Judges Hear Challenge to NYPD Transparency in Spy Lawsuits

By JAKE PEARSON, ASSOCIATED PRESS ·
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A lawyer for two Muslim men told a panel of state appellate judges Tuesday that the New York Police Department wrongly used a Cold War-era federal legal doctrine to neither confirm nor deny the existence of records related to investigators' surveillance of his clients that were requested under state open records law.

By invoking the Glomar doctrine in responding to Freedom of Information Law requests by a Rutgers University student and a well-known Harlem imam, city lawyers had effectively claimed an expansive privilege from disclosing certain kinds of information, lawyer Omar Mohammedi told a four-judge appeals court panel.

Glomar "is a federal doctrine that does not exist in FOIL," Mohammedi said in state Supreme Court Appellate Division in Manhattan, using the acronym for the state open records law. "It's a blanket exemption."

Two lower court judges have issued conflicting rulings in lawsuits brought by the Muslim men, Samir Hashmi and Talib Abdur-Rashid, related to their surveillance after the NYPD responded to 2012 FOIL requests by invoking Glomar.

Their lawsuits were prompted after a series of Pulitzer Prize-winning stories by The Associated Press detailed the ways in which the nation's largest police department searched for possible terrorists after the Sept. 11 attacks, in part by infiltrating Muslim student groups and putting informants in mosques.

This year, the city settled lawsuits over the surveillance practices, allowing a civilian lawyer appointed by the mayor to attend meetings about secret investigations.

A city lawyer, Devin Slack, told the judges the police were justified in invoking Glomar, noting that the department's intelligence chief, Thomas Galati, wrote in an affidavit that requiring the NYPD to show who was under surveillance could allow would-be terrorists to gain sensitive information that jeopardizes investigations.

That prompted one justice, Rosalyn Richter, to ask whether the city was asking courts to believe that because "the city says so, it must be so?"

Slack said responses of open record requests — even denials — that acknowledge the existence of certain documents could disclose protected information.

"FOIL shows it to the world," he said.

Glomar gets its name from a 1976 federal court decision that allowed the CIA to "neither confirm nor deny" whether records existed related to the Hughes Glomar Explorer ship that was used in the recovery of a Soviet nuclear submarine.

Robert Freeman, the executive director of the state Committee on Open Government, said state law already clearly delineates how agencies must respond to FOIL requests. If judges acknowledge Glomar, courts could be denied the ability to inspect sensitive records to determine the appropriateness of their disclosure, he said.

In an amicus brief, the Reporters Committee for Freedom of the Press and 20 media organizations warn that Glomar impedes transparency, noting it has increasingly been used by federal agencies even for requests unrelated to national security.

It isn't clear when the panel might issue a decision.