SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

SAMIR HASHMI,

Petitioner,

v.

NEW YORK CITY POLICE DEPARTMENT, and RAYMOND KELLY, in his official capacity as Commissioner of the New York City Police Department,

Respondents.

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

----------X

Index No. 101560/2013
IAS Part 57 (Moulton, J.)

PETITIONER'S MEMORANDUM OF LAW IN SUR-REPLY TO RESPONDENTS' REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS THE VERIFIED PETITION

Counsel:

Omar T. Mohammedi, Esq. (OTM7234)
Law Firm of Omar T. Mohammedi, LLC
233 Broadway, Suite 801
Woolworth Building
New York, NY 10279
(212) 725-3846

On behalf of Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

PRELIMINARY STATEMENT

Petitioner Samir Hashmi ("Petitioner" or "Mr. Hashmi") submits this Memorandum of Law in Sur-Reply to Respondents New York City Police Department and Raymond Kelly (in his official capacity as Commissioner of the New York City Police Department) (hereinafter collectively referred to as "the NYPD") Reply Memorandum of Law in Further Support of Motion to Dismiss.

On November 26, 2013, Petitioner filed a Freedom of Information Law[1] ("FOIL") Article 78 Petition. In his petition, Mr. Hashmi requested access to records created and held by the NYPD in relation to its surveillance of him, as well as the NYPD's surveillance of the Rutgers Muslim Student Association, for which Mr. Hashmi served on the board. Mr. Hashmi specified in his FOIL request that he did not oppose receiving records with exempt material redacted. In response, on February 13, 2014, Respondents filed the instant Motion to Dismiss. Respondents refused to disclose the records they have on Petitioner, and in violation of their obligations under FOIL, Respondents attempt to invoke federal Glomar doctrine ("Glomar"). Petitioner submitted its opposition brief on March 27, 2014, and Respondents replied on April 9, 2014.

Oral arguments on the motion were heard on June 11, 2014. During oral arguments, Petitioner moved to strike new arguments raised in Respondents' reply which were not raised in its motion to dismiss. This Court allowed parties to submit sur-replies, hence this brief.

At the June 11, 2014 oral arguments, as the parties and the Court were discussing the sur-reply briefing schedule, Respondents' counsel indicated that Respondents might need to file an additional affidavit along with their further reply. Due to the important role of affidavits in this proceeding, Petitioner opposes this request. A new affidavit would submit new facts and personal experiences that the Respondents will rely upon in support of their further reply.

[1] N.Y. Pub. Off. Law §§ 84-90.

Should Respondents file an affidavit in support of their further reply, we respectfully ask that this Court either strike the new affidavit or offer Petitioner the opportunity to file a reply to address new facts raised in the new affidavit.

The NYPD is attempting to change state law in its entirety to apply federal Glomar doctrine. By Respondents' own concession in their Reply Brief and at the June 11, 2014 oral arguments, no courts in all fifty states have applied the federal Glomar doctrine to state FOIL petitions. Respondents' Reply Brief ("Reply Br.") at 13; June 11, 2014 Oral Argument ("Oral Arg. Tr.") at 5:4-11. In addition, this Court confirmed at oral arguments that it had not found any state Court to have applied the Glomar doctrine. Oral Arg. Tr. At 5:2-3 (This Court stated that it "didn't see any authority from other states concerning similar issues."). The Glomar doctrine is not a response available for application by municipalities or state agencies, such as the NYPD, yet Respondents are asking this Court to rely on the NYPD's discretion in applying Glomar. This Court should deny the NYPD's Motion to Dismiss based on Glomar – a federal doctrine inapplicable to FOIL and direct Respondents to answer Petitioner's FOIL requests. The NYPD should fulfill its obligation under state FOIL and disclose to Mr. Hashmi the records he is entitled to, with proper exempt material redacted. In the alternative, this Court should conduct an *in camera* inspection of responsive records.

ARGUMENT

I. MOVE TO STRIKE FOIA EXEMPTION 7

Every single case cited by the NYPD in their moving papers involves Glomar being "tethered" to FOIA Exemption 1 and 3. *See* Petitioner's Opposition Brief ("Opp. Br.") at 6-7. The NYPD claims that "as can easily be seen, Respondents clearly cited these cases as a means of providing the Court with background and a general understanding of the Glomar doctrine and

the law enforcement privilege." *See* Respondents' Reply Brief ("Reply Br.") at 4. This argument is hyperbole. Normally parties cite to cases that are on point and supportive of their claims. The NYPD raises FOIA Exemption 7 for the first time only after Petitioner filed his opposition brief, claiming that "Petitioner states the obvious, as the analogous law enforcement exemption is FOIA Exemption 7." *See* Reply Br. at 4.

The NYPD's conduct clearly violates the established pleading rules where no new arguments can be raised in reply briefs. Arguments raised for the first time in reply are not to be considered. *See Wal–Mart Stores, Inc. v. U.S. Fidelity and Guar. Co.,* 11 A.D.3d 300, 784 N.Y.S.2d 25 (1st Dept. 2004). As the First Department explained in *Dannasch v. Bifulco,* 184 A.D.2d 415, 417, 585 N.Y.S.2d 360 (1st Dept. 1992), "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." (*Apartment Recycle Co. of Manhattan Inc.,* 10 Misc.3d 1066(A), 814 N.Y.S.2d 559 (Supreme Court, New York County 2005) *citing, Fiore v. Oakwood Plaza Shopping Center, Inc.,* 164 A.D.2d 737, 739, 565 N.Y.S.2d 799 [1st Dept.], *aff'd.,* 78 N.Y.2d 572, 578 N.Y.S.2d 115 (1991) *cert. denied,* 506 U.S. 823 (1992) ("The First Department, however, has carved out a narrow exception to the maxim excluding arguments advanced in a movant's reply papers: where the opposing party availed themselves of an opportunity to oppose the claims in their sur-reply,' the movant's arguments may be considered on their merits")).

The NYPD is requesting this Court to rely on the NYPD's discretion to invoke a Glomar response. The NYPD had the opportunity in their moving papers to put forth all exemptions they allege are applicable in denying Petitioner's request. However, it is only in their reply brief that the NYPD states ". . . Glomar may be properly invoked if tethered to, inter alia, the law

enforcement exemption found in FOIA Exemption 7." *See* Reply Br. at 4. The NYPD should not be allowed to raise new arguments after they were served with Petitioner's response to their original arguments. Respondents cannot keep making new arguments after Petitioner has responded to their original arguments. Such change in the arguments would foster the unfavorable theory of "litigation by ambush". New York courts have clearly held that "[a]rguments may not be made for the first time in a reply brief." *Knipe v. Skinner, et al.*, 999 F.2d 708, 711 (2d Cir.1993); *see, e.g.*, *Martin v. Triborough Bridge and Tunnel Authority et al*, 73 A.D.3d 481, 487; 901 N.Y.S.2d 193 (1st Dep't 2010).

II. THE NYPD HAS NOT MADE A SPECIFIC AND DETAILED SHOWING AS TO WHY THEY SHOULD USE GLOMAR.

A. The Glomar Doctrine Is Not Applicable To the Case At Bar.

Under New York FOIL, government agencies have only three choices to answer a FOIL request: (1) the record exists, and here are copies of what the government agency has; (2) the record exists, but due to exemptions, the government agency cannot submit copies to the FOIL requestor; and (3) the requested record does not exist.[2] In the case at bar the NYPD acting *ultra vires* and in clear violation of its FOIL obligation has not only refused to submit the records requested by Petitioner, but are attempting to invoke a federal doctrine that "they will neither confirm, nor deny" the existence of the record. Such an attempt by the NYPD simply fosters an abuse of power and secrecy. Such a failure to disclose will give the NYPD the unrestricted ability to use Glomar whenever they want without any oversight. As this Court recognized and acknowledged at the Oral Argument, "[t]he problem here is that secrecy of course is necessary for all manner of police investigation, but also can be used in an abusive way by government, to hide things that shouldn't be hid from the public at large." Oral Arg. Tr. at 7:15-20.

[2] The New York Committee on Open Government (the committee responsible for overseeing and advising on FOIL matters) has so advised. *See* http://www.dos.ny.gov/coog/foil2.html.

The NYPD began its oral arguments by submitting that this case was not about the NYPD's policies, practices and operations. Nor was it about the Petitioner. It was about the impact of the request, and whether the NYPD ought to be required to disclose whether responsive documents exist or not. *See* Oral Arg. Tr. at 3:7-13. Such an argument is troubling and defeats the purpose of the FOIL. FOIL requests are treated on a case-by-case basis. New York State FOIL was not established to accommodate the NYPD's policies or other matters that have nothing to do with a freedom of information request itself. A freedom of information request is solely for the requestor to find out information held by government agencies, absent any valid exemptions. *See* N.Y. Pub. Off. Law §§ 84, 87(2) (. . . [t]he people's right to know the process of government 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."). The FOIL was established for this very purpose and this purpose only.

The NYPD has not and cannot articulate in their arguments why they should benefit from Glomar, a federal FOIA doctrine. The purpose of both FOIL and FOIA is to avail to private citizen the opportunity to review records that law enforcement and other government agencies have on them, unless a legitimate exemption prevents such disclosure. In the case at bar, the NYPD has only made sweeping generalized statements and has not articulated specific reasons for their failure to release the requested records. All the NYPD has done is assert that they "cannot confirm or deny" the existence of the requested records. Petitioner Hashmi is not interested in records or information on other people. Nor is he seeking to learn about the NYPD's policies. His request is personal and protected under FOIL. At oral arguments, Respondents stated if they released information on Hashmi they would have to release other

information to other requesters. *See* Oral Arg. Tr. at 3:3-7, and 32:4-7. Such argument is without merit. Courts have rejected that "disclosure-of-some–is-disclosure-of-all" argument. *See, e.g.*, *Students Against Genocide v. Dep't of State,* 257 F.3d 828 (D.C. Cir. 2001) (disclosure of 14 photographs of Srebrenica massacre did not require release of other photos, since the additional disclosure could reveal reconnaissance imagery sources and methods); *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (disclosure by CIA to Congress of presence in Dominican Republic in 1960 did not require disclosure of documents confirming or denying presence in 1956). Respondents should not evade their obligation under FOIL by establishing an exemption that does not exist under state statute. Therefore, Respondents cannot invoke Glomar.

B. NYPD Has Not Met Its Burden Of Proof.

Glomar does not apply in the case at bar. The onus is upon the NYPD to demonstrate to this Court why it should apply Glomar. Why the three FOIL responses available to government agencies enumerated above are not sufficient. The NYPD has not demonstrated to this Court why it needs an additional exemption beyond the state FOIL exemptions.

Despite the fact that Glomar does not apply to the case at bar, the NYPD is attempting to invoke Glomar without meeting the requisite standards for such application. As submitted in Petitioner's Opposition Brief at 5, to properly employ the Glomar response to a FOIA request, an agency must "tether" its refusal to respond to one of the nine FOIA exemptions. *Wilner v. NSA*, 592 F.3d 60, 68 (2D Cir. 2009). The NYPD is a municipality. It is not a federal agency. It does not have the federal FOIA exemptions available to it, as of right. If the NYPD wants to avail itself to federal exemptions, the burden of proof is upon the NYPD to demonstrate to this Court why the federal exemptions should apply to the case at bar.

Assuming *arguendo* that Glomar applies, Respondents fail to satisfy the requisite federal FOIA standard. Courts have held that agencies resisting public disclosure have "the burden of proving the applicability of an exception." *Minier v. Central Intelligence Agency,* 88 F.3d 796, 800 (9th Cir.1996). "That burden remains with the agency when it seeks to justify the redaction of identifying information in a particular document as well as when it seeks to withhold an entire document." *United States Dep't. of State v. Ray,* 502 U.S. 164, 173 (1991) (emphasis added). An agency "may meet its burden by submitting a detailed affidavit showing that the information logically falls within the claimed exemptions." *Minier,* 88 F.3d at 800 (internal quotation marks and citation omitted). "In evaluating a claim for exemption, a district court must accord 'substantial weight' to (agency) affidavits, provided the justifications for nondisclosure are not controverted by contrary evidence in the record or by evidence of (agency) bad faith." *Id.* (internal quotation marks and citation omitted).

C. FOIA Requires Supporting Affidavit to Have Reasonable Specificity

Since the NYPD wants to seek federal exemptions, which Petitioner submits it should not, then the NYPD must follow the legal requirements of federal law and FOIA in particular, and embrace all aspects of FOIA. Under FOIA, "the affidavits in support of nondisclosure must show, with reasonable specificity, why the documents fall within the exemption. The affidavits will not suffice if the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping." *N.Y. Times Co. v. Dep't of Justice*, No.13-422(L), 2014 WL 1569514 (2d Cir. Apr. 21, 2014). Here, Galati's affidavit—which the NYPD exclusively relies upon—is generic, and makes broad conclusory statements with no relevance or connection to Petitioner Hashmi. This Court should not find the Galati affidavit as instructive for the nondisclosure.

In addition, the Galati affidavit's assertions of harm bound to arise from the disclosure is not entitled to deference by this Court. The Galati affidavit lacks "reasonable specificity of details" and has been "called into question by contradictory evidence." *See Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982). The Galati affidavit upon which the NYPD relies, recites incidents that have no relevance to the Petitioner's request. Such affidavit could be interchangeably used for any person requesting information under FOIL who is Muslim. For example, the Galati affidavit at paragraph 7 states "[t]he knowledge that a person or group is a subject of a NYPD counter-terrorism investigation would allow that person or group to alter their behavior so as to avoid detection and perhaps avoid contact with other potential subjects of investigation or sources of information . . . ." Galati Aff. ¶ 7. Further, Galati affidavit paragraph 50 goes so far as to state " . . . individuals and groups contemplating committing terrorist acts should not be allowed to submit FOIL requests so that they will be afforded the comfort of knowing that they are invisible to law enforcement scrutiny if the NYPD were to respond in the negative." Galati Aff. ¶ 50. It is hardly persuasive in determining that Mr. Hashmi was a particular individual who belonged to a particular group that would be engaging in the types of generalized harm that the NYPD claims would befall the people of New York if the NYPD was forced to confirm or deny the existence of the requested records. In Galati's affidavit, there was not a single sentence where he refers to Mr. Hashmi or to any activities related to him. Galati's affidavit could be used to fuel fearmongering in general and to group all Muslims under one banner. It could be used in a media setting, in a conference but it cannot be used as a basis to deny Mr. Hashmi his right to request information under FOIL. The NYPD erroneously relies on case law in their Reply Brief at 11 – *Matter of Whitley v. New York County Dist. Attorney's Off.*, 2012 N.Y. App. Div. Lexis 8320:2012 NY. Slip Op 8435 (Ist Dep't Dec. 6, 2012) – to counter

the requirement of particularized findings as to whether the exemption applies to each responsive document. What the NYPD deliberately fails to point out to the Court, is that the *Whitley* Court, rejected the argument that respondents were required to set forth particularized findings because there was a pending appeal on that case.

In addition to failing to offer any particular facts or specific details in Galati's affidavit, the NYPD goes as far as to cite case law to support their argument that information available to the FOIL or FOIA requester is similarly available to "North Korea's secret police and Iran's counterintelligence service too." Respondent's Moving Brief ("Moving Br.") at 22. There is no connection between Petitioner's request for information on himself and the examples of foreign terrorist organizations. Making such a baseless and conclusory comparison only establishes the fear tactic that has no logic in fact or in law.

Agencies withholding documents are meant to provide particularized and specific details for the withholding. In the case at bar, the NYPD has failed to do that. The Galati affidavit which the NYPD relies upon in their moving papers recites cases that have no relevance to the Petitioners request.

D. FOIA, Like FOIL, Favors Open Government

FOIA serves as a check for citizens to know what their government is up to.[3] FOIA favors openness, and the limited exemptions it provides are narrowly tailored. The NYPD has not made any specific showing in their moving papers or their reply, as to why this Court should allow them to invoke Glomar, or any of the FOIA exemptions as regards to Petitioner's specific request. Even in Respondents' reply brief, where they claim that FOIA Exemption 7 should apply to this case, the NYPD does not specify which part of Exemption 7 they refer to. *See* Reply Br. at 4. Instead Respondents refer to their Moving Brief ("Moving Br.") at 10-26, as

[3] *See* http://www.foia.gov.

supportive. In fact, Respondents' Moving Brief at 10-26 actually cites to case law which tethers FOIA to Exemption 1 and 3, not exemption 7, which has exhaustively been challenged by Petitioner's Opposition Brief at 8-11. The NYPD is a municipality and as such, lacks the authority to classify documents. Neither can the NYPD avail itself to any executive order that would permit it to provide blanket nondisclosure of the requested records.

The NYPD even attempts to tenuously show a link between this case and the *Asian American Legal Defense Fund v. NYPD*, 41 Misc. 3d 471 (Sup. Ct., N.Y. 2013) ("*AALDEF*") (currently on appeal). Such an attempt is futile. As explained in Petitioner's Opposition Brief at 21, the records requested in the case at bar are of a much narrower scope, than those requested in the AALDEF case. In the AALDEF case, the request was very broad, namely asking for the NYPD's policies and statistic pertaining to surveillance of Muslim communities in the tri-state area. In the instant case, Petitioner's request is only for records the NYPD has on him. He is not requesting any policies or statistics used by the NYPD.

The NYPD in the AALDEF case argued that the request was too broad because it asked for the generic NYPD policies. *AALDEF*, 41 Misc. 3d at 475. The AALDEF court agreed with the NYPD. *Id.* at 473-74. In the instant case before this Court, the Respondents' arguments undermine their previous arguments made in AALDEF. Now the Respondents are arguing that Petitioner Hashmi's FOIL request is not about the individual requester it is about the policy of the impact that the release of the requested records could have. It appears that the Respondents want to have their cake and eat it too.

E. There Is No Pending Proceeding Against Petitioner Hashmi

The NYPD has not commenced any proceedings against Mr. Hashmi, nor is Mr. Hashmi involved in any ongoing litigation. Courts have held that disclosure may be denied, where the

information is being used in "pending or prospective" enforcement proceedings. However the agency withholding the information must show that the release could reasonably be expected to cause some articulable harm. *Manna v. Dep't of Justice,* 51 F.3d 1158, 1164 (3d Cir. 1995). In the instant case, the NYPD, despite alleging that the law enforcement exemption applies, has failed to show how release of Mr. Hashmi's records to him will cause harm. Instead the NYPD resorts to emotionally-laden and fear-inciting tactics, by listing 27 cases of thwarted terrorist attempts, none of which have anything to do with Petitioner Hashmi. NYPD fails to establish the "articulable harm" of releasing Mr. Hashmi's record to him.

Speculative theories and examples of thwarted terrorist attempts presented in the Galati affidavits should not be a basis to assert Glomar. New York Penal Law sets forth specially defined offenses regarding terrorism or support of terrorism, or offenses that relate to matters such as aircraft hijacking or destruction, attacks on transportation, communications, or energy facilities or systems, biological or chemical weapons, nuclear or radiological materials, etc. *See* N.Y Penal Law § 490 *et al.* The NYPD requires reasonable suspicion to investigate and charge individuals under the criminal code. Mr. Hashmi has not been charged with any crime. Suffice to say that it is because the NYPD has not been able to find reasonable suspicion in order to charge Mr. Hashmi with a crime. There is a disconnect between what the Galati affidavit asserts as thwarted terrorist attacks and the attempt to link these terrorist attacks somehow to Mr. Hashmi's case. It cannot be done. Therefore, the NYPD's argument must fail.

Respondents cite to *Pittari v. Pirro*, 258 A.D. 2d 202 (2d Dep't 1999) in their Reply Brief in support of their nondisclosure, where the Second Department held "a generic determination could be made that disclosure under FOIL would cause interference" with the pending proceeding. Reply Br. at 9. In further support of Respondents' nondisclosure, they cite to *Legal*

Aid Soc'y v. New York City Police Dep't, 274 A.D.2d 207, 214, 713 N.Y.S.2d 3, 7 (1st Dep't 2000) where " the assertion that disclosure of records to a defendant in a pending criminal prosecution would interfere with that proceeding is a sufficiently particularized justification for the denial of access to those records under Public Officers Law § 87(2)(e)(i)." Reply Br. at 10. Respondents' arguments here are misleading and without merit. All these cases refer to specific criminal proceeding pending against the requester. There are no pending criminal prosecution proceedings against Petitioner Hashmi, therefore the cases *Pittari v. Pirro* and *Legal Aid Soc'y v. New York City Police Dep't* do not apply to the case as bar.

F. Unnecessary Secrecy and Fear of Embarrassment Are Not Valid Grounds for Nondisclosure.

The NYPD cannot use the Glomar doctrine to cover-up any misconduct or embarrassing information from disclosure. Courts are very cautious in granting Glomar, even in cases where federal agencies have appropriately raised the Glomar doctrine, in order to avoid abuse of the doctrine.

The secrecy of "cannot deny nor confirm" could easily be used as a tool by law enforcement agencies to evade FOIA requests. This Court expressed the same caution. "[t]he problem here is that secrecy....can be used in an abusive way by government, to hide things that shouldn't be hid from the public at large." Oral Arg. Tr. at 7:15-18.

The court in *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005), held that Glomar "encourage[s] an unfortunate tendency of government officials to over-classify information, frequently keeping secrets that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods." FOIA cannot be used to cover up embarrassment. *National Day Laborers v. US ICE*, 811 F. Supp. 2d 713, 758 (S.D.N.Y. 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).

The Rutgers Muslim Student Association was under routine daily surveillance by the NYPD.[4] Mr. Hashmi was Treasurer of the Rutgers Muslim Student Association during the time of the NYPD's surveillance. In June 2009, a building superintendent at an apartment complex near Rutgers University New Brunswick, New Jersey campus called 911 because he thought he had stumbled upon a terrorist safehouse.[5] When the New Jersey police and FBI responded, they discovered that the would-be terrorist safehouse was actually the NYPD's surveillance center for spying on Rutgers University's Muslim students.[6]

As it has been widely reported[7], The NYPD's improper religious profiling of the Rutgers Muslim Student Association without any reasonable suspicion is an embarrassment for the NYPD. The Glomar doctrine cannot be used by a government agency to hide from its

---

[4] *See* N.Y. Police Dep't, Weekly MSA Report (2006), *available at* http://hosted.ap.org/specials/interactives/documents/nypd-msa-report.pdf.

[5] Matt Apuzzo and Adam Goldman, *See Something, Say Something, Uncover NYPD Spying*, Associated Press, July 25, 2012, *available at* http://bigstory.ap.org/article/what-confused-911-caller-outs-nypd-spying-nj

[6] *See id.*

[7] *AP's Probe Into NYPD Intelligence Operations*, Associated Press, *available at* http://www.ap.org/Index/AP-In-The-News/NYPD (last accessed October 9, 2013).

Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas,* Associated Press, August 23, 2011, *available at* http://www.ap.org/Content/AP-in-the-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas.

Chris Hawley & Matt Apuzzo, *NYPD Infiltration of Colleges Raises Privacy Fears*, Associated Press, October 11, 2011, *available at* http://www.ap.org/Content/AP-In-The-News/2011/NYPD-infiltration-of-colleges-raises-privacy-fears.

Matt Apuzzo & Adam Goldman, *NYPD: Muslim Spying Led to No Leads, Terror Cases*, Associated Press, Aug. 21, 2012, *available at* http://www.ap.org/Content/AP-In-The-News/2012/NYPD-Muslim-spying-led-to-no-leads-terror-cases.

Matt Apuzzo and Adam Goldman, *See Something, Say Something, Uncover NYPD Spying*, Associated Press, July 25, 2012, *available at* http://bigstory.ap.org/article/what-confused-911-caller-outs-nypd-spying-nj

embarrassing misconduct. Allowing the use of the Glomar doctrine in the instant case would defeat why citizens have the right to request information in the first place. Therefore, the Respondents should not withhold the requested information and try to assert a blanket claim that they "cannot confirm or deny" the existence of requested records.

III. THERE IS NO STATE LAW PROVISION OR EXEMPTION THAT PERMITS A "CANNOT CONFIRM NOR DENY" RESPONSE TO A FOIL REQUEST.

Petitioner Hashmi made a state FOIL request for records from the NYPD. In response the NYPD is trying to invoke federal provisions to answer a state request, while the actual state freedom of information law is sufficient and has been for over 30 years.

Respondents in their moving papers and Reply Brief assert that disclosing the existence of documents responsive to Petitioner's FOIL request would implicate recognized FOIL exemptions—specifically, the law enforcement exemption found in N.Y. Pub. Off. Law §87(2)(e)(i) (interference with law enforcement investigations), and §87(2)(e)(iv) (protection against revealing non-routine criminal investigative techniques), and §87(2)(f) (exempting documents where disclosure could endanger the life or safety of any person). *See* Reply Br. at 2. Petitioner in his Opposition brief has demonstrated how none of the above three state FOIL exemptions are applicable to the instant case. *See* Opp. Br. at 17-26.

A. "Cannot Confirm or Deny" the Existence of Records Sought Is Not a N.Y. Pub.Off. Law §87(2)(e)(i) Provision

N.Y. Pub. Off. Law §87(2)(e)(i), exempts from disclosure records which would interfere with law enforcement investigation or pending judicial proceedings. This exemption does not give the Respondents the exclusive right to state "we cannot confirm or deny the existence of records sought." Respondents have not demonstrated or shown that Petitioner Hashmi is involved in criminal activities. Neither have they demonstrated that Petitioner Hashmi was ever

criminally charged, nor currently undergoing criminal proceeding. Furthermore, there is no provision under the N.Y. Pub. Off. Law which would give the NYPD the authority to state "we cannot confirm or deny the information sought."

New York Court have held that §87(2)(e)(i) does not apply to completed investigations in which no further action is contemplated. *See, e.g., Church of Scientology of N.Y. v. State of N.Y.,* 403 N.Y.S.2d 224, 226 (N.Y. App. Div. 1978). In Petitioner's case, there has been no action following the investigation and surveillance. *See* Opp. Br at 19.

B. Petitioner Does Not Seek NYPD's Investigative Techniques and Procedures

The exemption under N.Y. Pub. Off. Law §87(2)(e)(iv) does not apply to Petitioner Hashmi because the requested records do not fall squarely within the ambit of §87(2)(e)(iv). Petitioner's request largely does not seek details about investigative techniques and procedures. Petitioner's request simply seeks intelligence gathered specifically about him. Furthermore, Petitioner in his FOIL request stated that he is willing to receive the records with exempt information redacted. Courts have held that in the event any responsive record contains both exempt information and non-exempt information, the NYPD must produce the responsive records with the exempt information concerning non-routine investigative techniques redacted. *Fink v. Lefkowitz,* 419 N.Y.S.2d at 472 (N.Y. 1979). See Opp Br. at 21.

C. The Respondents Could Not Demonstrate "Possibility of Endangerment"

N.Y. Pub. Off. Law § 87(2)(f) exempts responsive records from disclosure that, "if disclosed could endanger the life or safety of any person." NYPD's blanket refusal to produce responsive documents let alone their refusal to confirm or deny the existence of responsive documents under this exemption is invalid. For this safety exemption to apply, the NYPD must demonstrate at the least "a possibility of endangerment". *Bellamy v. N.Y.C. Police Dep't,* 87

A.D.3d 874, 875 (N.Y. Sup. Ct. App. Div. 1st Dep't 2011). However, this "possibility" must be more than "speculative." *N.Y. Times Co. v. City of New York Police Dep't,* No. 116449/10, 2011 WL 5295044 (N.Y. Sup. Ct. Oct. 3, 2011). *See* Opp. Br. at 24

As asserted in Petitioner's Opposition Brief at 25, the NYPD has not met its burden to show that the requested records fall squarely within the claimed exemption. Undercover informants have been used routinely in investigations. Such information is easily redacted from the responsive documents.

Respondents use *Lesher v. Hynes*, 19 N.Y.3d 57, 67 (2012) to assert that disclosure of the responsive documents would provide the public with access to valuable and sensitive information regarding what information is collected, how it is obtained, from whom it is obtained and how it might be used, and would enable someone inclined to commit acts of terrorism to circumvent the NYPD. *See* Reply Br. at 12. Respondents misconstrue the court's holding in *Lesher*, where "not . . . every document in a law enforcement agency's criminal case file is automatically exempt from disclosure simply because kept there. The agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents." *Lesher*, 19 N.Y.3d at 67 (2012). In addition, Mr. Hashmi has no criminal charges against him.

Petitioner Hashmi's FOIL request is for records created and held by the NYPD in relation to its surveillance of him. Mr. Hashmi specified in his FOIL request that he did not oppose receiving records with exempt material redacted. The NYPD has merely used Glomar to assert a blanket statement that they will "not confirm nor deny" the existence of the information Petitioner Hashmi sought.

More importantly, the cases the NYPD cite discuss the disclosure of information. However, the NYPD is actually challenging the concept of disclosure in and of itself by stating "we cannot confirm or deny" the existence of such records. The NYPD has not followed the *Lesher* standards. They have not identified the kind of documents that are exempt, nor the risk posed by disclosure of those documents. NYPD cannot identify exempt documents or the possible risk because there is no risk posed from disclosure to Petitioner Hashmi of the records he seeks.

IV. THE NYPD HAS A LONG HISTORY OF ABUSE OF POWER AND THIS COURT SHOULD NOT DEFER TO THE NYPD'S JUDGMENT.

The NYPD is asking this Court to defer to the NYPD, and trust its discretion to apply Glomar. *See* Moving Br. at 27-31. This *could* have been an option but for the fact that no state court has ever applied Glomar, and with the NYPD's long-standing reputation of abuse of power and questionable policies, this Court should hesitate to rely on the NYPD's judgment pushing for Glomar to be applied in this case. The NYPD's track record reveals abuses and many instances of civil rights violations. Before the establishment of the Inspector General's ("IG") office in 2013, there was no oversight mechanism for the NYPD, whereas, oversight has always existed for federal and New York state agencies. Giving the NYPD additional exemptions via Glomar will deepen the abusive nature of the NYPD's secrecy. By asking this Court to trust the NYPD's discretion, The NYPD has opened the door for its policies to be called into question as analyzed below.

A. Surveillance Widely Publicized.

The NYPD has been the center of many controversies involving racial and religious profiling and surveillance of certain communities in New York and the tri-state area. In particular there have been multiple publications about the NYPD's surveillance of the Muslim

community. The surveillance was not based on leads, but purely based on religious beliefs and practices of those communities.[8] For example, the now disbanded "Demographic Unit" extensively mapped Muslim communities and spied on them.[9] This unit was headed by Chief Thomas Galati, who is the affiant in this case, and upon whose affidavit the NYPD extensively relies upon in their motion to dismiss.

B. Incidents of NYPD Abuse of Power.

Deference cannot be extended to the NYPD because as an institution, the NYPD has a history of civil rights violations. For instance, on August 12, 2013, the federal court found the NYPD's highly controversial stop-and-frisk practices unconstitutional. *Floyd et al. v. City of New York*, 959 F.Supp. 2d 540 (S.D.N.Y. August 12, 2013).[10]

---

[8] AP's Probe Into NYPD Intelligence Operations, Associated Press, *available at* http://www.ap.org/Index/AP-In-The-News/NYPD (last accessed October 9, 2013).

Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas,* Associated Press, August 23, 2011, *available at* http://www.ap.org/Content/AP-in-the-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas.

Chris Hawley & Matt Apuzzo, *NYPD Infiltration of Colleges Raises Privacy Fears*, Associated Press, October 11, 2011, *available at* http://www.ap.org/Content/AP-In-The-News/2011/NYPD-infiltration-of-colleges-raises-privacy-fears.

Matt Apuzzo & Adam Goldman, *NYPD: Muslim Spying Led to No Leads, Terror Cases*, Associated Press, Aug. 21, 2012, *available at* http://www.ap.org/Content/AP-In-The-News/2012/NYPD-Muslim-spying-led-to-no-leads-terror-cases. Matt Apuzzo and Adam Goldman, *See Something, Say Something, Uncover NYPD Spying*, Associated Press, July 25, 2012, *available at* http://bigstory.ap.org/article/what-confused-911-caller-outs-nypd-spying-nj

[9] Matt Apuzzo & Adam Goldman, *New York Drops Unit that Spied on Muslims*, N.Y. Times, Apr. 15, 2014, *available at http://www.nytimes.com/2014/04/16/nyregion/police-unit-that-spied-on-muslims-is-disbanded.html*; *See* Mayor Bill DiBlasio's Statement regarding Disbandment of Demographics Unit, Apr. 15, 2014, *available at* http://www1.nyc.gov/office-of-the-mayor/news/155-14/statement-the-mayor-nypd-demographics-unit; *See also* Public Advocate Letitia James's Press Release, Apr. 16, 2014, *available at* http://pubadvocate.nyc.gov/sites/advocate.nyc.gov/files/PUBADV%204.16.14-%20NYPD%20Demographics%20Unit%20Statement.pdf.

[10] In *Floyd*, the court found that the NYPD's practices violated New Yorkers' Fourth Amendment rights to be free from unreasonable searches and seizures. The Court also found that the practices were racially discriminatory in violation of the Equal Protection Clause of the Fourteenth Amendment. To remedy the widespread constitutional violations, the judge ordered a court-appointed monitor to oversee a series of reforms to NYPD policing practices.

Another notorious case involving the NYPD was the February 4, 1999, shooting of Amadou Diallo, a West African immigrant, by four white officers from the NYPD Street Crime Unit (SCU). The SCU was formed in 1971 as the "City Wide Anti-Crime Unit" and was later disbanded in 2002. [11]

C. Oversight Mechanism

As a result of the NYPD's history of abusing its power and the existence of no oversight, on June 27, 2013, two Community Safety Act bills were passed by the City Council.[12] The first bill is - End Discriminatory Profiling Act - Protecting New Yorkers against discriminatory profiling by the NYPD (Intro. 1080). This bill establishes a strong and enforceable ban on profiling and discrimination by the New York City Police Department.[13] The second is - NYPD Oversight Act - Establishing independent oversight of the NYPD (Intro. 1079): Office of the Inspector General ("IG"). Oversight by the IG office includes reviewing NYPD operations, policies, programs and practices. As stated above, before the establishment of the IG office in 2013, the NYPD had no oversight mechanism, unlike federal agencies or New York state and city agencies.

---

[11] As the "City Wide Anti-Crime Unit", the SCU from 1999 was under civil rights investigation by federal prosecutors in Manhattan and a class-action lawsuit, *Daniels, et al. v. The City of New York, et al.* The Lawsuit alleged that the SCU tactics were discriminatory because officers engaged in racial profiling targeting predominantly black and Hispanic men. Later in year in 1999, Attorney General Eliot L. Spitzer found that NYPD officers, and in particular those in the SCU, were much more likely to stop blacks and Hispanics than they were to stop whites. Civil Rights Bureau, Office of New York State Attorney General Eliot Spitzer, *The New York City Police Department's "Stop & Frisk" Practices: A Report to the People for the State of New York From The Office of the Attorney General* 128-30 (1999); *See* press release *available at* http://www.nydailynews.com/archives/news/street-crime-unit-dumped-kelly-sending-cops-detective-plainclothes-squads-article-1.477955.

[12] *See* Legislation to combat discriminatory policing and hold the NYPD accountable. *Available at* http://changethenypd.org/about-community-safety-act

[13] It expands the categories of individuals protected from discrimination. The current prohibition covers race, ethnicity, religion, and national origin. The bill expands this to also include: age, gender, gender identity or expression, sexual orientation, immigration status, disability, and housing status.

Due to the long history of the NYPD's violations of civil rights and the lack of oversight, the NYPD cannot ask this Court to defer to its judgment. The NYPD has not provided this Court with a valid basis under FOIL or FOIA for this Court's deference. The NYPD could assert secrecy under Glomar to avoid its obligation whenever it chooses so.

D. *In Camera* Review is Available

Assuming *arguendo* that this Court finds that an exemption applies, then this Court should conduct an *in camera* review of the responsive documents. In the FOIL context, courts have established that if it is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an *in camera* inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material. S*ee Matter of Xerox Corp. v. Town of Webster,* 65 N.Y.2d 131, 133, 490 N.Y.S.2d 488; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp.,* 62 N.Y.2d, at 83, 476 N.Y.S.2d 69. Similarly well-established in the FOIA context, the district court's *in camera* review of sensitive national security matters strikes the appropriate balance of protecting the secret while providing meaningful judicial review. *See Jabara v. Webster,* 691 F.2d 272, 274 (6th Cir.1982); *see also Phillippi v. CIA,* 546 F.2d 1009, 1013-14 (D.C. Cir. 1976) ("It is clear that the FOIA contemplates that the court will resolve fundamental issues in contested cases on the basis of *in camera* examinations of the relevant documents."); *Patterson v. FBI,* 893 F.2d 595, 599 (3d Cir.1990) ("If, however, the agency is unable to articulate publicly the specific disclosure it fears and the specific harm that would ensue, then *in camera* inspection of a more detailed affidavit must be resorted to.") (internal quotation marks omitted).

CONCLUSION

For all the foregoing reasons, Petitioner Samir Hashmi respectfully requests that the Court grant his Article 78 Verified Petition and reject the NYPD's Motion to Dismiss. In the alternative, Petitioner respectfully requests that the Court order an *in camera* review of randomly selected responsive records in the event this would better inform the Court as to the contents and form of the records requested by Petitioner, as well as the need for redactions.

Respectfully submitted.

By: /s/ Omar T. Mohammedi
Omar T. Mohammedi
LAW FIRM OF OMAR T. MOHAMMEDI, LLC
233 Broadway, Suite 801
New York, NY 10279
(212) 725-3846

By: Elizabeth Kimundi
Elizabeth K. Kimundi
LAW FIRM OF OMAR T. MOHAMMEDI, LLC
233 Broadway, Suite 801
New York, NY 10279
(212) 725-3846

Attorneys for Petitioner