To Be Argued By:

Omar T. Mohammedi
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

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REPLY BRIEF OF PETITIONERS – APPELLANTS

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Date Completed: June 8, 2017

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PRELIMINARY STATEMENT

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") filed detailed requests for records pertaining to themselves and their respective organizations[1], the Mosque of Islamic Brotherhood and the Muslim Students Association at Rutgers University. The New York Police Department (hereinafter referred to as "NYPD") denied both requests. In response to Article 78 proceedings, the NYPD invoked the Glomar response, a foreign principle to FOIL. The Trial Court in *Hashmi* correctly held that the Glomar response was inappropriate (*Hashmi v. New York City Police Dep't,* 46 Misc. 3d 712, 998 N.Y.S.2d 596 (Sup. Ct. 2014)) (R. 681-700), while the *Abdur-Rashid* Court erred by accepting the NYPD's Glomar response (*Abdur-Rashid v. N.Y. City Police Dep't*, 45 Misc. 3d 888, 992 N.Y.S.2d 870 (Sup. Ct. 2014)) (R. 228-235). The two cases were appealed. The Appellate Division, First Department, (hereinafter referred to as "Appellate Division") in a joint decision appeared unsure of which position to take regarding the application of Glomar but erred by permitting the

[1] Petitioners-Appellants requested non-exempt documents and justification for the exempt documents. See R. 259, 269, 721 and 730. Contrary to Respondents' position (NYPD Br. at 2), Petitioners-Appellants rightfully press the paradox because it matters, and the NYPD should not be allowed to circumvent laws as and when it suits it, hence a rigid rule is required. This rigid rule ensures the NYPD and other city agencies follow the legislatures' intent and most importantly, do not abrogate a court's authority to conduct an *in camera* review.

NYPD's use of Glomar in response to the FOIL requests in this case. Petitioners-Appellants appealed the Appellate Division decision. *See* Brief for Petitioners-Appellants (hereinafter referred to as "Abdur-Rashid/Hashmi Br.") at 2. The NYPD served their Respondents' Brief (hereinafter referred to as "NYPD Br."). Petitioners-Appellants now serve their reply brief.

FOIL legislation does not include the Glomar response, a fact that now appears to have become apparent to Respondents. Throughout the NYPD Br., Respondents have purposely stayed clear of identifying the Glomar response by name, choosing rather to pass it off as "circumscribed response," which is still a Glomar response. *See* NYPD Br[2]. NYPD's tactics are simply aimed at distracting from their attempts to usurp and have this Court usurp the powers of the legislature - an issue the Trial Court in *Hashmi* said "*is one better left to the State Legislature, not to the Judiciary.*" (R. 696). (emphasis added).

This Court should find that the Appellate Division erred in its decision for the following reasons. First, Petitioners-Appellants' requests did not seek counterterrorism material. (*See* R. 258-259, and 720-721). Second, "case law

[2] However, the NYPD's distracting and artful techniques fail. At the Trial Court, the NYPD boldly used the name Glomar (R. 341-343, 409-412, 851-852, 911-913) and argued that Glomar is a judicial doctrine (R.424:21-25 and 425:1-14 – June 24, 2015 Oral argument hearing transcript) and that the Court should defer to NYPD (R. 360-363, 868-872). Before the Appellate Division, First Department, they started shying off from the name and started passing it off as a "circumscribed response" inherent in FOIL. Now before this Court, they have pretty much stayed clear of the name, but for introducing it in connection to case law. *See* NYPD Br. at 18.

demonstrates that the NYPD has been able to protect sensitive information very well within the existing procedures that FOIL currently provides." (R. 699) (emphasis added). Third, Glomar is not among the enumerated responses under FOIL, and Respondents' argument that it's a "common-sense" and "case specific" applicable exemption (NYPD Br. at 2) is hyperbolic. Fourth, the Appellate Division, in allowing the NYPD to assert Glomar to Petitioners-Appellants' requests, in effect departed from its precedent in *Matter of Asian Am. Legal Defense & Educ. Fund v. New York City Police Dept.* (125 AD3d 531, 532 [1st Dept. 2015], lv denied 26 NY3d 919 [2016]) (*AALDEF*) (R. 148). The Glomar response was not used in *AALDEF*.

Lastly, the Appellate Division decision contradicts this Court's own holding in *Gould v. N.Y. City Police Dep't*, 89 N.Y.2d 267, 274–75, 675 N.E.2d 808, 811 (1996) where this Court held:

> "All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2). To ensure maximum access to government documents, the "exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption" (citing *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; *Gould*, 89 N.Y.2d, at 274–75.

The Public Officers Law requires the NYPD to acknowledge the existence of documents, whether such documents are subject to disclosure or exempt from disclosure. The burden is upon the NYPD to demonstrate why, *if at all*, it should be allowed to assert Glomar here, a burden it cannot overcome. The NYPD cannot overcome this burden because FOIL has sufficient exemptions from disclosure (POL § 87(2), § 89(2)(a)(b)).

The Appellate Division stated that, by its decision, it was not suggesting that any FOIL request for NYPD records would justify a Glomar response (R. 148). However, its decision did just that. Its decision emboldened the NYPD to use the Glomar response to FOIL requests for NYPD records. The NYPD recently used Glomar in response to FOIL request submitted by members of the Black Lives Matter movement in *Millions March NYC, et. al., v. NYPD*, Matter Index No. 100690/17. The Appellate Division's erroneous decision has emboldened the NYPD to assert the Glomar response whenever citizens of New York request documents or records relating to infringement of their religious rights or their political freedom. Thanks to the Appellate Division decision, the NYPD is now stifling New Yorkers rights to religious practices and political activities under the First Amendment. The NYPD is freely asserting the Glomar response to avoid the embarrassment the revelation of their outrageous conduct would bring upon them.

The NYPD's distractive counterterrorism and fear-mongering techniques are a cloak over their infringement of New Yorkers' First Amendment rights.

If this Court also allows the NYPD to assert the Glomar response to FOIL request, it will be allowing the NYPD to continue infringing upon New Yorkers' First Amendment rights with impunity. It will defeat the purpose, the intent, and existence of FOIL. It will build an impregnable wall against disclosure and virtually stifle adversarial proceedings. *Hashmi,* 46 Misc. 3d, at 722-23. (R. 696-697). Most importantly it will have a detrimental effect on the Court's ability to fully perform its judicial functions, such as ascertaining the validity of claimed FOIL exemptions through *in camera* review (R. 699), which Glomar theory does not allow (R. 691). This Court should find that the Glomar response is not applicable to a FOIL request.

ARGUMENTS

POINT I

THE GLOMAR RESPONSE IS NOT AVAILABLE UNDER FOIL

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).

In the case at bar, Petitioners-Appellants submitted FOIL requests (R. 258-259, and 720-721). Their requests were structured as regular FOIL requests, requiring FOIL responses pursuant to POL §89(3)(a). Respondents *sua sponte* chose to assert the Glomar response to Petitioners-Appellants' request (R. at 339-343, and 848-852). Respondents now make bold-faced assertions (NYPD Br. at 3) that the availability of the Glomar response is compatible with FOIL's express terms but provide no citation to support their statement.

When faced with a request for records, POL §89(3)(a) gives an agency three options. It can (1) make the records 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 records 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.

Respondents have resorted to a new diversion (NYPD Br. at 3-4) and are attempting to incite fear and undermine the judiciary. NYPD Br. at page 4 specifically states "Petitioners would have this Court compel the NYPD to routinely disclose the identities of subjects of counterterrorism surveillance or investigation." Petitioners-Appellants are not asking the NYPD to divulge the identity of undercover officers. There are exemptions under FOIL the NYPD can use and not have to disclose the identity of undercover officers, if any. (R. 168, 259, 721, and 899). The NYPD invoked these exemptions in *Matter of Asian Am. Legal Defense & Educ. Fund,* 125 AD3d 531, 532. Petitioners-Appellants' dispute (which is the subject of this instant appeal), is Respondents' use of the Glomar response to a State FOIL request. Such use will have a devastating effect not only on Petitioners-Appellants' FOIL requests but on New Yorkers' rights under FOIL. As demonstrated *infra* Point V, the NYPD has already used the Glomar response against a legitimate civil rights organization (Million March NYC) following the Appellate Division's decision. Glomar response is not a "form response" as Respondents are attempting to define it. (NYPD Br. at 19). As argued in Abdur-Rashid/Hashmi Br. at 15-18, if this Court allows Glomar response to be asserted here, it will have detrimental effect on open government, judicial scrutiny, and New Yorkers' rights, thereby defeating the reason why FOIL was established.

Respondents have not been able to support their frivolous claim that Glomar is an enumerated FOIL response or an enumerated FOIL exemption, because they cannot. Pursuant to the Court's holding in *Hanig*, FOIL "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*, 79 N.Y.2d, at 109. Respondents are asking this Court to view FOIL exemptions expansively, rather than narrowly as precedent requires. This is exactly what the legislature did not intend. *Id.* This Court should find Respondents' position to be untenable. It is Respondents who are using Glomar as a backdoor to sneak in a foreign theory into FOIL (NYPD Br. at 45-45).

As argued in Abdur-Rashid/Hashmi Br at 15-17, the Appellate Division erred when it allowed the NYPD to invoke the federal Glomar doctrine to state FOIL requests. Petitioners-Appellants respectfully request this Court to find as Justice Moulton did in *Hashmi*, that "nothing in the record before the Court . . . indicates that the NYPD's work has been compromised by its inability to assert a Glomar response. To 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). As Justice Moulton did, this Court should also find the creation of a new law [the adoption of Glomar into New York State FOIL] "is one better left to the state Legislature, not the Judiciary." (R. 696). "It

is a legislative function to write a statute that strikes a balance embodying society's values [on the need for disclosure and need for secrecy]" (R. 700) and not the judiciary's.

POINT II

FOIL LEGISLATIVE INTENT

POL § 84 explicitly states "people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality." It then proceeds to spells out the legislature's intent in its enactment of FOIL, as:

> "[t]he legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article. (Open Government) (POL § 84).

The legislature then places the burden on all government (state and city) agencies to make available for public inspection and copying all records, except in the case of enumerated exemptions. (POL § 87(2)). Nonetheless, the legislature requires the agency to search for documents and acknowledge their existence. (Abdur-Rashid/Hashmi Br. at 20).

In the case at bar, Respondents attempt (without any legal basis) to shift their (agency) burden of proof onto Petitioners-Appellants; this is not only problematic, but also violates FOIL's requirements. Respondents argue that Petitioners-Appellants "seek to force the NYPD to deny their requests in a form that would necessarily reveal that information anyway." (NYPD Br. at 16). Respondents' flawed argument presents the exact problem FOIL was established to prevent. The NYPD cannot be allowed to evade its burden under FOIL - to search and acknowledge the existence or non-existence of the requested documents (POL §89(3)(a)) - even if it claims that Petitioners-Appellants are "forc[ing]" it to abide by FOIL by acknowledging it searched for documents, whether they are under enumerated exemptions or not. Otherwise, the existence of FOIL would be futile.

Respondents give no valid justification for this Court to divert from its holding in *Gould*, 89 N.Y.2d, at 274–75 (Disclosure may only be withheld where requested material falls squarely within the ambit of FOIL exemptions only). They *sua sponte* use Glomar without any statutory justification and merely claim that it is a "straightforward and sensible application of FOIL enumerated exemptions". (NYPD Br. at 18). Unfortunately, it is not. As argued in the moving brief, none of FOIL's enumerated exemptions allow for a "neither confirm nor deny" response. (Abdur-Rashid/Hashmi at 20-21). "[T]he 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." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 696 N.E.2d 978 (1998). (*See* Abdur-Rashid/Hashmi at 21). The New York State legislature has amended FOIL at least five times since the Glomar response came into existence, and at no time have they chosen to adopt the Glomar response into FOIL. (Abdur-Rashid/Hashmi at 1-2). Since the clearest indicator of legislative intent is the statutory text, here it is very clear that FOIL legislative intent is to not make the Glomar response available for FOIL requests. As such, Respondents' Glomar-leaning arguments (NYPD Br. at 19-27) are the ones incompatible with the legislature's judgment.

Respondents again make another flawed argument that has no basis in facts or law by stating that FOIL allows an agency, when presented with Petitioners-Appellants' special kind of requests, to assert Glomar (which they claim is a "case-specific application of the statute's exemption") (NYPD Br. at 19, 21, and 48-49). There is nothing under FOIL designating the Glomar response as a case-specific application of FOIL exemptions. Without any statutory basis or legal precedent, Respondents want to create a "case-specific application" of their own.

In *People v. Taylor*, 9 N.Y.3d 129, 131, 878 N.E.2d 969 (2007) this Court stated "we cannot, however, ourselves craft a new instruction, because to do so would usurp legislative prerogative." This Court's position in *People v. Taylor*, is along the same lines as the *Hashmi* Court's holding that "the decision to adopt the

Glomar doctrine is one better left to the State Legislature, not to the Judiciary." (R. 696). This Court should find that the Appellate Division erred by accepting the NYPD's "neither confirm nor deny" response, because this response prevents the Court from doing its work. "The insertion of the Glomar doctrine into FOIL . . . build[s] an impregnable wall against disclosure of any information concerning the NYPD's anti-terrorism activities." "[T]he decision to approve or deny a Glomar response is made with very little information and with almost no useful input from the person or entity seeking the documents. A Glomar response virtually stifles an adversary proceeding." *Hashmi,* 46 Misc. 3d, at 722 -723. (R. 696-697). Respondents' arguments should fail for the simple reason enumerated *supra* FOIL's plain language does not call for Glomar response. *Majewski,* 91 N.Y.2d, at 696.

POINT III

EQUATING COUNTERTERRORISM TO MUSLIMS

Respondents dedicate a substantial portion of their brief claiming that to respond to Petitioners-Appellants' requests would compel the NYPD to disclose identities of subjects of counterterrorism surveillance or investigations. (NYPD Br. at 3, 8-13). They self-congratulate on their alleged efforts to detect and keep New York City safe from terrorism (NYPD Br. at 5-7). However, that does not

justify their response to Petitioners-Appellants' FOIL requests, which the Respondents claim to be "case-specific application."

Respondents' counterterrorism and terrorism arguments (including the references under the Galati affidavit), as opposed at the Trial Court level (R. 934) and before the Appellate Department, First Division (R. 206, 531, and 797-798), serve no other purpose but to induce fear. As argued in Abdur-Rashid/Hashmi Br at 36, it is fear brought on by the fact that Petitioners-Appellants are Muslims. The halls of justice should not be used to perpetuate such stereotyping and discrimination.

Petitioners-Appellants are law abiding citizens with no criminal records (R. 209, 394 and 902), much less terrorism ties. What the NYPD claims to fear is that any response other than the Glomar response will reveal whether Petitioners-Appellants and their respective organizations were the subject of surveillance (NYPD Br. at 22 and 54-55). This fear is secrecy by another name. Courts have held that 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." *Hashmi,* 46 Misc. 3d, at 724. (R. 700).

This Court should find, as the *Hashmi* Court found, that "[s]ince the September 11 attacks the NYPD has worked tirelessly in protecting New York City." The "court's decision does not reflect any judgment of the NYPD's work.

The court is instead concerned with oversight of governmental functions as embodied by FOIL." (R. 700) (emphasis added).

POINT IV

RESPONDENTS' PRIVACY ARGUMENTS IGNORE FOIL PRIVACY EXEMPTION

Respondents offer numerous alternative and speculative facts, such as reference to the New York City Department of Health and Mental Hygiene, Sexual Health Clinics (NYPD Br. at 36-41), in their attempt to counter Petitioners-Appellants' *Hanig* challenge (Abdur-Rashid/Hashmi Br. at 22-23), and allegedly in support of their privacy argument. Such attenuated theories still obligate Respondents to acknowledge the existence of documents and use the enumerated safeguard under FOIL exemptions. The Court in *Hashmi* already 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." The Court 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).

Respondents' reliance on *North Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office*, 146 A.3d 656 (N.J. Super. Ct. App. Div. 2016) (NYPD Br. at 40-41) as part of their privacy argument fails for the following reasons. Firstly, the

requestor in *North Jersey Media Grp*, was a third party (Newspaper publisher) seeking records on law enforcement reports relating to a pastor *who had not been arrested or charged with any crime (*emphasis added) *(Id.))*, unlike the instant case, where Petitioners-Appellants seek their own records and those of their affiliate organizations. Secondly, the *North Jersey Media Grp* case is not brought under OPRA which has provisions prohibiting the agency (for privacy concerns) from releasing the names of individuals who were the subject of a criminal investigation *that did not result in a charge or arrest.* (N.J.S.A. 47: 1A-3) (emphasis added). The New Jersey legislature, by enacting OPRA, expressed its clear intent to permit New Jersey agencies to respond in this fashion Thirdly, it fails because OPRA provisions (N.J.S.A. 47: 1A-3) are not Glomar. (R. 522-524, and 800-801). The Respondents' argument should also fail for the reasons articulated in Judge Moulton's decision in *Hashmi* mentioned *supra* ("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).

POINT V

THE NYPD LACKS THE TYPES OF SAFEGUARDS AVAILABLE TO FEDERAL AGENCIES ALLOWED TO ASSERT THE GLOMAR RESPONSE

As argued in Petitioners-Appellants' moving brief, since *Phillippi I*,[3] federal courts have accepted Glomar response under very specific and distinct exceptions, which the NYPD cannot rely upon. (Abdur-Rashid /Hashmi Br. at 28-30). Glomar is a judicial theory tethered to two main safeguards: (1) Executive Order or Act of Congress granting classification authority (FOIA exemption 1 and 3), and (2) express authorization by statute (FOIA Exemption 6 and 7(C)). In this case, Respondents have inappropriately cited to federal cases allowing Glomar under Executive Order or Act of Congress, which the NYPD does not possess. (R378-383 and 886-890).

FOIA Exemption 1 permits the nondisclosure of records that are "(A) *specifically authorized* under criteria established by an *Executive order* to be kept secret in the interest of national defense or foreign policy and (B) are in fact *properly classified pursuant to such Executive order.*" 5 U.S.C. § 552(b)(1) (emphasis added). FOIA Exemption 3 allows nondisclosure of documents "*specifically exempted from disclosure by statute. . . .*" 5 U.S.C. § 552(b)(3) (emphasis added). "An agency may invoke Exemption 1 in withholding records

[3] *Phillippi v. CIA*, (*Phillippi I*), 546 F.2d 1009, (D.C. Cir. 1976).

only if it complies with classification procedures established by the relevant Executive order and withholds only such material as conforms to the other's substantive criteria for classification." *Judicial Watch, Inc. v. Dep't of Def.*, 857 F. Supp. 2d 44, 55 (D.C. Cir. 2012). Similarly, Exemption 3 is also narrowly applied pursuant to specific congressional order requiring the federal agency to classify the documents at issue. *Fitzgibbons v. CIA*, 911 F.2d 755, 761-62 (D.C. Cir. 1990) (*the congressional intent to withhold is made manifest in the withholding statute itself).*

While using cases relevant to FOIA Exemption 1 and 3, Respondents are unable to comprehend this classification requirement and proffer dubious classification arguments that the "NYPD's ability to provide a circumscribed response is not dependent on its ability to classify documents" (NYPD Br. at 58). Unfortunately, federal judicial precedent, which is what Respondents seek to assert, differs from Respondents' position. Glomar is only available under specific enumerated circumstances, such as to protect our national security secrets. *See Phillippi I*, 546 F.2d 1009, at 1017. "[T]he fact that Glomar doctrine has arisen, and has been shaped, by the federal government's preeminent role in "national defense [and] foreign policy" (5 U.S.C. § 552(b)(1)) casts doubt on whether a judge should apply the doctrine to the NYPD." *Hashmi* 46 Misc. 3d, at 724 (R. 699).

Petitioners-Appellants have extensively argued that Respondent NYPD is a city law enforcement agency. 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 Central Intelligence Act. (Abdur-Rashid/Hashmi Br. at 30). The NYPD does not have the safeguards these agencies (who assert Glomar) have.

Respondents' argument that the Handschu guidelines and the Office of Inspector General serve as an oversight (NYPD Br. at 7-8) is disingenuous at best. The Handschu guidelines referenced in the Respondents' brief should be stricken from the record and not considered by this Court for the following reasons. First, the Handschu guidelines are not applicable to the case at bar and were not subject to this litigation and not an issue considered by the lower Court. Second, Petitioners-Appellants are not litigating the sufficiency of the Handschu guidelines; hence the same cannot be used against them as an oversight or a safeguard. Third, the Handschu guidelines do not deal with FOIL. Fourth, the Handschu guidelines regulate "future surveillance conduct" not past conduct. (*See* NYPD Br. Exhibit A at 2). Fifth, the NYPD is using the Handschu Guidelines as a shield[4], disguised as

[4] On June 1, 2016, the Court (*In Barbar Handshcu et al., v. Special Services Division, et al,* 71 Civ. 2203 (CSH)) held a second fairness hearing on Handschu guidelines. At the hearing, out of an abundance of caution, Abdur-Rashid/Hashmi counsel requested a confirmation on the record from the NYPD that they will not use the proposed Handschu guidelines as a shield.

oversight to allow it to evade its obligation and abuse FOIL's principle of –open government. (POL §84). Sixth, Handschu Guidelines do not address record retention, which Petitioners-Appellants are seeking. Seventh, Counsel on behalf of Petitioners-Appellants submitted written opposition to the proposed guidelines. Petitioners-Appellants also submitted individual affidavits in opposition to the proposed Handschu guidelines[5]. Eighth, the Handschu guidelines are a token to the NYPD[6] and provide no oversight on its use of the Glomar response.

> "The first thing is we would like a confirmation that the Handschu guidelines will not be used as a shield to prevent private persons from filing litigations or lawsuits against the NYPD." June 1, 2016, Hrg Tr. 52:18-21.

The request was motivated by the fact that the NYPD were *ultra vires* asserting the Handschu guideline as a shield.

> "Your Honor, the reason for this request arises from something that we mentioned here in court. It arises from the fact that at the moment, the proposed guidelines, which are yet to be approved by the Court, are already being used as a defense. They've been used specifically in the *Hassan v. New York City* case, which is a federal matter in front of the United States District Court for the District of New Jersey." June 1, 2016, Hrg Tr.53:12-18.

> "[T]he Hassan plaintiffs are actually not part of the Handschu class at all." June 1, 2016, Hrg Tr.53:23-24.

[5] Pertinent portions of both Abdur-Rashid and Hashmi affidavits stated:
"I submit this affidavit as a member of the class encompassed in the Handschu matter. I am directly impacted by the NYPD surveillance . . . . As my attorneys explained in this submission, I am also concerned that the NYPD may use the Guidelines as a shield if I choose to file a private lawsuit challenging the NYPD's violations of my constitutional rights . . . . The settlement should also address what will become of the records the NYPD has on individuals such as me. . . . I filed a FOIL request, to which they responded by bringing in foreign law to a state claim, i.e., the Glomar Response, neither confirming nor denying the existence of documents. The proposed settlement is silent on the records. I believe it should not be. Individuals like me, want to know what is in those records and want to also know what will

Assuming *arguendo* that the Handschu guidelines are an oversight (which is not the case), the present safeguards thereunder cannot fix NYPD's violations of FOIL requirements. The same reason the Handschu guidelines cannot fix what the NYPD did to Petitioners-Appellants (timing), is also why the Office of the Inspector General cannot be an oversight here. The office was created in 2013, after the NYPD conduct towards Petitioners-Appellants. The suggested so-called oversights and safeguards do not eliminate the respondents' obligations under FOIL.

Respondents' other set of alleged safeguards (NYPD Br. at 42-44) all fail as well for the following reasons. First, from its enumerated federal safeguards, it is evident the NYPD is attempting to replace FOIL with Glomar; this Court should not allow such an abuse. The NYPD, as a city agency governed under FOIL, cannot meet the burden of proof required to assert the federal Glomar response.

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become of those records and we ask this Court to grant us that right. It also concerns me when I read that a Full Investigation can be opened when "facts or circumstances reasonably indicate that an unlawful act has been, is being, or will be committed." In my case the NYPD considers me dangerous person with fear mongering about terrorists activities which I have nothing to do with except for the fact that I am a Muslim. (*In Barbar Handshcu et al., v. Special Services Division, et al,* 71 Civ. 2203 (CSH)) (Abdur-Rashid Aff. ¶¶ 28, 32-33, and 35) and (Hashmi Aff. ¶¶ 25, 29-30, and 32)

[6] They propose a Handschu Committee which is made of ten (10) senior commanding members of the NYPD and only one (1) Civilian Representative. (NYPD Br. Exhibit 1 at 12). It is no surprise that Respondents consider the Handschu guidelines a sufficient oversight based on the composition of the Committee - particularly because the Civilian Representative does not have any independent investigatory power and is a position held at the appointment of the Mayor in consultation with the Police Commissioner. (NYPD Br. Exhibit 1 at 12)

Glomar is not a "particularized exemption" under FOIL. The Respondents' assertion of Glomar at the state level curtails the receipt and review of requested records otherwise discoverable under FOIL. Hence, contrary to the NYPD's safeguard arguments, there can be no adversarial testing or rebuttal. More importantly, there will be no judicial review or even *in camera* review of the records. The NYPD's suggested safeguards are not warranted. FOIL has specifically stipulated safeguards and exemptions from disclosure (POL §87(2)(a-g) §89(2)). In *Hashmi*, the lower Court already said FOIL exemptions "*provide some modicum of oversight* by allowing the requester to formulate arguments in opposition to a claim of exemption, and by allowing a court to actually view responsive documents to ensure they fall within an exemption. *Hashmi* 46 Misc. 3d, at 724 (R. 699) (emphasis added). Respondents are asking this Court to allow them to evade this oversight for the simple reason that the Appellants-Petitioners are forcing them to acknowledge the existence of documents. (NYPD Br. at 2, 16, 20-24).

This Court should find Respondents' proposed safeguards to be self-serving and an attempt to do what federal courts warned against in *Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547, 562 (S.D.N.Y. 2005), ("The practice of secrecy . . . makes it difficult to hold executives accountable and compromises

the basics of a free and open democratic society. It also creates a dangerous tendency to withhold information from those outside the insular group . . .").

Permitting the use of the Glomar response will allow the NYPD to continue using this theory with impunity against legitimate organizations and individuals, such as Petitioners-Appellants in this case, for expressing their political views or practicing their religious rights. As recently as February 2017, the NYPD asserted Glomar, following the Appellate Division's decision, in response to a FOIL request submitted by members of Black Lives Matter (Millions March NYC) seeking information about whether the NYPD is using technology to infringe on the protest rights of activists. (*Millions March NYC, et. al., v. NYPD*, Matter Index No. 100690/17).

The NYPD trend, if allowed to continue, will not only infringe upon New Yorkers' First Amendment rights but will offer no remedy to New Yorkers, and courts will have no oversight to ascertain the validity of the NYPD actions. Accepting Respondents' proposed safeguards will do what the Court in *Hashmi* warned against that "[e]ngrafting the Glomar doctrine onto FOIL would change . . . 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. It is a legislative function to write a statute that strikes a balance embodying society's values." (R. 700).

POINT VI

PETITIONERS-APPELLANTS' REQUESTS IN COMPARISON TO THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (AALDEF) REQUESTS

Respondents attempt to marry the *AALDEF*[7] FOIL requests with Petitioners-Appellants' FOIL requests. (NYPD Br. at 9-10 and 46-49). Respondents then allude that the NYPD appropriately responded to Petitioners-Appellants' FOIL requests (NYPD Br. at 10). Both narrations are dubious for the following reasons.

First and foremost, the NYPD never appropriately responded to Petitioners-Appellants' requests. The NYPD at the administrative level provided "bare recitation" of statutory exemptions, which Petitioners-Appellants appealed against. (R. 269-270 and 730-731). Thereafter at the trial court, they asserted Glomar, an approach that finds no support in FOIL's terms or purpose.

Petitioners-Appellants have argued how their requests are distinct from the *AALDEF* requests (R. 528-532 and 797-800). They have argued how, unlike the *AALDEF* requests, they did not ask the NYPD to produce policy guidelines as relates to surveillance of Muslims in New York City and the surrounding areas. (R. 529 and 798). Most importantly, Petitioners-Appellants pointed out that

[7] *Matter of Asian Am. Legal Defense & Educ. Fund,* 125 AD3d 531, 532.

despite the *AALDEF* requests being broader than Petitioners-Appellants', Respondents did not assert Glomar in *AALDEF*, that FOIL provided sufficient exemptions. Petitioners-Appellants have persisted that all they are asking the Respondents to do is what they did in *AALDEF*. That is - apply FOIL legislation in response to Petitioners-Appellants' FOIL requests and produce all non-exempt documents, and if any exempt documents should exist, then articulate which FOIL exemption those documents fall under. (R. 529-530 and 798). The Respondents used Glomar theory instead.

This Court should find that the Appellate Division in its decision, which appeared unsure of which position to take, erred by not distinguishing between the NYPD's response in *AALDEF* which was within FOIL's requirements and its Glomar response in the case at bar. (R. 148). Had the Appellate Division distinguished the two responses, it would have asked the NYPD to acknowledge the existence of the requested documents, produce the non-exempt ones, and assert any applicable enumerated FOIL exemption to exempt documents should they exists. Instead, the Appellate Division failed to compel the NYPD to remain within the confines of state law (FOIL), as it had in *AALDEF*.

POINT VII

RESPONDENTS' ACKNOWLEDGMENT OF EXISTENCE OF REQUESTED DOCUMENTS DEFEATS THE GLOMAR RESPONSE

Even under federal law, an agency is 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 v. Nat'l Sec. Agency*, 592 F.3d 60, 70 (2d Cir. 2009). "When information has been officially acknowledged, its disclosure may be compelled even over the agency's otherwise valid exemption claim." *Fitzgibbon,* 911 F.2d, at 765.

Throughout this litigation, Respondents have insisted on the position that Petitioners-Appellants' requests were a subset of the *AALDEF* documents. They said it was part of AALDEF's "go FOIL yourself campaign" (NYPD Br. at 9, 12-13 and 52-54). Therefore, Respondents by this insistence have recognized the existence of Petitioners-Appellants requested documents.

In addition, at the March 8, 2016 oral arguments, Respondents independently acknowledged the existence of Petitioners-Appellants requested documents, when Respondents' counsel said Respondents had produced a subset of Petitioners-Appellants requested records in an unrelated case (*Raza et al v. City of New York et al,* 13 CV 3448 [EDNY]). (Abdur-Rashid/Hashmi at 39).

Respondents by their own admission have conceded to the existence of the requested records. Respondents' admission defeats their unfounded "good faith" use of the Glomar response (NYPD Br. at 63). This Court should also find the NYPD's use of the Glomar response to Petitioners-Appellants' request was done in bad faith as they have acknowledged the existence of the requested records.

POINT VIII

RESPONDENTS ARE CIRCUMVENTING COURTS' AUTHORITY

Pursuant to FOIL, 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. *Matter of New York Civil Liberties Union v. City of Schenectady*, 2 N.Y.3d 657, 661 (2004) (citing *Gould*).

However, Respondents (NYPD Br. in general and at 25) are asking this Court to view FOIL exemptions expansively, rather than narrowly as precedent requires in an attempt to circumvent the Court's authority. Arguments relating to "common sense," the citation of inapplicable FOIA decisions, and analogies to unrelated principles, such as the misplaced attorney-client privilege and the right against self-incrimination (NYPD Br. at 23), even assuming they are relevant, are insufficient to overcome the clear intent of FOIL. The attorney work product doctrine and the Fifth Amendment right against self-incrimination both have bases

under statute, unlike the NYPD's attempt to apply Glomar here, which does not. The attorney work product comparison is particularly misplaced since attorneys cannot assert a privilege and escape review as the NYPD is attempting to do here. Where an attorney asserts the work product privilege, he or she is under the obligation to produce a privilege log identifying the subject matter of the privilege, the type of documents, the author, and recipient if applicable for the court to determine whether or not the privilege claim is valid. Here, the NYPD is trying to usurp the adversarial process and defeat judicial scrutiny, thereby defeating the purpose of our established laws under a democratic society. Allowing agencies to invoke this federal doctrine will foster an environment of secrecy and distrust, which is the exact opposite of the transparency intended by the legislature in enacting FOIL. This Court should not permit the NYPD or any other state or local agency to usurp the role of the legislature and write additional exemptions to disclosure into FOIL. *Hashmi,* 46 Misc. 3d, at 722 (R. 696).

Contrary to Respondents' arguments (NYPD Br. at 24), Petitioners-Appellants are not disputing the "information." Petitioners-Appellants do not have the "information" to dispute in the first place due to the problematic Glomar response. What Petitioners-Appellants are disputing is Respondents' Glomar response, which is not applicable to FOIL requests. The Glomar response abrogates Petitioners-Appellants' statutory right under FOIL to challenge any

objection to record disclosure. Glomar prevents this Court from exercising its judicial function since Glomar does not even allow *in camera* review, as Judge Moulton recommended (R. 689-690) thereby enabling the NYPD to escape judicial review. (Abdur-Rashid Br. at 38).

This Court should not allow the NYPD to circumvent the Court's powers. It should find that the Appellate Division erred when it did not at a minimum order an "*in camera* review".

POINT IX

FOIL LEGISLTAION IS SUFFICIENT FOR THESE FOIL REQUESTS

Even though it is well settled that FOIL was modeled after its federal counterpart FOIA, the two statutes contain differences that are directly relevant to the issue at bar. In particular unlike FOIA, FOIL requires that an agency,

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

A provision that troubles Respondents. (See NYPD Br. at 28-31). However much it troubles them, Respondents' position is still wrong. Unlike its federal counterpart, the New York State Public Officers Law clearly requires that the agency acknowledge whether or not the records exist. *See, Key v. Hynes,* 613 N.Y.S.2d 926, 205 A.D.2d 779 (1994) (a certification containing conclusory

allegations that a record could not be found are not sufficient); and *Rattley v. NYPD,* 96 N.Y.2d 873,875 (2001) (acknowledging the need for a certification but stating that the Public Officers Law does not dictate the manner of the certification). These cases and a plain reading of POL § 89 (3) clearly support the Petitioners-Appellants' argument that the inclusion of this certification requirement in FOIL requires agencies to state whether or not they have records in their possession.

Respondents' explanation of the court's holding in *Rattley* is flawed. Respondents argue that an agency can certify they searched and could not find the documents only when the requested documents are "not exempt". (NYPD Br. at 29). This argument is illogical at best. How can an agency know if documents are exempt or not if they were not found after diligent search? The duty to acknowledge the documents supports what the legislature intended, whether the agency asserts exemption or not (*Rattley* 96 N.Y.2d, at 875). An agency will have to search and acknowledge the existence of requested documents/records. If these documents are not found, then the agency is required to certify that, following a diligent search, it could not find the requested records (POL § 89 (3)). If found, the agency will have to produce the documents or claim an enumerated FOIL exemption from disclosure (POL §87(2)(a-g) §89(2)). How can an agency be required to certify it searched but could not find the requested documents and

simultaneously say "we cannot confirm or deny the existence of documents" and /or acknowledge the existence of documents when available? Respondents' arguments have no logic in the law or fact. The legislature's intent and the case law do not support the Respondents' argument.

CONCLUSION

For the reasons set forth in the opening brief and in this reply brief, this Court should find the Appellate Division erred and usurped the legislature's function by allowing the NYPD to assert Glomar to FOIL requests. This Court should find FOIL exemptions provide adequate safeguards against disclosure (POL §87(2)(a-g) §89(2)), and Glomar is not among the articulated exemptions.

Petitioners-Appellants further respectfully request this Court compel the NYPD to respond to their FOIL request and Article 78 Petition. In the alternative, Petitioners-Appellants request this Court compel an *in camera* review of the requested documents.

Dated: New York, NY
June 8, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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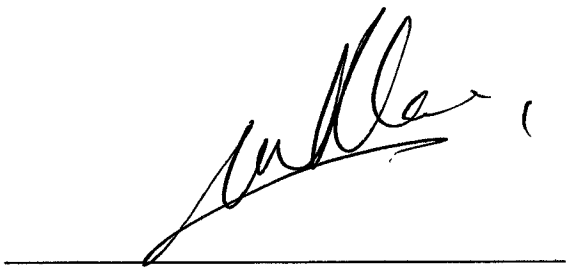

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