To Be Argued By:
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Time Requested: 30 Minutes

APL-2016-00219

New York County Clerk"s Index Nos. 13/101559 & 13/101560

Court of Appeals
State of New York

In the Matter of the Application of

TALIB W. ABDUR-RASHID and SAMIR HASHMI,

Petitioners - Appellants,

-against-

NEW YORK CITY POLICE DEPARTMENT, *et al.,*

Respondents - Respondents.

For a Judgment Pursuant to Article 78 of the New York Civil Practice Laws and Rules

BRIEF FOR PETITIONERS – APPELLANTS

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Date Completed: February 20, 2017

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PRELIMINARY STATEMENT

This matter arises originally from a decision by the Respondents–Respondents, the New York Police Department (hereinafter referred to as "NYPD") to deny two separate record requests by the Petitioners–Appellants (Talib W. Abdur-Rashid and Samir Hashmi) pursuant to the New York State Freedom of Information Law (New York State Public Officer Law ("POL"), Article 6, Sections 84-90) (hereafter referred to as "FOIL"). It is not merely the denial of the production of records that is at issue. It is the fact that Respondents-Respondents have asserted that they cannot admit or deny the existence of documents responsive to the requests.

This response – commonly referred to as a Glomar response – was created by the Appellate Division for D.C. Circuit in 1976. See, *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976) (*Phillipi 1*). *Phillippi* allowed federal agencies with the ability to classify documents pursuant to executive order or an act of Congress to respond to federal Freedom of Information Act (5 U.S.C. 552) (hereafter referred to as "FOIA") requests by neither confirming nor denying the existence of records when doing so would reveal information that would otherwise be exempt from disclosure.

The Glomar Doctrine has been in existence for over 42 years at the time of this writing, yet the Abdur-Rashid and Hashmi cases are the first

time that a state or local agency has attempted to invoke the doctrine in response to a state FOIL request. Further, over that same 42-year period, the New York State Legislature has amended FOIL at least five times, and at no time have they chosen to adopt the Glomar Doctrine.[1] The New York State Legislature, through their inaction, has clearly stated their intent not to adopt the federal Glomar Doctrine.

The Appellate Division, First Department"s decision seems unsure of which position to take as regards the application of the Glomar response. On the one hand, while saying that the Glomar response is applicable to the Petitioners-Appellants, it also recognizes that Glomar should not apply to FOIL. (R. 148). The Court appears to side with Respondents-Respondents that Glomar is consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL. (R. 146-147). On the other hand, it proceeds to argue that by its decision, the Court is not suggesting that any FOIL request for NYPD records would justify a Glomar response. (R. 148). Further, the Court did not offer any legal basis for its finding, despite Petitioners-Appellants exhaustive arguments that, unlike some federal agencies that have the authority to classify documents, the NYPD

[1] See Committee on Open Government "40 Years of FOIL and the Committee on Open Government." Available here: http://www.dos.ny.gov/coog/pdfs/Timeline2014.pdf. Last visited February 14, 2017.

has no such authority, a fact to which Respondents-Respondents have admitted. (R. 342 and R. 851-852). If the NYPD has no legal basis to classify documents, it follows that they have no legal basis to assert Glomar. In addition, the Court ignored Petitioners-Appellants‟ argument that the Glomar response is only asserted when it is tethered to any of the enumerated FOIA exemptions. As explained in this brief and in the record, the NYPD, in asserting Glomar, tethered its application to FOIA exemptions and not FOIL. The Appellate Division, First Department incorporates the Glomar Doctrine, a federally created response under FOIA, into FOIL.

Such a decision undermines several FOIL provisions, including its specifically defined and narrowly tailored exemptions, which are meant to protect an agency from having to reveal sensitive documents. (POL§ 87(2)(a-g) and 89 (2)). It also undermines the requirement that an agency certify to the completeness of records provided or to the efforts made to locate records (POL§ 89(3)(a)). Further, the decision drastically changes the stated purpose of FOIL, which favors the production of records (POL§ 84). The Appellate Division, First Department‟s decision has inappropriately undermined legislative prerogative by creating instead of interpreting the law.

While erroneously permitting the application of Glomar to FOIL, the Appellate Division, First Department neglected important federal requirements imposed on federal agencies before they can benefit from the response that they "cannot confirm or deny" the existence of documents. For instance, the Appellate Division, First Department erred by allowing the Respondents-Respondents to invoke the Glomar Doctrine based on the sub-standard Affidavits of Chief Galati and the non-existent national security concerns of a city agency, rather than basing its decision on FOIL legislation and the long standing New York State precedent and legislative intent regarding FOIL. As argued hereunder, the claims in the Galati Affidavits were made in bad faith, as Chief Galati had – prior to providing the two affidavits in issue here – previously filed a Declaration in an unrelated matter wherein he described the number and type of records gathered and retained by the unit he commanded.

Assuming, *arguendo*, that the NYPD is able to invoke the Glomar Doctrine, which is a drastic expansion not permitted under the narrowly tailored FOIL exemptions, the Appellate Division, First Department still did not require even a minimal showing that the use of the doctrine was required, nor did it address the relevancy of the Glomar response to these two specific requestors in this instant brief.

Finally, further assuming *arguendo* that the use of the Glomar Doctrine is applicable to FOIL, as explained in greater detail *infra* this brief, the federal Glomar response cannot be asserted when the federal agency has already admitted the existence of documents. *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 70 (2d Cir. 2009). The NYPD has already admitted the existence of some of the requested documents and records. It has done so in *Asian Am. Legal Def. & Educ. Fund v. N.Y. City Police Dep't*, 41 Misc. 3d 471, 477, 964 N.Y.S.2d 888, 895 (Sup. Ct. 2013), *aff'd,* 125 A.D.3d 531, 5 N.Y.S.3d 13 (N.Y. App. Div. 2015) (*AALDEF*) (the Appellate Court, First Department considered Petitioners-Appellants requested records to be a subset of the records in *AALDEF*). The NYPD has also admitted the existence of requested records in this Appellants-Petitioners' case at the March 8, 2016 oral argument before the Appellate Division, First Department. A federal agency"s acknowledgement of the documents defeats the application of the Glomar doctrine as a matter of law.

The NYPD has sufficient exemptions from disclosure under FOIL, and it should comply with the State legislation. If this Court allows the NYPD to operate outside the New York State FOIL legislation, it will have a detrimental effect on the legislation. The objective of the New York State FOIL legislation is to foster "Open Government" while protecting state and

city agencies from revealing sensitive information under stipulated and narrowly tailored exemptions.[2] The Appellate Division, First Department decision permits the NYPD to operate without any oversight either under FOIL or under the federal law. This Court should reverse the decision of the Appellate Division, First Department and direct the NYPD to respond to the Petitioners-Appellants‟ requests for documents in accordance with FOIL. The FOIL statute is more than adequate to protect the NYPD from being required to produce sensitive documents.

[2] The sufficiency of FOIL legislation was recently confirmed by the Supreme Court of the State of New York by the decision by Justice Manuel Mendez, where, in an identical petition as the two in consideration here, he annulled the NYPD‟s FOIL determination and ordered disclosure of records requested by Black Lives Matters protestors, for an *in camera* review. New York State Supreme Court, Matter Index No. 153965/16.

QUESTION PRESENTED

Can the NYPD respond to a New York State FOIL request by "neither confirming nor denying" (a federal Glomar response) the existence of records? The Appellate Division, First Department determined that it could.

STATEMENT OF JURISDICTION

On November 26, 2013, Petitioners-Appellants filed separate CPLR Article 78 Petitions in the Supreme Court, New York County challenging the NYPD‟s refusal to respond to their respective FOIL requests. The NYPD moved to dismiss the Article 78 Petitions by asserting the Glomar Doctrine in response to FOIL requests for records. (R. 341-343 and R. 850-852). In conflicting decisions, on September 11, 2014, the Honorable Alexander W. Hunter, Jr. dismissed Abdur-Rashid‟s Petition (R. 228-233), and on November 14, 2014, the Honorable Peter H. Moulton denied the NYPD‟s Motion to Dismiss Hashmi‟s Petition and directed the NYPD to respond to Hashmi‟s Petition (R. 680-700).

On July 21, 2015, Petitioner Abdur-Rashid appealed Judge Hunter‟s decision to the Appellate Division, First Department (R. 150-536). On September 4, 2015, the NYPD appealed Judge Moulton‟s decision in the *Hashmi* matter to the same court. (R. 615-840). The parties agreed that the appeals would be heard together. Oral arguments were heard on March 8, 2016. On June 2, 2016, the Appellate Division, First Department issued a decision upholding Judge Hunter‟s decision (dismissing the CPLR Article 78 Petition in the *Abdur-Rashid* matter) and reversing Judge Moulton‟s decision (directing the NYPD to respond to the Petition in the *Hashmi*

matter), thereby dismissing Hashmi‟s CPLR Article 78 Petition as well (R. 143-149). It is this decision that is the subject of this appeal.

On June 29, 2016, Petitioners-Appellants filed for leave to appeal the June 2016 decision issued by the First Department. (R. 48-142). On November 21, 2016, this Court granted the Petitioners-Appellants motion for leave to appeal. This Court‟s Order granting leave for the Petitioners-Appellants to appeal is contained in the Record at page 46. (R. 46-47).

STATEMENT OF THE CASE

On October 23, 2012, Hashmi, at the time a student at Rutgers University and the Treasurer of the University‟s Muslim Student Association ("Rutgers MSA") and Abdur-Rashid, Imam at the Mosque of Islamic Brotherhood, each made separate FOIL requests to the NYPD. They asked for records relating to the NYPD‟s surveillance of themselves and the organizations to which they belong.

On November 13, 2012, the NYPD provided their first response to the requests. The NYPD acknowledged receipt of the requests, indicated that they were investigating, and advised that a determination would be issued within 20 business days. It was not until June 28, 2013, six months after the above-referenced determination was due, that the NYPD issued determinations denying the requests. The reasons for the denial were as follows:

> A lack of certification of the Appellant‟s identities. Acknowledging the existence of records would constitute an unwarranted invasion of privacy. The Appellants‟ failure to consent to the release records to their attorney. The release would interfere with law enforcement investigations or judicial proceedings. The release of records would identify a confidential source or confidential

> information. The release of records would reveal non-routine criminal investigative techniques. The release of records would endanger the life or safety of any person. The release of records would constitute an unwarranted invasion of privacy. The records are pre-decisional inter-agency or intra-agency materials and are specifically exempted from disclosure by state or federal statute. (R. 267-268 and R. 727-728).

Inexplicably and with the intent to evade its obligation under FOIL, the NYPD also referenced federal statutes to justify the denial of the Plaintiffs-Appellants‟ requests when it included the following: FOIA exemption for inter and intra–agency communication (5 USC 552(b)(5)) (even though they referenced a similar exemption under FOIL (POL § 87(2)(g))); a provision stating that "The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure" (50 USC 403-1(i)(1)); and a provision that states that the Office of the Director of National Intelligence shall have a General Counsel (50 USC 403-3(c)(5)). More problematic, the NYPD cited to a federal provision outlining the penalties for disclosure of classified information, which is not available to the NYPD as they have no legal basis to use it. The NYPD does not have the ability to classify documents (50 USC 421), which it admitted in its

briefs (R. 342 and R. 851-852). The NYPD‟s FOIL response gives the impression that the NYPD inexplicably believes itself to be governed by federal law instead of state law.

On July 19, 2013, the Petitioners-Appellants appealed the June 28, 2013 determinations (POL § 89(4)(a)). On August 7, 2013, Jonathan David, Record Appeals Officer for the NYPD, submitted 4-page responses denying the Petitioners-Appellants‟ appeals. The stated reasons for the denial included the Petitioners-Appellants‟ failure to certify their identities or consent to release of documents to their attorney and the failure to reasonably describe the records sought. The alleged vagueness of the request presumably prevented the NYPD from searching for and locating the requested records, yet the NYPD went on to say that the records would be exempt under POL § § 87 - 89. (R. 271-274 and R. 732-736). It is not clear how the NYPD was able to evaluate whether the requested records were exempt since, according to them, the request was so vague that records could not be located. In making such a response, the NYPD failed to provide the detailed explanation it was required to offer when denying access to records pursuant to POL § 89(4).

The NYPD has the burden to prove how any FOIL exemption applies to record requests, which necessitates an acknowledgement as to whether or

not records exist (POL § 89(3)). The burden to demonstrate that the requested records fit within an exemption (see, *Matter of Hanig v. State Dep't of Motor Vehicles*, 79 N.Y.2d 106, 109, 588 N.E.2d 750 (1992)) cannot be met when, as here, the NYPD merely listed the FOIL provisions without explanation. (R. 271-274 and R. 732-736).

On November 26, 2013, Petitioners-Appellants commenced Article 78 proceedings seeking judicial review of the NYPD‟s denial of their FOIL requests. Respondents moved for dismissal of the Petitions in lieu of responding. Supreme Court, New York County Justice Peter H. Moulton denied the Motion to Dismiss in a 19-page detailed analysis supporting his opinion (R. 680-700), and ordered that the Respondents respond to the Petition. Judge Moulton opined that "[t]he adoption of Glomar would effect a profound change to a statutory scheme that has been finely calibrated by the legislature." (R. 696). He further said "the insertion of the Glomar doctrine would build an impregnable wall against disclosure." (R. 696-697). Judge Moulton found that the "Glomar response virtually stifles an adversary proceeding." (R. 697). In a conflicting decision, Justice Alexander W. Hunter, Jr., in a 5-page decision, dismissed Abdur-Rashid‟s Petition (R. 228-235). Abdur-Rashid appealed Justice Hunter‟s decision, and the NYPD appealed Justice Moulton‟s decision to the Appellate

Division, First Department. The parties agreed to argue the cases together since they involved the same issues. The New York Civil Liberties Union and the Brennan Center for Justice, as well as The Reporters Committee for Freedom of the Press (representing 20 news organizations) filed *Amici Curiae* briefs supporting the Appellants. (R. 537-614).

On June 2, 2016, the Appellate Division, First Department issued an Order (R. 143-149) dismissing the Article 78 Petitions in both cases, thereby authorizing state and local agencies to use the Glomar Doctrine in response to FOIL requests. The decision failed to provide any guidance regarding the standards to be used in determining whether the doctrine is properly invoked or the provisions of FOIL rendered superfluous by the decision.

If this Court allows the use of the Glomar Doctrine in these cases, it will be ignoring years of precedent regarding the narrow application of FOIL exemptions and the burden of proof regarding whether an exemption applies. See, *Gould v. N.Y. City Police Dep't*, 89 N.Y.2d 267, 675 N.E.2d 808 (1996). Furthermore, allowing the use of the Glomar Doctrine in these cases contradicts FOIL‟s plain language, which requires the agency to certify that the records provided are accurate or that, after a thorough search, records could not be found. *See,* POL§ 89(3). The Petitioners-Appellants request that this Court reverse the decision of the Appellate Division, First

Department and direct the Respondents-Respondents to respond to the Petitioners-Appellants‟ requests for documents in accordance with FOIL.

ARGUMENT

I. THE APPELLATE DIVISION, FIRST DEPARTMENT ERRED WHEN IT ALLOWED THE NYPD TO INVOKE THE FEDERAL GLOMAR DOCTRINE IN RESPONSE TO A NEW YORK STATE FOIL REQUEST FOR RECORDS

A. Allowing The NYPD To Invoke Glomar In Response To A New York State FOIL Request Strikes Down Years Of Precedent And Creates A Void In Existing Law

The purpose of the New York State Public Officers Law, Article 6, Sections 84-90, also known as the Freedom of Information Law, is to further governmental transparency and protect the public's right to know. Accordingly, any FOIL exemptions are interpreted narrowly. See *Matter of Markowitz v. Serio*, 11 N.Y.3d 43, 51, 893 N.E.2d 110 (2008).

It is well settled that "[P]ursuant to FOIL, government records are presumptively available to the public unless they are statutorily exempted by N.Y. Pub. Off. Law § 87(2)" (citing to *Matter of Fappiano v. N.Y. City Police Dep't*, 95 N.Y.2d 738, 746, 747 N.E.2d 1286 (2001)). "Those exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption" (*Matter of Hanig v. State of N.Y. Dept. of Motor Vehs*., 79

N.Y.2d 106, 109 [1992]).” *Thomas v. N.Y. City Dep't of Educ.*, 103 A.D.3d 495, 496, 962 N.Y.S.2d 29, 31 (2013) (emphasis added).

This Court expressed its general view of the intent of the Freedom of Information Law in *Gould*, 89 N.Y.2d 267:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption.' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 see, Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld.' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (*Id*., 275).

FOIL imposes a broad duty of disclosure upon government agencies. Government records are "presumptively open" to the public, statutory exemptions to disclosure are "narrowly construed," and the agency must articulate a "particularized and specific justification" for nondisclosure. See, *Matter of N.Y. Civil Liberties Union v. City of Schenectady*, 2 N.Y.3d 657, 661, 814 N.E.2d 437 (2004) (citing *Gould*). The Appellate Division, First Department ignored this Court‟s guidance in *Gould* when it failed to construe the exemptions narrowly and failed to meet the burden of demonstrating that the requested documents fall within an exemption. Instead of following years of precedent, the lower courts completely

undermined FOIL and this Court‟s decisions in applying FOIL. The Appellate Division, First Department inappropriately created new law. The creation of a new law, as Justice Moulton correctly opined, should have been left to the state legislature, not to the judiciary. (R. 696). "It is a legislative function to write a statute that strikes a balance embodying society‟s values" (R. 700) and not the judiciarys‟. Most importantly, Judge Moulton found that there was "nothing in the record before the Court that indicated that the NYPD‟s work has been compromised by its inability to assert a Glomar response." He said "[t]o 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." (R. 699).

In *Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), the United States Supreme Court stated that "*stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." In determining that the NYPD may properly invoke a Glomar Response in reply to a FOIL request, the Appellate Division, First Department has struck down years of precedent cited throughout this brief regarding the application of FOIL.

The lower Court‟s decision creates more problems than it resolves. It ignores s*tare decisis* and oversteps the judicial authority by creating legislation instead of applying it. For these reasons, this Court should reverse the Appellate Division, First Department‟s June 2, 2016 Decision and Order.

B. The Appellate Division, First Department Erred When It Usurped Legislative Prerogative And Created A New Exemption In FOIL

In his decision in the *Hashmi* case, Justice Moulton, focusing on the roles of the legislature and the judiciary and the negative impact of allowing state and local agencies to avail themselves of Glomar, determined that the Glomar response is not available under FOIL. Justice Moulton in *Hashmi* warned against the lack of over-sight and likelihood of abuse (R. 699), ultimately determining that it is up to the legislature, not the courts, to adopt the principles of the Glomar Doctrine. (R. 700). Justice Moulton (R. 699) also pointed out that there is no evidence that the current statutory structure has hampered the NYPD‟s ability to protect confidential information and criminal investigations by asserting the FOIL law enforcement exemption. *Hashmi v. N.Y. City Police* Dep't, 46 Misc. 3d 712, 724, 998 N.Y.S.2d 596, 604 (Sup. Ct. 2014). This is particularly true in *AALDEF* (125 A.D.3d 531 (2015)) where the NYPD applied FOIL exemptions to FOIL requests

seeking records similar to those sought in this case. The Appellate Division, First Department in *AALDEF* determined that the requested records fell within several exemptions, including the law enforcement exemption (POL § 87(2)(e)). The Appellate Division, First Department should have interpreted Petitioners-Appellants‟ FOIL requests as it did in *AALDEF*. Instead, it played the role of the legislator.

Our State Constitution establishes a system in which governmental powers are distributed among three co-ordinate and co-equal branches. *Matter of Nicholas v. Kahn*, 47 N.Y.2d 24, 389 N.E.2d 1086 (1979). Extended analysis is not needed to detail the dangers of upsetting the delicate balance of power existing among the three, for history teaches that a foundation of free government is imperiled when anyone of the co-ordinate branches absorbs or interferes with another. *Oneida Cty. v. Berle*, 49 N.Y.2d 515, 404 N.E.2d 133 (1980). "Courts are not supposed to legislate under the guise of interpretation, and in the long run, it is better to adhere closely to this principle and leave it to the legislature to correct evils if any exist." *Bright Homes, Inc. v. Wright*, 8 N.Y.2d 157, 162, 168 N.E.2d 515 (1960).

More recently, this Court, in declining to create a new jury instruction in death penalty cases, stated that "we cannot, however, ourselves craft a

new instruction, because to do so would usurp legislative prerogative. We have the power to eliminate an unconstitutional sentencing procedure, but we do not have the power to fill the void with a different procedure…" *People v. Taylor*, 9 N.Y.3d 129, 131, 878 N.E.2d 969 (2007).

The lower Court has done exactly what this Court refused to do. The lower Court, by its decision to recognize the Glomar response, added another provision into FOIL legislation that contradicts the explicit FOIL exemptions currently in place. The enumerated exemptions under FOIL require the NYPD to admit the existence of documents even when it does not have to produce them. (POL §87(2)) (Each agency shall… make available for public inspection and copying all records, except that the agency may deny access to records or portions thereof that: [fall under the listed exemptions (POL §87(2)(a-g) and POL §89(2))]) (Emphasis added). When faced with a record request, POL §89(3)(a) gives the agency three options. It can (1) make the record available, (2) deny the request pursuant to a specified FOIL exemption (POL §87(2)(a-g) §89(2)) (or acknowledge receipt of the request and advise the requestor of the need for a reasonable time to either provide the record or deny the request), or (3) certify that it does not possess such records or that such records cannot be found after diligent search.

The Public Officers Law sections 87(2) and 89(2) already protect agencies against disclosure of exempt records. None of the enumerated exemptions created by the legislature provide for a "neither confirm nor deny" response to a New York State FOIL request. The lower Court decision to permit the NYPD to state it "cannot confirm or deny" the existence of documents will undermine FOIL and its goal of transparent government.

This Court, in *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 696 N.E.2d 978 (1998), stated that "…the clearest indicator of legislative intent is the statutory text; the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." When attempting to determine the intent of the legislature, courts should never opt for an intent that negates explicit provisions of the statute. See, *Id.* at 587 (The general principle that legislation is to be interpreted so as to give effect to every provision. A construction that would render a provision superfluous is to be avoided).

Allowing the Appellate Division, First Department"s decision to stand will make the FOIL exemptions (POL §87(2)(a-g) §89(2)) and the certification provision (POL§89(3)(a)) in FOIL superfluous. The certification provision requires:

> " …[T]he entity shall provide a copy of such record and certify to the correctness of such copy … or as the case may be, shall certify that it does not have possession of such record, or that the record cannot be found after diligent search." (POL§89(3)(a)).

Allowing a state or local agency to neither confirm nor deny the existence of records negates the explicit statutory intent of this provision. How can an agency certify that it does not have possession of records, as required, if it is permitted to neither confirm nor deny the existence of records? This violates the very essence of FOIL.

More importantly, the exemptions themselves and the agency"s burden to show that the requested documents fall under the exemptions become superfluous if state and local agencies are permitted the neither confirm nor deny the existence of records. See*, Hanig*, 79. N.Y.2d, 106 at 109. The Appellate Division, First Department, despite recognizing the *Hanig* precedent, misinterpreted its holding. The Appellate Division, First Department stated:

> "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" (citing to *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." (R. 146-147).

In *Hanig*, the Department of Motor Vehicles did not assert the Glomar Doctrine. Rather, it produced the relevant non-exempt records requested and redacted a portion of the records that were exempt from disclosure under POL §89(2)(i) (safeguarding information that falls under a FOIL exemption). The Court in *Hanig* found that FOIL exemptions are consistent with the legislative intent and general purpose of FOIL – not the Glomar Doctrine. The Appellate Division, First Department implied that *Hanig* addressed the Glomar response. In *Hanig*, the Glomar response was not asserted, and *Hanig* correctly applied FOIL exemptions, which is what Petitioners-Appellants are seeking in this case. As argued herein-above, in addition to misinterpreting *Hanig,* the lower Court"s decision has isolated the basic principles in determining legislative intent and has over-stepped the boundary between appropriate interpretations of legislation and usurping the role of the legislature by creating new law.

C. <u>The Appellate Division, First Department Did Not Support Its Own Precedent In *AALDEF*</u>

The Appellate Division"s decision (R. 148) stated that the Petitioners-Appellants" requests are a subset of the requests made in *AALDEF*, 125

A.D.3d 531 (2015). However, the Appellate Division, First Department failed to follow its own precedent in *AALDEF* when it allowed the NYPD to "neither admit nor deny" the existence of records. As it did in its interpretation of *Hanig*, the Appellate Division, First Department seemed to confuse the two standards (FOIL exemptions versus the Glomar response) when it opined that it already considered documents exempted from disclosure in *AALDEF*. It failed to differentiate between the NYPD FOIL response in the *AALDEF* case and its response in Petitioners-Appellants" cases. In *AALDEF*, the NYPD turned over non-exempt records. It acknowledged the existence of other documents but withheld them as exempted from disclosure pursuant to the law enforcement exemption (POL § 87(2)(e)). The NYPD in *AALDEF* did not invoke the Glomar Doctrine. It appropriately responded to the AALDEF"s requests in compliance with the FOIL requirements.

The lower Court correctly issued its decision in *AALDEF* based on existing FOIL language and principle ("…the requested documents are exempt from disclosure under Public Officers Law § 87(2)(e)(iii), (iv), commonly known as the "law enforcement privilege," in that disclosure of the requested documents would identify confidential sources, confidential information relating to criminal investigations, and non-routine investigative

techniques or procedures") (*Asian Am. Legal Def. & Educ. Fund v. N.Y. City Police Dep't,* 125 A.D.3d 531, 532, 5 N.Y.S.3d 13, 15 (N.Y. App. Div. 2015), leave to appeal denied, 26 N.Y.3d 919, 47 N.E.3d 94 (2016)).

The Appellate Division, First Department in *AALDEF* went on to say that "The [lower] court also properly found that the requested disclosure „could endanger the life or safety of any person."" *Id.* This argument specifically supports Petitioners-Appellants" argument that the Appellate Court in *AALDEF* properly applied the exemptions under FOIL where the NYPD acknowledged the existence of documents but could not produce them claiming production "could endanger the life or safety of any person" (POL § 87 (2)(f)). This also supports Judge Moulton"s opinion in *Hashmi* that "case law demonstrates that the NYPD has been able to protect sensitive information very well within the existing procedures that FOIL currently provides." Citing, *Matter of Bellamy v. New York City Police Department*, 87AD3d 874 (1st Dep't 2011); *Matter of Legal Aid Society v. New York City Police Department*, 274 AD2d 207 (1st Dep't 2001); *Matter of Asian American Legal Defense and Education Fund v New York City Police Dep't*, 41 Misc3d 471; *Urban Justice Center v. New York City Police Dep't*, 2010 NY Misc. Lexis 4258. (R. 699). The NYPD can and has properly protected

sensitive information under the existing FOIL exemptions (POL § 87(2)(a-g) § 89(2)) without ever needing to utilize a Glomar response.

The NYPD‟s response in the *AALDEF* case is completely different from the manner in which it handled the Petitioners-Appellants‟ requests. Therefore, the Appellate Division, First Department erred when it opined that the NYPD claiming Glomar in Petitioners-Appellants cases is similar to the NYPD‟s invocation of FOIL law enforcement exemption in *AALDEF*.

FOIL requires the NYPD to search for and acknowledge the existence of records (POL § 87(2)) even if it does not have to produce them, which is consistent with the *AALDEF* ruling. The "cannot confirm or deny" response under Glomar does not exist in the FOIL. It is not a law enforcement exemption and is not consistent with the Appellate Division, First Department‟s own decision in *AALDEF*. More importantly the NYPD does not comply with the strict and explicit requirements under FOIL, i.e., that the public should have access to government records (POL § 84), that the agency provide records unless they fit within an exemption (POL §87(2) § 89(2)), or that the agency certify that the records provided are accurate or that they could not locate the requested records (POL §89(3)(a)).

II. THE APPLICATION OF THE GLOMAR DOCTRINE WOULD BE INAPPROPRIATE IN THE PETITIONERS-APPELLANTS' CASE

In asserting the Glomar doctrine, the NYPD specifically cited to FOIA exemptions and attempted to tether Glomar theory to FOIA exemptions instead of FOIL. (R. 339-343 and R. 848-852). However, even when attempting to apply the federal FOIA law to the New York State FOIL statute, the Appellate Division, First Department failed to properly address the requirements under the Glomar Doctrine. The Appellate Division, First Department, in addition to striking down long established state precedent in FOIL and attempting to play the role of the legislature, contradicts the federal precedent and federal FOIA requirements when considering the use of the Glomar Doctrine by federal agencies.

A. The NYPD Does Not Possess The Classification Authority

The principle behind the Glomar response is that revealing the very fact of whether or not the federal government possesses records about a topic can sometimes reveal protected information, even if the underlying records would themselves be safe from disclosure under FOIA"s exemptions. The Glomar response does not function independently of the FOIA statute, however: "[I]n order to invoke the Glomar response . . . , an agency must tether its refusal to one of the nine FOIA exemptions." *Wilner*,

592 F.3d at 71, (internal quotation marks and citation omitted); accord *Wolf v. C.I.A.*, 473 F.3d 370, 374 (D.C. Cir. 2007). 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 *acknowledgment* of such documents." *Minier v. Cent. Intelligence Agency*, 88 F.3d 796, 800 (9th Cir. 1996) (emphasis added). Absent Glomar theory, 5 USC § 552(b) requires the federal agency to redact exempt information if it is "reasonably segregable" and produce the redacted document(s).

Since *Phillippi I*, 546 f.2d 1009 (1976), federal courts have accepted the application of the Glomar response under very specific and distinct exceptions, which the NYPD cannot rely upon: (1) those relating to national security (justified by Exemptions 1 and 3), (2) those that would result in an "unwarranted invasion of personal privacy" (pursuant to Exemptions 6 and 7(C)),[3] and (3) those entailing the protection of the identities of confidential

[3] In the privacy context, the concern is that the government would infringe upon an individual‟s privacy interest by acknowledging that the government has records about him or her, as when a request is made to the FBI for investigative records about an individual. Because it is presumed that an agency like the FBI would hold certain types of records about an individual only if he or she had been under investigation, acknowledging whether records exist would compromise the individual‟s privacy interest by "carry[ing] a stigmatizing connotation." Office of Information Policy, U.S. Dep‟t of Justice, OIP Guidance: The Bifurcation Requirement for Privacy "Glomarization," 17 FOIA UPDATE 2, (Spring 1996) [hereinafter Bifurcation Requirement], available at http://www.justice.gov/oip/blog/foia-update-oip-guidance-bifurcation-requirement-privacy-glomarization (Last visited February 17, 2017) (quoting Office of Info Policy, U.S. Dep‟t of Justice, OIP Guidance: Privacy "Glomarization," 7 FOIA UPDATE 3, 3 (1986)).

informants to federal law enforcement agencies (under § 552(c)(2)).[4] 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 USC § 3024-1 (i) (1)), and the Central Intelligence Agency Act of 1949, which requires the CIA director to protect intelligence sources or methods.

In Petitioners-Appellants‟ case, the NYPD, a city agency, did not and could not demonstrate how the requested records were a matter of deepest national security secrets (to qualify under FOIA exemption 1 and 3) (R. 378-383 and R. 885-890); would result in unwarranted invasion of privacy (to qualify under FOIA exemption 6 and 7(c)) (R. 928-933); or deal with the

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[4] Subsection (c)(2) of FOIA provides that requests for certain records that would reveal the identity of confidential informants to federal law enforcement agencies may be treated as not subject to disclosure. 5 U.S.C. § 552(c)(2) (2006). This provision has been interpreted as "provid[ing] express legislative authorization for a Glomar response" in a narrow set of circumstances. *Benavides v. DEA*, 968 F.2d 1243, 1246 (D.C. Cir. 1992).

identities of confidential informants to federal law enforcement agencies (to qualify under § 552(c)(2)). All the NYPD could argue was that Petitioners-Appellants‟ applications should not be looked at in isolation and that they constituted part of a "mass Freedom of Information Law campaign." (R. 353, R. 862, and R. 936).

The NYPD concedes that, as a municipal agency, it does not possess classification authority and therefore cannot rely on FOIA Exemptions 1 and 3 as a basis for nondisclosure under FOIL. (R. 378-383 and R. 885-890). The NYPD is not the CIA or its equivalent. Congress has not vested the NYPD with the same "sweeping" powers it has provided to specifically–enumerated federal agencies via statutes like the National Security Act and the Central Intelligence Act. (R. 382-383 and R. 890).

In addition, FOIA exemption 7 is not applicable to Petitioners-Appellants. The NYPD has adequate remedies under FOIL‟s own law enforcement exemption. Most importantly, just as the federal agencies cannot not evade or cover up for embarrassment or misconduct, this Court should not allow the NYPD to do so here. FOIA cannot be used to cover up embarrassment. *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, 811 F. Supp. 2d 713, 758 (S.D.N.Y. 2011), amended on reconsideration (Aug. 8, 2011), (holding that redacted portions

were not deliberative or predecisional, but rather more embarrassing for the agency to disclose, which was not an appropriate reason for withholding information). It is evident that the NYPD's sole purpose in attempting to avail itself of the FOIA Glomar response is to prevent disclosure of documents that will shed light on its discriminatory, overreaching, and baseless surveillance practices against the Muslim community, which would assuredly be a cause of great shame to the agency. However, as Justice Moulton in *Hashmi* correctly held: "[e]ngrafting 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." (R. 700).

Lastly, even when Glomar is applicable to federal agencies, federal courts have found that the Glomar response would only be justified in unusual circumstances and only by a persuasive Affidavit. *N.Y. Times Co. v. Dep't of Justice*, No.13-422(L), 2014 WL 1569514 (2d Cir. Apr. 21, 2014). The NYPD has not met this burden in the case at bar. The NYPD deemed it not necessary to comply with FOIA and federal law, because as a city agency, it is not regulated by FOIA or federal law. Yet, it was eager to

assert the federal Glomar theory. The lower court has permitted the NYPD to have its cake and eat it too. (R. 172).

B. The Galati Affidavit Fails To Meet The Minimum Standards For A Public Affidavit Required Under Federal Law To Justify A Glomar Response

Under federal law, an agency must file a Public Affidavit justifying their reliance on Glomar. *Phillippi 1*, 546 F.2d, at 1013 (1976). (The agency must provide a Public Affidavit explaining in as much detail as possible the basis for its claim that it can be required to neither confirm nor deny the existence of the requested records). The Affidavit must survive the test of reasonableness, good faith, specificity, and plausibility. *Gardels v. C. I. A.*, 689 F.2d 1100, 1105 (D.C. Cir. 1982).

The Affidavits of Chief Galati submitted in support of Respondents-Respondents failed to satisfy the minimal federal standards under the Glomar Doctrine, as set out in *Gardels* (reasonableness, good faith, specificity, and plausibility). *Id.* In *Gardels,* the court ultimately determined that the CIA properly invoked the Glomar Doctrine. It did so based on the filing of three Affidavits from the agency detailing the reasons why admitting the existence of records would negatively impact national security, the filing of a Vaughn Index, and the agency‟s response to two sets of interrogatories. The Petitioners-Appellants vehemently argue against the

adoption of Glomar into state law, especially since state and local agencies do not have the ability to classify documents pursuant to an act of Congress or Executive Order. However, even under the federal standard, for reasons argued below, the Galati Affidavits would be insufficient to satisfy the Glomar Response.

Mere allusion in the Public Affidavit as to why an agency can neither confirm nor deny the existence of documents is not sufficient to justify a Glomar Response. See, *Morley v. CIA*, 508 F.3d1108 (D.C. Cir. 2007). Under this federal theory, the federal agency must substantiate its Glomar Response with reasonably specific details. See, *Id.* at 1126 and *Lame v. U.S. Dep't of Justice*, 654 F.2d 917, 928–929 (3d Cir. 1981) (Both cases considered the sufficiency of the agency‟s Affidavits in relation to a FOIA exemption. However, the same standard should apply to Public Affidavits justifying a Glomar Response). In 1986, the 11th Circuit stated that a failure to adhere to safeguards "was to give the government an absolute, unchecked veto over what it would and would not divulge, in clear violation of the provisions of the statute [FOIA]. It diverted to the agency the court‟s obligation to decide these questions according to the law." *Ely v. F.B.I.*, 781 F.2d 1487, 1494 (11th Cir. 1986).

The courts also have an obligation in situations where they consider the application of Glomar to accord substantial weight to the federal agency's Affidavit concerning the details of the classified status of the disputed record. *Wolf*, 473 F.3d, 370. Generally when reviewing such submissions, courts are required to afford "substantial weight" (*Wilner*, 592 F.3d at 68 [emphasis added]) to agency"s Affidavits as long as they contain "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." *Larson v. Dep't of State,* 565 F.3d 857, 861, 862 (D.C. Cir. 2009) (quoting *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984)). The lower court did not engage in any of these considerations with respect to the Galati Affidavits in the instant case. In simply accepting the Galati Affidavits to justify the use of the Glomar Doctrine, without the analysis required by federal case law discussed above, the Appellate Division, First Department failed in its obligation, thereby leaving it to the agency to decide questions of law.

The Galati Affidavits (R. 306-330 and R. 740-766), both sworn to on February 11, 2014, fail to provide any information specific to these Petitioners-Appellants. They speak in generalizations that could apply to

any request by any individual as long as he or she is a Muslim. The fact that the Affidavits are identical, except for changes in the names, bolsters the Petitioners-Appellants‟ argument. To be sufficient, the Galati Affidavits (which the Appellate Division, First Department likened to a Public Affidavit) would have had to contain specific information as to each requester regarding why the acknowledgment of the existence of documents would hamper the functioning of the NYPD, especially since - as Justice Moulton correctly held - "case law demonstrates that the NYPD has been able to protect sensitive information very well within the existing procedures that FOIL currently provides." (R. 699). See also, *Phillippi 1* 546 F.2d *at* 1013 (1976).

The Appellate Division, First Department not only failed to analyze the Galati Affidavits fulfilment of federal requirements, but it also allowed the NYPD to discriminate based on the identity of the requestors in violation of FOIL. This Court has held that "the status or need of the person seeking access [to records] is generally of no consequences in construing FOIL and its exemptions." *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 567, 496 N.E.2d 665 (1986). An agency inquiry into or reliance upon the status and motive of a FOIL applicant would be administratively infeasible, and its intrusiveness would conflict with the

remedial purposes of FOIL. See, *M. Farbman & Sons, Inc. v. N.Y. City Health & Hosps. Corp.*, 62 N.Y.2d 75, 80, 464 N.E.2d 437 (1984). "Entitlement to the requested…reports is not contingent upon the showing of some cognizable interest other than that inhering in being a member of the public." *Scott, Sardano & Pomeranz v. Records Access Officer of City of Syracuse*, 65 N.Y.2d 294, 297, 480 N.E.2d 1071 (1985).

It is clear from the record in this case, specifically the February 11, 2014 Galati Affidavits (R. 306-330 and R. 740-766), that the NYPD invoked the Glomar response, which is outside FOIL, specifically because the Petitioners-Appellants are Muslims. The Affidavits, which as mentioned are identical in every aspect except for the names, consist entirely of fear mongering about Muslim terrorists. They contain no specific information regarding the individual requests made by the Petitioners-Appellants except for them (Abdur-Rashid and Hashmi) being Muslims. In fact, in their lower court briefs (R. 353, R. 862, and R. 936), the NYPD argue that the Petitioners-Appellants" requests are part of a larger attempt by the Muslim community to create a campaign against the NYPD seeking information following the Associated Press reporting that the NYPD surveilled the Muslim community based on religion.[5]

[5] *AP's Probe Into NYPD Intelligence Operations*, Associated Press, available at

C. Even A Federal Agency Cannot Claim Glomar After It Has Already Revealed The Existence Of Documents

Even under federal law, an agency cannot assert that "it cannot confirm or deny" the existence of records after it has already acknowledged their existence. "An agency is therefore precluded from invoking the Glomar response if the existence or non-existence of the specific records sought by the FOIA request has been the subject of an official public acknowledgment. If the government has admitted that the specific records exist, a government agency may not later refuse to disclose whether that same record exists or not." *Wilner*, 592 F.3d at 70. "When information has been officially acknowledged, its disclosure may be compelled even over the

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http://www.ap.org/Index/AP-In-The-News/NYPD;

Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, Associated Press, August 23, 2011;

Chris Hawley & Matt Apuzzo, *NYPD Infiltration of Colleges Raises Privacy Fears*, Associated Press, October 11, 2011;

Adam Goldman & Matt Apuzzo, *With Cameras, Informants, NYPD Eyed Mosques,* Associated Press, February 23, 2012;

Adam Goldman & Matt Apuzzo, *Documents Show NY Police Watched Devout Muslims*, Associated Press, September 6, 2011;

Matt Apuzzo & Adam Goldman, *Inside the Spy Unit that NYPD Says Doesn't Exist*, Associated Press, August 31, 2011;

Adam Goldman & Matt Apuzzo, NYPD: *Muslim Spying Led to No Leads, Terror Cases*, Associated Press, Aug. 21, 2012.

agency‟s otherwise valid exemption claim." *Fitzgibbon v. C.I.A.*, 911 F.2d 755, 765 (D.C. Cir. 1990).

Under federal law, the NYPD would be prohibited from invoking the Glomar Doctrine because the agency has already admitted the existence of documents. *Wilner* at 70 and *Fitzgibbon* at 765. At minimum, if the Appellate Division analyzed the Glomar requirements under the federal context, it would have deemed the NYPD improperly invoked Glomar even within the federal analysis. By not doing so, the Appellate Division, First Department has not only allowed the NYPD to evade compliance with FOIL‟s strict requirements, but it has permitted the NYPD to claim a federal theory without having to comply with the federal rules themselves. The Appellate Division, First Department‟s decision, while it permits the NYPD to be free from all judicial oversight, does not attempt to analyze the requirement the NYPD would have to fulfill to benefit from the federal Glomar case law, even assuming it is applicable.

As argued *supra* this brief, the NYPD has acknowledged the existence of records related to their spying on the Muslim community in several instances. In *Asian Am. Legal Def. & Educ. Fund v. New York City Police Dep't*, the NYPD acknowledged the existence of records but asserted FOIL

exemptions and provided non-exempt documents that were responsive to the request. (41 Misc. 3d 471 [Sup. Ct. 2013]).

Having publicly acknowledged the existence of these documents in court, the NYPD cannot now avail themselves of the Glomar response. The lower Court confirmed this fact by stating "the records sought here are subset of the records found properly exempt under FOIL" [in *AALDEF*] (R. 148). The NYPD admitted the existence of the requested documents in this case when it argued the documents are a subsection of the documents in *AALDEF* (R. 493-497 and R. 626-627). The Appellate Division, First Department also recognized the records requested in these cases as subset of the records requested in *AALDEF* (R. 148) yet ignored that, in *AALDEF*, the NYPD acknowledged the existence of exempt documents.

Further, during the oral argument on March 8, 2016, before the Appellate Division, First Department, the NYPD again admitted the existence of documents when counsel stated that documents were produced in response to another case (*Raza et al v. City of New York et al*, 13 CV 3448 [EDNY]) (where Plaintiffs claimed constitutional violations against the NYPD for its illegal surveillance of members of the Muslim community based on their religion).

The third example of the NYPD‟s public acknowledgement of records that are the subject of the Petitioners-Appellants‟ requests is a recently discovered Declaration of Thomas Galati, filed in the United States District Court for the Southern District of New York on or around May 16, 2013 (prior to the Affidavits filed in this matter). In the May 16, 2013 Declaration, Chief Galati described the surveillance activities of the Zone Assessment Unit (later renamed as "The Intelligence Bureau") in the Muslim community, the type of information collected by the unit, the number of records maintained by the unit, and stated that sample reports generated by the Zone Assessment Unit had been turned over. [6]

The NYPD, and Chief Galati himself, were aware that they had already acknowledged the existence of these records prior to invoking

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[6] The pertinent paragraph states "In an effort to resolve the concerns raised by Class Counsel about the Zone Assessment Unit, I was deposed by Class Counsel in response to their request to have someone speak about the Zone Assessment Unit and the information this unit collected. My deposition took place on 28 June 2012. Prior to my deposition, the NYPD Intelligence Division made available to Class Counsel samples of the reports generated by the Zone Assessment Unit. The purpose of this production was to allow Class Counsel to see the type of information collected and retained by the Zone Assessment Unit." ¶ 4, May 16, 2013,Galati Declaration in *Handschu et al v. Special Services Division*, 71 Civ. 2203 (CSH).

Though filed in May 2013, Appellants do not believe that this Declaration was made public until January 2016. The declaration is can be found on the NYPD‟s website under their legal filing, available here: http://www.nyc.gov/html/nypd/downloads/pdf/pr/declaration_of_thomas_galati_with_exhibit_a.pdf. (last visited January 16, 2017).

Glomar in this matter. The NYPD filed subsequent identical Affidavits in *Hashmi* and *Abdur-Rashid* on February 11, 2014 to invoke Glomar.

The Appellate Division, First Department, even when attempting to use the federal law as constructive, fatally failed to require the NYPD to at least comply with minimal federal requirements when asserting Glomar. Having publicly declared that the requested records exist, including making the declaration in open court before the Appellate Division, First Department at the March 2, 2016 oral arguments, the NYPD should not be allowed to assert Glomar, even assuming *arguendo* that this theory exists in FOIL.

D. It Is Bad Faith For The NYPD To Invoke The Glomar Doctrine In Response To The Petitioners-Appellants‟ FOIL Request

Under federal case law, bad faith and the fact that the Affidavit contradicts other evidence in the record is sufficient to defeat the Glomar Doctrine. *Wilner*, 592 F.3d, at 68. Instances of the NYPD‟s bad faith and wrongdoing have been prevalent in recent years. As an example, the NYPD‟s abuse and harassment of African-American and Hispanic residents through their overuse of stop and frisk was criticized in *Floyd v. City of N.Y.*, 739 F. Supp. 2d 376 (S.D.N.Y. 2010)Similar to the disgraceful stop and frisk policies that brought the department much criticism, the NYPD in this case abused the Muslim community through their excessive and illegal

surveillance based on religion. Despite claims in the Galati Affidavits provided to Petitioners-Appellants that the counterterrorism activities of the NYPD thwarted fourteen or more terror plots[7], Galati himself, in a June 28, 2012 deposition in the *Handschu* case, stated that the activities of the Zone Assessment Unit did not result in any prosecution.[8] It is discernible from NYPD‟s actions that disclosing or even admitting to the existence of the records requested by Mr. Abdur-Rashid and Mr. Hashmi would shed further light on the NYPD‟s discriminatory and baseless surveillance activities of the Muslim community at large. These practices, when confirmed, are sure to prove ignominious to the NYPD. The NYPD is certainly apprehensive of

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[7] At least one news organization analyzed and challenged statements by Mayor Bloomberg and Police Commissioner Kelly that the NYPD thwarted 14 terror plots and credibly called those statements into question by pointing out that the plots were actually thwarted by other agencies or that the plots were facilitated by and could not have been accomplished without the assistance of government informants. See: https://www.propublica.org/article/fact-check-how-the-nypd-overstated-its-counterterrorism-record. Last visited January 16, 2017.

[8] June 28, 2012 Deposition of Thomas Galati in *Handschu v. Special Services Division*, 71CIV. 2203 (CSH)

> Q. If they make an assessment of what's being brought in, warrants, some action, does that indicate that an investigation has commenced? (96: 16-19)
>
> A. Related to Demographics, I can tell you that information that have come in has not commenced an investigation. (96: 21-23)
>
> Q. You're saying that based on what has occurred during your tenure, correct? (96:24-25)
>
> A. Yes. (97:2)

the potential embarrassment that disclosure of these records would reveal. However, as argued *supra* this brief, courts of law cannot be used to help conceal embarrassment and protect NYPD‟s bad faith reliance on the Glomar Doctrine.

Furthermore, Galati‟s May 16, 2013, Declaration filed in the *Handschu* case (See fn 6), furnished before the Affidavits in the case at bar, admitted the existence of documents and described the number and substance of the documents. Both the Galati deposition and prior declaration contradict the contents in the February 11, 2014 Affidavits filed in this case, establishing on-going bad faith on the part of the NYPD for years. For the foregoing reasons, the Appellate Division, First Department should have rejected the February 11, 2014 Galati Affidavits for not fulfilling the federal requirements and should have declared the NYPD‟s Glomar response both a violation of FOIL and a bad faith attempt at skirting NYPD‟s obligations under state law.

CONCLUSION

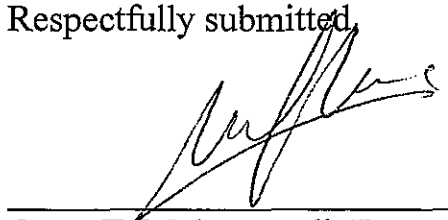
The Appellate Division, First Department erred when it did not direct the NYPD to comply with FOIL by acknowledging the existence of documents pursuant to POL§89(3)(a). The Appellate Division, First Department erred when it did not opine that the Glomar response is not

inherent in FOIL. The Appellate Division, First Department erred when it usurped the role the role of the legislature by granting the NYPD the opportunity to assert the federal Glomar response to FOIL requests. Glomar does not exist under FOIL, nor can it be tethered to any FOIL exemption. Further, the Appellate Division, First Department erred when it did not reject the federal Glomar standard which contradicts New York State FOIL‟s spirit of open government and the strict requirements upon agencies to use FOIL exemptions. The Appellate Division, First Department erred when it did not at a minimum order an *"in camera review"* as Judge Moulton recommended. (R. 689-690).

For the foregoing reasons, the Petitioners-Appellants request that this Court reverse the Appellate Division, First Department‟s June 2, 2016, Decision and Order, dismissing the Petitioners-Appellants‟ CPLR Article 78 Petitions. Petitioners-Appellants further request that this Court direct the NYPD to provide the requested records or meet their burden and establish that the requested records fall within a FOIL exemption. In the alternative, Petitioner-Appellants request that NYPD at least produce documents for in *camera* review for the judiciary to determine the validity of the NYPD‟s objections. Petitioners-Appellants request costs and fees.

Dated: New York, New York
February 20, 2017

Respectfully submitted,



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PRINTING SPECIFICATION STATEMENT

The foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point Size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, is 9,244.

COURT OF APPEALS OF THE STATE OF NEW YORK

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TALIB W. ABDUR-RASHID and
SAMIR HASHMI,

Petitioners-Appellants, APL -2016-00219

v. **Affidavit of Service**

NEW YORK CITY POLICE DEPARTMENT, *et al.*,

Respondents-Respondents.

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Heela Masood, being duly sworn, deposes and says that she is over eighteen years of age and is not a party to the action.

That on the 20th day of February, 2017, deponent served a true copy of the BRIEF FOR PETITIONERS – APPELLANTS, and RECORD ON APPEAL upon ZACHARY W. CARTER, JOHN MOORE, and DEVIN SLACK, CORPORATION COUNSEL OF THE CITY OF NEW YORK, 100 Church Street, New York, NY 10007 via Federal Express.

Sworn to before me this
20th day of February, 2017

Heela Masood

Notary Public

ELIZABETH K KIMUNDI
Notary Public, State of New York
No. 02KI6295507
Qualified in Kings County
Commission Expires Jan. 06, 20___