

 [Click to Print](#) or Select 'Print' in your browser menu to print this document.

Page printed from: [New York Law Journal](#)

---

# NY Court Taps U.S. Doctrine in FOIL Suit Against NYPD

Joel Stashenko, New York Law Journal

September 24, 2014

A state judge has invoked a federal court doctrine to reject a request under New York's Freedom of Information Law for information about police surveillance of a New York City mosque.

Finding no guidance from higher courts in New York, Manhattan Supreme Court Justice Alexander Hunter Jr. ruled that New York City Police Department may invoke the "Glomar doctrine" exception under the federal Freedom of Information Act (FOIA) to deny an Islamic group's request under the state Freedom of Information Law (FOIL).

The Glomar doctrine allows federal agencies, citing law enforcement or national security concerns, to refuse to confirm or deny that the information sought under a FOIA application exists.

Hunter ruled that while FOIA does not apply to state or local agencies, courts may use federal court precedents when considering questions about the state FOIL.

He said in [Abdur-Rashid v. New York City Police Department](#), 101559/2013, that the city had persuasively argued that applying the Glomar doctrine to state cases is "in keeping with the spirit" of the federal appellate rulings where use of the doctrine has been upheld, such as [Wilner v. National Sec. Agency](#), 592 F.3d 60 (2nd Cir. 2009).

"Respondents meet their burden to issue a Glomar response, set by the federal courts, by describing generic risks posed by disclosure, including undermining counter-terrorism operations, compromising the intelligence capabilities of the NYPD, and disclosing sources of the information of the NYPD," Hunter wrote.

He added that police have also demonstrated that even acknowledging whether or not the records exist "could impair the lives and safety of undercover officers and confidential informants."

Imam Talib Abdur-Rashid asserts that both he and Harlem's Mosque of Islamic Brotherhood, which he heads, are the subjects of NYPD investigations. In October 2012, he submitted a FOIL request for information about possible surveillance and other investigatory activities by

police. After several delays, the NYPD formally denied the FOIL request in August 2013. Abdur-Rashid filed suit.

Hunter cited an affidavit filed by Thomas Galati, chief of the NYPD's intelligence bureau, in which Galati argued that release of the information could reveal details about "operations, methodologies and sources of information" that could put officers and informants involved in any current operation in danger and also compromise future investigations.

Hunter also traced the history of what has become known as the "Glomar doctrine" or "Glomar response" to a FOIA request. He said the response grew out of [Phillippi v. CIA](#), 546 F.2d 1009 (D.C. Circuit 1976), in which petitioners sought details of the activities of a drillship platform named the Hughes Glomar Explorer and whether it was involved in a CIA-directed salvage operation of a sunken Soviet submarine in the Pacific Ocean.

The doctrine holds that if the confirmation or denial of the existence of a record held by a federal agency could cause the same harm as disclosure would under FOIA, the agency could make an unresponsive reply to a request—meaning it could decline to confirm or deny the information's existence.

In Abdur-Rashid's case, Hunter said the NYPD argued that acknowledging the existence of an investigation and its details would fall under disclosure exceptions that would interfere with law enforcement investigations, reveal criminal investigative techniques or procedures and endanger the life and safety of people.

Omar Mohammedi represented Abdur-Rashid and his mosque.

Assistant Corporation Counsel Jeffrey Dantowitz argued for the police department.

"We are very pleased that the court agreed with our legal position and recognized that disclosing certain information would undermine the city's counterterrorism efforts and compromise its intelligence capabilities," Dantowitz said in a statement.

Robert Freeman, executive director of the state Committee on Open Government, said there is no provision in New York's FOIL for a Glomar-like doctrine. Rather, an agency has only two options: It may deny release of information under a recognized FOIL exception or it may determine it does not have the requested records.

In accepting the Glomar response, a court may diminish the basic premise of FOIL that requires agencies to defend the non-disclosure of information, Freeman said.

He questioned why Hunter did not consent to an in camera inspection of the records to discern whether police concerns were valid.

"Certainly a court can do so and reach a conclusion without disclosing details that would result in harm," Freeman, who was not involved in the Abdur-Rashid case, said in an interview Monday.