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# Judge Declines Police Motion to Dismiss FOIL Request

Andrew Keshner, New York Law Journal

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Though the New York City Police Department denied a Muslim student's request for surveillance records by refusing to acknowledge their existence, a judge said he would not adopt the legal doctrine allowing such a response.

Police asked Manhattan Supreme Court Justice Peter Moulton ([See Profile](#)) to follow the "Glomar Doctrine," which allows federal agencies to invoke security concerns to neither confirm nor deny records requested under the Freedom of Information Act.

In [Hashmi v. New York City Police Department](#), 101560/2013, Moulton declined to adhere to the doctrine used in federal matters, saying the decision to incorporate the doctrine should be made by state lawmakers, not state judges.

Furthermore, Moulton said, abiding by Glomar would upend statutory balances now set between secrecy and public disclosure in the state's Freedom of Information Law.

"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," Moulton wrote. "A Glomar response virtually stifles an adversary proceeding."

Moulton's rejection of the city's motion to dismiss Samir Hashmi's Article 78 petition is at odds with a September ruling by his colleague, Manhattan Supreme Court Justice Alexander Hunter Jr.

Hunter allowed police to use a Glomar response in a FOIL request regarding alleged surveillance of an imam and a Harlem mosque. When Hunter ruled on [Abdur-Rashid v. New York City Police Department](#), 101559/2013, he called the case an "important issue of apparent first impression" ([NYLJ, Sept. 24](#)).

Imam Talib Abdur-Rashid is appealing Hunter's decision.

In a footnote in *Hashmi*, Moulton wrote that he was "not persuaded" by Hunter's reasoning.

Both Moulton and Hunter's case were prompted by Associated Press articles on New York City police surveillance of various Muslim individuals, groups and mosques.

A 2012 article reported that surveillance stretched throughout the Northeast and pointed out that the Rutgers University Muslim Student Association was among the watched groups.

In the article, a police spokesman, when asked about the monitoring, gave a list of individuals arrested or convicted on terrorism charges who were once members of student associations across the region.

"As a result, the NYPD deemed it prudent to get a better handle on what was occurring at [Muslim student associations]," said the spokesman, adding that police tracked student websites and collected public information between 2006 and 2007.

Hashmi was a Rutgers student from 2006 to 2011 and served as treasurer of the school's Muslim Student Association.

In an affidavit, Hashmi said he has denounced terrorism, has never been charged with a crime and done nothing to deserve surveillance. He claims the only reason he was "spied" on was because he was Muslim.

Hashmi submitted a FOIL application to police in October 2012. He requested "all records related to any investigation" of him between 2006 and 2011, as well as investigation results.

In denying the request, the agency said if the records were in police possession, they were shielded from disclosure on various grounds.

The agency cited FOIL exemptions including possible interference with law enforcement probes or judicial proceedings, disclosure of non-routine criminal investigations and the possible endangerment of life and safety.

Hashmi pressed his administrative appeal while police surveillance in Muslim communities was becoming an issue in the New York City mayoral race. After Bill de Blasio was elected mayor, he dissolved the police unit conducting surveillance.

When Hashmi's administrative appeal failed, he filed the Article 78 petition before Moulton.

Moulton ruled that in order to invoke FOIL exemptions, law enforcement agencies have to first "acknowledge the existence of responsive documents."

Often, he added, judges need to review the information in chambers to decide what falls in the exemptions. Federal procedures for information requests were similar, he said.

But the Glomar doctrine—arising from a query on a salvage operation of a Soviet nuclear submarine by a ship named the Hughes Glomar Explorer—allows federal agencies to depart from the usual approach if confirmation or denial of responsive documents cause cognizable harm under FOIA exemptions.

The police insisted they needed the option of using a Glomar response to avoid jeopardizing surveillance and anti-terrorist strategies.

Because federal lawmakers never codified Glomar into the FOIA statute, the police argued, there was no requirement that state legislators formally incorporate Glomar into the FOIL statute.

But Moulton said Glomar responses have been shaped by more than 30 years of legal precedent. "It may be that the state Legislature would not choose to adopt wholesale that body of law," he said.

Moulton said differences between FOIA and FOIL exemptions also raised questions on whether judges "should engraft" Glomar onto the state statute.

For example, the judge said federal agencies often invoked Glomar in connection to a FOIA exemption cloaking "classified documents" designated by "executive order."

"Municipal governance does not include an analogous category of documents," Moulton said.

Besides, the judge said there was nothing in the record indicating that police work "has been compromised by its inability to assert a Glomar response."

In fact, case law showed police have protected sensitive information "very well" under FOIL procedures that gave a "modicum of oversight," he said.

He emphasized that his denial of the dismissal motion was not meant as judgment on the police's work. "The court is instead concerned with oversight of governmental functions as embodied by FOIL."

Omar Mohammedi of Manhattan represented Hashmi, as well as Imam Talib Abdur-Rashid in the case Hunter decided.

In a statement, Mohammedi said Moulton's ruling not only asserted Hashmi's "right to receive information concerning him, but establishes a precedent that is in opposition to the similar case regarding Imam Talib Abdur-Rashid."

Senior Law Department Counsel Jeffrey Dantowitz appeared for the city.

"By allowing the subjects of covert law enforcement operations to learn that they are the subject of such operations, the Court's decision severely undermines the City's counter-terrorism efforts and compromises its intelligence capabilities," Dantowitz said in a statement.

"We are disappointed that, unlike in the earlier Abdur-Rashid decision decided by a different judge, the Court declined to recognize the application of a doctrine which has been so comfortably a part of analogous federal law for nearly 40 years, which allows us to neither confirm nor deny that an individual is the subject of an investigation."

Robert Freeman, executive director of the state Committee on Open Government, said that apart from the city's police force, he did not know of any other agency relying on Glomar.

"The government is obliged to tell the truth about the existence of records. The state Legislature has made that clear. Any change in that principle, as suggested by the court, should be addressed by state Legislature," said Freeman, who was not involved in the case.

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