NEWS

# Judges hear challenge to NYPD's use of secrecy law to dodge open-records request

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By JAKE PEARSON / THE ASSOCIATED PRESS

NEW YORK – 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 Muslims that were requested under state open records law, a lawyer argued Tuesday.

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 not spelled out in state law, 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 in city neighborhoods after the Sept. 11 attacks. Those efforts included cataloging Muslim neighborhoods, infiltrating Muslim student groups, putting informants in mosques and listening to sermons.

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, arguing the men could seek the information via lawsuits.

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 clearly delineates how agencies must respond to requests: by providing the requested information, by denying a request citing certain exemptions in state law or by acknowledging the record doesn't exist.

If judges were to acknowledge Glomar, courts could be denied the right to inspect sensitive records to determine the appropriateness of 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.

The legislature, not the courts, should decide whether to allow a Glomar-like exemption under FOIL, the brief says.

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





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