New York Law Journal

Panel Supports City's Denial of Data on NYPD Surveillance

Andrew Denney, New York Law Journal

June 3, 2016

Police properly applied a legal doctrine allowing it to refuse to acknowledge the existence of records, requested under state Freedom of Information Law, that related to surveillance programs, a Manhattan appeals court found.

The ruling by the Appellate Division, First Department, settles a dispute between two trial judges who disagreed in 2014 as to whether the New York City Police Department could use the "Glomar Doctrine." The policy allows federal departments to cite security concerns to neither confirm nor deny the existence of records requested under the federal Freedom of Information Act.

The doctrine is named for an inquiry into a salvage operation of a Soviet nuclear submarine by a ship named the Hughes Glomar Explorer.

In September 2014, Supreme Court Justice Alexander Hunter Jr., sitting in Manhattan, ruled in *Abdur-Rashid v. New York City Police Department*, 101559/2013, that Glomar could be invoked to deny an Islamic group's request under the state's Freedom of Information Law for NYPD records related to surveillance of the Harlem's Mosque of Islamic Brotherhood (NYLJ, Sept. 24, 2014).

Hunter said that, while federal law does not apply to state or local records, state courts may use federal court precedents when considering questions about New York's open-records law. He also said the NYPD had met the burden for invoking Glomar by explaining the risks posed by disclosure, such as undermining the NYPD's counterterrorism operations and revealing its sources of information.

But about two months later, Manhattan Supreme Court Justice Peter Moulton ruled in *Hashimi v. New York City Police Department*, 101560/2013, that inserting Glomar into the state's open records law would erect an "impregnable wall" against disclosing any information about the NYPD's counterterrorism program. He said the decision to incorporate federal doctrine into state law should be left to the state Legislature (NYLJ, Nov. 20, 2014).

Moulton also wrote in *Hashimi,* a case involving a Muslim student who requested records on surveillance of him, that he was not persuaded by Hunter's reasoning in *Abdur-Rashid.*

On Tuesday, a unanimous panel consisting of Justices David Friedman, Richard Andrias, David Saxe and Rosalyn Richter issued a single ruling affirming Hunter and reversing Moulton.

The justices said in an unsigned decision that NYPD met its burden to "articulate particularized and specific justification" for invoking Glomar in the form of an affidavit submitted by the department's intelligence chief, who said that confirming or denying the existence of the records in question would reveal that certain parties or locations were under surveillance (see *Wilner v. National Sec. Agency*, 592 F.3d 60 [2nd Cir. 2009]).

"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," the judges said.

The judges said that the NYPD showed that answering the plaintiffs' inquiries would cause "harm cognizable" under the law enforcement and public safety exemptions of Public Officers Law §87(2).

Citing *Matter of Hanig v. State of N.Y. Dept. of Motor Vehicles*, 79 NY2d 106, 110 (1992), the panel wrote that Glomar is "consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL."

Devin Slack of the New York City Law Department's appeals division appeared for the NYPD.

"We are all safer because of this ruling, which confirms that the NYPD is not required to reveal the targets of counterterrorism surveillance," department spokesman Nicholas Paolucci said.

Omar Mohammedi of the Law Firm of Omar T. Mohammedi, who represents the plaintiffs in both cases, said he plans to appeal. He found the decision "problematic" and said it could open the door for abuse by state and city departments using the doctrine to avoid disclosing files.

"I'm very disappointed and I think the law was not applied here," he said.

The New York Civil Liberties Union, the Brennan Center for Justice at the New York University School of Law and about 20 media companies and media advocacy groups filed friend-of-the-court briefs.

Mariko Hirose, Jordan Wells and Christopher Dunn appeared for the NYCLU. In an email to the Law Journal, Dunn said the First Department's decision marks a "dangerous new exception" to the Freedom of Information Law.

"The First Department's interpretation of FOIL goes well beyond what the statute permits, and we do not believe the Court of Appeals would accept this ruling," Dunn said.

Michael Price appeared for the Brennan Center; and Alison Schary, an associate at Davis Wright Tremaine, appeared for the media organizations.

Andrew Denney can be reached via email or on Twitter @messagetime.
