOIA exemption through a persuasive Vaughn index.

  - FOIL does not have an analogous index.
Vaughn Index (Continued)

- The Index verifies that
  (1) the records requested are exempt from disclosure; and
  (2) the agency has adequately segregated exempt from non-exempt materials.

- The index **must** be provided and **specifically** list the **withheld** documents and articulate the applicable exemption

  - Under FOIA (“the affidavits in support of NONDISCLOSURE must show, with reasonable specificity, why the documents fall within the exemption”). See e.g. *N.Y. Times Co. v. Dep't of Justice*, No.13-422(L), 2014 WL 1569514 (2d Cir. Apr. 21, 2014).
What is Glomar?

Glomar is a judicial doctrine derived from federal case law that permits a federal agency to refuse to confirm or deny the existence of records where to answer the inquiry would itself cause harm cognizable under a FOIA exemption.

- *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982); *Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009).
What is Glomar? (Continued)

- To properly employ the Glomar response to a FOIA request, an agency must “tether” its refusal to respond to one of the nine FOIA exemptions.
  
  *Wilner*, 592 F.3d at 71.

- In other words, a “government agency may . . . refuse to confirm or deny the existence of certain records . . . if the FOIA exemption would itself preclude the acknowledgement of such documents.”
  
  *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996); *Wilner*, 592 F.3d at 68.
Tethering Glomar to FOIA Exemption

- In most cases where the Glomar response has been accepted, it has been tethered to FOIA Exemption 1 and 3

- **Exemption 1** applies to records classified pursuant to an Executive order to be kept secret in the interest of national defense. 5 U.S.C. § 552(b)(1). See *Judicial Watch, Inc. v. Dep’t of Def.*, 857 F. Supp. 2d 44, 55 (D.C. Cir. 2012)

- **Exemption 3** requires a statute to mandate the non-disclosure of the record. 5 U.S.C. § 552(b)(3).
Tethering Glomar to FOIA Exemption (continued)

In isolated incidences the Glomar response is tethered to FOIA exemption 7. 5 U.S.C. § 552(b)(7).

- **Exemption 7** deals with records or information compiled for law enforcement purposes.
NY Case law has held that courts should find federal case law and legislative history “instructive” when construing specific state FOIL provisions that are “patterned” after federal FOIA provisions.
No Precedent

- No court in all 50 states has permitted the use of the federal Glomar response by a state or city agency or a municipality.

- Why should the NYPD be entitled to such a ruling, especially when it cannot meet the requisite burden to benefit from the use of the Glomar response.
State and City Agencies Lack Classification Authority and Executive Authority

- Unlike federal agencies with authority to assert the Glomar response.
  - State and city agency **do not have the legal authority to classify documents.**
    - The classification authority under Glomar is pre-empted by the federal government.
    - Neither the President nor Congress has authorized state or city agencies to classify information.
  - State and city agencies cannot **avail themselves to any executive order** that would permit them to use Glomar.
State and City Agencies Lack the Authority Possessed by Federal Agencies

- State or city agencies and municipalities are not the CIA, the FBI or their equivalent.

- Congress has not vested state or city agencies with the same “sweeping” powers it has provided specific federal agencies via statute such as the National Security Act or the Central Intelligence Act.
State and City Agencies Lack Federal Checks and Balances

- Additionally federal law has established a system of checks and balances to protect not only the agencies involved but also the American people from an all-powerful security state.

- Federal agencies have to fulfil the previously mentioned requirements and conditions to benefit from FOIA exemption 1 and 3.

- New York State FOIL does not have an analog.
FOIL Legislative History

- The New York FOIL legislation went into effect on September 1, 1974.

- In 1975 it was amended to parallel the federal Freedom of Information Act.

- In 1977 it was repealed and replaced with a significantly changed law (1977 N.Y. Laws ch. 933).

None of the amendments included an exemption to disclosure that permits an agency to say it can “neither confirm nor deny” the existence of records responsive to a request.

Significantly, the 1977 overhaul of the statute was after the landmark *Phillippi v. CIA*, 546 F.2d 1009, (D.C. Cir. 1976) (*Phillippi I*), case that ushered in the Glomar doctrine. Yet even after that significant ruling became federal law, the New York State Legislature still did not see fit to engrave the Glomar response into New York State FOIL.

The inaction of the legislature shows a clear intent not to adopt the Glomar doctrine.
FOIA Legislative History

- Federal FOIA was enacted on July 4, 1966, but had an effective date of one year after the date of enactment, on July 4, 1967.

- FOIA also favors open government.

- It provides the public the right to request records from any federal agency.

- FOIA limited exemptions are narrowly tailored.
FOIA Legislative History (Continued)

- Under FOIA federal agencies have 3 response options to a FOIA request.

- However, since 1976, a fourth non-statutory response has arisen, through which authorized agencies can under narrow circumstances refuse to confirm or deny the existence of requested records — on the grounds that acknowledging their very existence would itself reveal secret information.
Conclusion

- FOIA calls for open government.
- FOIL calls for open government.
- The Glomar response is sparingly used by specific federal agencies vested with the authority to use it by either Acts of Congress or Executive Order.
- State or City agencies and municipalities do not have this inherent authority, thus cannot avail themselves to the Glomar response.
FOIL Meets GLOMAR

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- Section 1983 Cases in SDNY & EDNY
- Police misconduct / tort cases in NY Supreme Court
- FOIL cases
- CCRB investigations
“[A]n agency responding to a FOIA request refuses to confirm or deny the existence of the requested records if such confirmation or denial would cause harm cognizable under a FOIA exemption.”*

“A]n agency may refuse to confirm or deny the existence of records (i.e., assert a Glomar response) if the FOIA exemption would itself preclude the acknowledgement of such documents. ... When employing a Glomar response, an agency must 'tether' its refusal to respond to one of the nine FOIA exemptions.”**


GLOMAR
Should Be Very Rare

- We find a Glomar response justified only in "unusual circumstances, and only by a particularly persuasive affidavit."***

*** Florez v. CIA, 829 F.3d 178, 184-85 (2d Cir. 2016).
The Court of Appeals has disapproved of judicial modification of the FOIL statutory scheme.

“Given that the Legislature established a general policy of disclosure by enacting the Freedom of Information, we cannot undermine that policy by exempting a large category of information from FOIL in a manner inconsistent with the plain language of the statute.”

Federal GLOMAR Procedure

- Agency does not admit the existence of the documents, even to the court:
  - No “Vaughn index” of documents withheld and statutory basis.
  - No in camera review.
  - Claim to exclusion necessarily generalized, not linked to any particular document.

- “Instead the agency meets its burden by submitting an affidavit showing that the requested material, if it exists, logically would fall within the claimed exemptions.”

- “The affidavit must also set forth the harm that would ensue from merely acknowledging the existence of the requested records.”

- “Because of the alleged sensitivity of the request, sometimes the agency's affidavits are submitted to the court in camera, which of course gives the plaintiff no chance to respond.”

- “In evaluating an agency's Gomlar response the court should attempt to create as complete a public record as is possible.”

*** Florez v. CIA, 829 F.3d 178, 184-85 (2d Cir. 2016)
GLOMAR Castrates the FOIL Principle of Rational Mistrust

- FOIL exists because the NYS Legislature believes:
  - Citizens need to know what public agencies are doing.
    - To prevent abuse
    - To participate in democratic self-government
  - Agencies will not provide the public this necessary information unless they are compelled to do so.
    - Why admit abuses?
    - Why complicate decisions by involving the public?
    - Why risk electoral defeat?
  - A co-equal branch (the courts) and adversarial proceedings (Art. 78) are required to compel these reluctant agencies to in the citizens’ interest rather than their own.
GLOMAR Puts Agency in Near-Total Control

“[T]he procedures used to vet a Glomar response ... ensure that the decision to approve or deny a Glomar response is made with very little information, and with almost no useful input from the person or entity seeking the documents. A Glomar response virtually stifles an adversary proceeding.”****

“The insertion of the Glomar doctrine into FOIL would build an impregnable wall against disclosure of any information concerning the NYPD's anti-terrorism activities.”****

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NYPD Lacks Competence at Conforming to Law and Self-Oversight

- Routinely claims inability to protect safety while obeying Constitutional limits.
- NYPD dedicates massive resources to unlawful “law enforcement” efforts which inflict serious harm on the community
  - Summons quotas
  - Marijuana “plain view” arrests
  - Stop & Frisk
  - Vagrancy & cruising statutes
  - Lucky bag arrests

- Ineffective internal control procedures:
  - 20,000+ unlawful arrests for vagrancy & cruising statutes; failed to comply with court order for five years.
  - Civil forfeiture database.
  - Handschu:
    - “The weaknesses in NYPD’s current case tracking and monitoring process – which make it difficult to reliably assess NYPD’s compliance with the Guidelines – highlight the need for NYPD to use a more thorough, consistent, and auditable system for registering and tracking dates and deadlines for the authorization and extension of investigations and the use of human sources.”
    - “the Intelligence Bureau’s current tracking and monitoring mechanism is not effective.”

NYPD Has a Consistent Policy of Lying – Cannot Be Trusted With GLOMAR Power

- Routine lying:
  - Criminal complaints (see: plain view marijuana; resisting arrest, etc.)
  - Stop and Frisk records and policy statements
    - Conduct justifying the stop
    - Need to stop and frisk 800,000 per year.
  - Evidence-related testimony in criminal proceedings.
  - NYPD scandal *du jour* (most recent: ticket-fixing).

- Most of these lies are criminal acts. Most are unpunished.
Example: Failure to Comply With Handschu

- “NYPD's compliance failures demonstrate the need for ongoing oversight, which OIG-NYPD will now provide.”

- “Terrorism is a real threat that requires constant vigilance; it does not require, however, that NYPD fall short of adhering to well-accepted rules for protecting the rights of the citizens it is sworn to protect. Indeed, there was nothing in the documents that OIG-NYPD reviewed to suggest that adherence to the rules would have harmed the investigations at issue or hindered vigorous anti-terrorism enforcement.”

- “Because there has historically been no third-party review and NYPD is self-monitoring, careful compliance is particularly important.”

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

In the Matter of the Application of

JAMES LOGUE,

Petitioner,

-against-

NEW YORK CITY POLICE DEPARTMENT,
and WILLIAM BRATTON, in his official
capacity as Commissioner of the New York
City Police Department,

Respondents.

Index No. 153965/2016
IAS Part 13
(Mendez, J.)
I hereby request under the Freedom of Information Law (FOIL) all records pertaining to officers' filming and photographing in Grand Central Station from November 2014 through January 2015, including, but not limited to:

1. all pictures, videos, audio recordings, data, and metadata related to Grand Central Station protests that were collected or received by your agency;
2. records describing the information collected, the dates of collection, and the official purpose of the collection;
3. copies of files documenting the use of property within Grand Central Station related to monitoring of the protests;
4. records describing the surveillance equipment used by officers within Grand Central Station;
5. copies of all communications sent or received by your agency between November 2014 and January 2015 pertaining to protests in Grand Central Station.
6. the names of governmental organizations and private security companies who collaborated in the collection of the information;
7. the names of all organizations public and private with whom the information was shared.
This is in response to your letter dated, 01/25/2015 in which you request access to certain records under the New York State Freedom of Information Law ("FOIL").

In regard to the documents which you requested in items “1,2,3,3,5, and 6”, this unit is unable to locate records responsive to your request based on the information you provided. In addition, to the extent that if such records existed, they would be subject to exemptions under section 87(2) of the Public Officers Law.

In regard to the documents which you requested in item “4”, I must deny access to these records on the basis of the following:

Public Officers Law section 87(2)(b) as such information, if disclosed would constitute an unwarranted invasion of privacy.

Public Officers Law section 87(2)(f) as such information, if disclosed could endanger the life or safety of any person.

Public Officers Law section 87(2)(e)(i) as such records/ information, if disclosed would interfere with law enforcement investigations or judicial proceedings.

Public Officers Law section 87(2)(e)(iii) as such information, if disclosed could identify a confidential source or disclose confidential information relating to a criminal investigation.

Public Officers Law Section 87(2)(e)(iv) as such information, if disclosed, would reveal non-routine techniques and procedures.

Public Officers Law Section 87(2)(g) as such records/information are inter-agency or intra-agency materials.
In addition, to the extent that your appeal may encompass records that were requested by Mr. Logue, the appeal is denied because the requested records, if in existence, would be exempt from disclosure pursuant to Public Officers Law (POL) Section 87(2)(e)(iv) since disclosure of any such records would reveal non-routine investigative techniques. In addition, such records are exempt from disclosure pursuant to POL Section 87(2)(e)(i) since the disclosure of any such records would hinder law enforcement investigations and potentially compromise the identity of undercover officers. Also, such records are exempt from disclosure pursuant to POL Section 87(2)(f) because disclosure thereof could endanger both civilians and undercover officers who are in some way connected to any investigation. Also, to the extent that any such records include confidential information, the requested records are further denied pursuant to POL Section 87(2)(e)(iii). Finally, the success of any such investigations could be compromised by disclosure of such records, thereby potentially endangering the people of the City of New York.
NYPD Litigation Argument

- NYPD argues that disclosing “multimedia records” would allow malefactors to:
  - Learn what kind of optical technology is used for surveillance.
  - Hack the network.
  - Learn “precise locations” of surveillance cameras.
  - Learn “blind spots” where cameras don’t cover.

- “Facts” were set forth in affidavit by Assistant Chief John Donahue XO of Intelligence Division.
NYPD Production Teed Up More Litigation

- Only one video was disclosed – 15 second film shot by handheld camera, probably a cell phone.

- As a mobile camera, cell phone has not “precise location” to be disclosed.

- As only one camera, and a mobile camera, has no relevance to blind spots of installed surveillance network.

- NYPD redacted time and date of all communications.
Court Ordered Disclosure

- Ordered disclosure of multimedia records and communications.
- Allowed redaction of identifying information re officers sending and receiving messages.
Post-Judgment, City Seeks “Ex Parte Conference” With Judge Mendez

I am the Assistant Corporation Counsel assigned to represent the Respondents New York City Police Department and former Commissioner William Bratton (collectively, “Respondent” or “NYPD”) in the above-referenced Article 78 FOIL proceeding. I write to bring to the Court’s attention a dispute between the parties concerning Respondents’ compliance with Your Honor’s Order of February 6, 2017 (dkt. no. 61) that Respondents believe can be resolved in a conference with Your Honor, and without the need for motion practice. However, due to the exceptional circumstances and sensitive nature of the NYPD’s position on this issue, and the risk that public discussion could lead to the identification of undercover officers and also jeopardize the safety of others, Respondents respectfully request that they be permitted to explain their position to the Court in an ex parte, in camera conference.

~ Lesley Berson Mbaye
Assistant Corporation Counsel
July 10, 2017 Letter
(Docket 92)
Proposes Conference re Issues Raised in Inter-Party Correspondence

- Respondents request was NOT:
  - A motion or OTSC.
  - A response to a motion or OTSC.
    - The letter from petitioner’s counsel was simply a letter, and was not filed to the docket.
  - A response to an Order of the Court.

- Respondents had filed no notice of appeal or motion to reconsider/renew Court’s judgment, and were time-barred to do so.

- Respondents claimed ex parte conference could avoid need for motion practice. But what motion?
  - Petitioner’s letter indicated intent to file motion for contempt in the future if parties did not resolve dispute.
NYPD Wants to Reargue Redaction Issues

The Court’s Judgment permitted redaction of “identifying information” concerning senders and recipients of disclosed communications. NYPD redacted the time & date of such communications. Petitioner’s letter objected that message time and date are not “identifying” information.

NYPD says it has to secretly explain its “position” on these issues because explanation:
- “would require NYPD to reveal or explain non-routine law enforcement techniques” and
- “would also implicate issues of public safety and security.”

In providing these documents, however, NYPD did not unredact the remaining information sought by Petitioner (i.e., date, time, and filename information), because doing so would reveal non-routine investigative techniques, and also could result in the identification of undercover police officers, thereby endangering their lives and safety. Petitioner’s June 15 letter also asked NYPD to “provide us with further information about why this data in particular [i.e. portions of file names, date, and time information] would identify NYPD personnel.” Providing such an explanation, however, would require NYPD to reveal or explain non-routine law enforcement techniques, and also would implicate issues of public safety and security.
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NYPD Wants to Explain Why Its Sworn Lies Aren’t Perjury

Petitioner’s letter points out that Chief Donahue’s affidavit contains perjury unless it is true that there are multiple videos from stationary cameras (sufficient to permit inference as to blind spots, for example). No such videos were produced. Petitioner asked: Are you in contempt or did Chief Donahue perjure himself?

NYPD again says it has to secretly explain its “position” on this issues because explanation:
• “would require NYPD to reveal or explain non-routine law enforcement techniques” and
• “would also implicate issues of public safety and security.”

Similarly, an explanation of NYPD’s position regarding the alleged video and/or still photographic surveillance records also would require NYPD to reveal or explain non-routine law enforcement techniques, and also would implicate issues of safety and security.
Petitioner’s First Response: File Counter-Letter Fast

Addressing Substance:
• Subject matter of NYPD’s proposed conference is a matter already decided by the Court — against the Respondents — and time for reargument has passed.

Instead of complying with the Judgment and Order, by their July 10th letter, Respondents seek an *ex parte* proceeding to re-litigate arguments that were fully briefed and decided against them. They claim that the withheld imagery and information would “reveal or explain non-routine law enforcement techniques” and that implicate matters of “public safety and security.” *See* Respondents’ letter, NYSCEF Doc. No. 92. Respondents already advanced these arguments during the litigation, and the Court rejected those arguments as insufficient and conclusory. *See generally* Judgment and Order, NYSCEF Doc. No. 62.
Petitioner’s Later Response: File Motion for Contempt and Sanctions

- Petitioner argued that the letter was frivolous and therefore sanctionable because:
  - No justification for an ex parte conference.
  - No cited or existing legal basis for one.
  - No procedural purpose to one.
  - Not making or responding to a motion.
  - What exactly is the Court supposed to do after this conference that will avoid motion practice?
  - Technically not filed as either a motion
NYPD Tries To Justify Ex Parte Conference Request Citing GLOMAR
Petitioner Argued That False Testimony Regarding Video Required Sanctions

Assistant Chief Donahue Falsely Swore that “Precise Locations” of Cameras and “Blind Spots” Would be Revealed.

Assistant Chief Donahue stated that for at least one area of Grand Central Terminal, there was a responsive video from every installed surveillance camera, saying:

[T]hese records would show not only which areas were under surveillance, but also the inverse: specifically, any areas NYPD does not have under surveillance, thereby exposing gaps in coverage. (Donahue Aff. ¶ 24).
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Petitioner Argued for Sanctions for Baseless Legal Arguments Repeating False Testimony Regarding Video

Multiple written submissions referenced “blind spots” and “precise locations” of cameras, none of which arguments were remotely applicable to what was actually produced.

35. Much of the argument and legal authority cited by Ms. Edmonds relating to the multimedia records concerned an agency’s supposed right to withhold information about the location of stationary cameras and installed “electronic information infrastructures” such as fiber-optic networks (Edmonds Memo pp. 19-21, 24-26), including:

a. “Several courts interpreting parallel statutes have similarly found that government agencies should not be required to disclose records that could show the precise locations of cameras.” (Edmonds Memo p. 20).

b. Case quotations and parentheticals about whether “camera locations” must be disclosed under FOIL. (Edmonds Memo pp. 20-21).

NYPD Argued That Petitioner Misunderstood Perjured Testimony

- Taking a minor point of Petitioner and representing it as Petitioner’s ONLY argument, NYPD argued that use of plural phrase “multimedia records” did not imply multiple (two or more) videos, because the dozen photographs were also “multimedia” and therefore the use of the plural was accurate.

- NYPD did not attempt to explain its “blind spots” or “precise locations” arguments.
Analogous to the case at bar are those cases challenging an agency’s use of a Glomar response -- in which the agency neither confirms nor denies the existence of responsive records -- in connection with a request for records pursuant to the federal Freedom of Information Act ("FOIA"). To justify such a response, an agency must submit an affidavit to the court showing that a FOIA exemption “would itself preclude the acknowledgment of such documents.” Wilner v. NSA, 592 F.3d 60, 68 (2d Cir. 2009) (internal quotations and citations omitted); Minier v. CIA, 88 F.3d 796, 800 (9th Cir. 1996); Phillipi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (agency’s affidavit should “explain [] in as much detail as possible the basis for [the agency's] claim that it can be required neither to confirm nor to deny the existence of the requested records.”).
The Court Chose Not to Punish the *Ex Parte* Request

On July 10, 2017, prior to Oral Argument on Motion Sequence 002, Respondents sent letters to Petitioner's Counsel and the Court responding to Petitioner's objections to redactions and the video or multi-media production, seeking an ex parte in camera conference to explain their position (Mot. Exhs. R and S). Respondent's letter request was not properly before the Court and no conference was held.

- 11/29/2017 Decision and Order, p. 2

Respondents have made a colorable argument to avoid sanctions on the request for an “ex parte in camera conference.” Their conduct is not sufficient to warrant sanctions for frivolous conduct. Petitioner has not shown that Assistant Chief Donohue committed perjury by stating there were “multi-media records.” The plural use of “records” is potentially satisfied by Respondents production.

- 11/29/2017 Decision and Order, p. 4
The Court Did Not Accept Petitioner’s Perjury Argument

The Court adopted the NYPD’s position that the sole inaccuracy in NYPD submissions was the use of the plural noun for the word “records.” Petitioner will appeal and/or seek reargument on this issue.

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- 11/29/2017 Decision and Order, p. 4
The Court Found NYPD in Contempt for Its Redactions

Respondents have not provided an explanation for the failure to include the date and time on the communications records under item 4. Their argument that the information will identify plainclothes and undercover officers, and that “NYPD cannot publicly explain how the redacted information could lead to the identification” fails, given that no proper effort was made to seek in camera inspection of any records, or to seek reargument or modification of the February 6, 2017 Decision, Order and Judgment, and is sufficient for a finding of contempt. The Court concedes that the “file name” might include the name or other identifying information of the officer involved and can remain redacted.

Respondents previously argued that disclosure would reveal surveillance capabilities. Their argument was addressed and rejected in the February 6, 2017 Decision, Order and Judgment and Respondents did not seek reargument or modification. Respondents in choosing to use their interpretation over what this Court actually stated prior to and in the directives under item 1, have failed to substantially comply with this Court’s Order.
NYPD Is Now Trying to Reargue This Order

- NYPD Filed an OTSC on Friday, evidently seeking to put reargument before a different judge.
- OTSC has been granted only so far as to stay case until Judge Mendez is available.
In the Broader Battle for Openness and Accountability, What’s At Stake is Everything

“When we allow the police, FBI, CIA, and NSA to operate without oversight simply by invoking the magic word of terrorism, we do to ourselves what ISIS could never do to us.”

23. It is worth remembering that terrorism does not succeed by injuring the target society. It succeeds by inducing the target society to injure itself. Thus, the attack on 9/11 – already a success because it killed 3,000 people – became a success of millennial proportions when this country, in blind scared thoughtless reaction, committed ourselves to a never-ending failed war in the Middle East and South Asia. That never-ending failed war killed more Americans than bin Laden did, cost trillions of dollars of American strength, and sucked dry our credibility as a world power. The 9/11 attack hurt us; our reaction to the attack hurt us much more. The 9/11 attack helped bin Laden; but it was our response to that attack which turned huge swaths of the Middle East into terror’s playground.

24. Less dramatically, what terrorist organizations usually can hope for is that they can induce the target society to injure itself in ways that incrementally but progressively weaken it. ISIS is trying to encourage Islamophobia in the West, for example, because it makes it easier to recruit. A large segment of American society is happy to play along – they are willing dupes for the terrorists.