TO BE ARGUED BY:
OMAR T. MOHAMMEDI

Supreme Court of the State of New York
Appellate Division: First Department

In the Matter of the Application of
TALIB W. ADBUR-RASHID,
Petitioner-Appellant

For a Judgment Pursuant to CPLR Article 78,

-against-

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

REPLY BRIEF OF PETITIONER-APPELLANT

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Supreme Court, New York County, Index No. 101559/13

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PRELIMINARY STATEMENT

Petitioner-Appellant Mr. Abdur-Rashid filed a detailed Freedom of Information Law ("FOIL") request for records pertaining to him and the Mosque of Islamic Brotherhood, where he serves as the Imam. The New York Police Department ("NYPD") denied his request. At the Article 78 proceeding the NYPD not only responded with a blanket denial of Mr. Abdur-Rashid's request, but invoked a foreign principle to FOIL, a "neither confirm nor deny" response ("Glomar") as well. The Trial Court erred by accepting the NYPD's Glomar response. Mr. Abdur-Rashid timely appealed the Trial Court's decision. *See* Petitioner-Appellant Brief (hereinafter referred to as "Abdur-Rashid Br."). The NYPD served their Respondents Brief (hereinafter referred to as "NYPD Br."). Petitioner-Appellant, now serves his reply brief.

Mr. Abdur-Rashid's FOIL request was very specific and narrowly drawn. It only sought records pertaining to him and the Mosque he leads. Mr. Abdur-Rashid's request is legitimate and is made pursuant to FOIL (N.Y. Pub. Off. Law § 84)[1]. Mr. Abdur-Rashid is not a terrorist or a criminal. He is well respect member

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[1] NYPD Br. statement of the case commences with reference to terrorist threats to the City of New York and a reference to the Galati Affidavit on the twenty-seven terrorist plots that law enforcement has disrupted since September 11, 2001. Throughout its statement of the case, the NYPD belabors this threat of terrorism in general. NYPD also belabors the potential danger a response to a request such as Mr. Abdur-Rashid's and the effect acknowledging the existence of the records would have on their counterterrorism operations. The NYPD fails to make even a single statement on the requester in this proceeding Mr. Abdu-Rashid. The NYPD went even further to treat Mr. Abdur-Rashid's FOIL request, as part of a conspiracy perpetuated on the

of the New York community and the NYPD's surveillance of him is illegal. Mr. Abdur-Rashid's request did not ask for records about the NYPD's surveillance programs or techniques. The NYPD's fear mongering[2] is irrelevant and inapplicable to Mr. Abdur-Rashid and attempts to distract this Court from the facts of this case. Mr. Abdur-Rashid and terrorism have no connection, unless the NYPD wants to establish a connection based on Mr. Abdur-Rashid's religion, thereby indicating that all Muslims should be treated as potential terrorists. Therefore, all FOIL requests by Muslims should have a different set of rules and regulations outside FOIL. Whatever the NYPD attempts to argue, the fundamental question in this appeal remains whether the trial Court erred by allowing the NYPD to invoke a federal response of "neither confirm nor deny," in response to a state FOIL request. The NYPD brief does not, even once cite to, or refer to the trial Court's decision, to challenge Mr. Abdur-Rashid's appeal. Mr. Abdur-Rashid's arguments against the trial Court's analysis and holding are unchallenged.

NYPD and part of a campaign led by the Asian American Legal Defense and Education Fund ("AALDEF"). Such arguments have no basis in fact or law

[2] The NYPD fear mongering is unfounded, because their surveillance of Mr. Abdur-Rashid and other Muslims never resulted in criminal proceedings. NYPD Chief Galati, in a 2012 deposition in an unrelated litigation, acknowledged that the surveillance by the Demographic Unit, later renamed "Zone Assessment Unit" (before being disbanded in 2014) led to no investigations or commencement of criminal proceedings. *See* Abdur-Rashid Br. at 9-10, and footnote 12.

Contrary to the NYPD's assertion, the Glomar response is not a pre-existing exemption, and hence cannot be a response permitted under FOIL[3]. The New York State FOIL has specific enumerated exemptions to disclosure. The Glomar Doctrine is not one of those exemptions. The common sense theory the NYPD asserts, that Glomar is a FOIL pre-existing exemption, is misplaced[4].

If the trial Court's decision is allowed to stand thereby permitting Glomar as a response in state FOIL requests, state courts will lose the judicial oversight required in FOIL matters. This Court should agree with the lower Court's holding in *Hashmi v. New York City Police Dep't*, 46 Misc. 3d 712, 998 N.Y.S.2d 596 (Sup. Ct. 2014), that a Glomar response is not appropriate in a state FOIL request[5]. Mr. Abdur-Rashid respectfully requests that this Court reverse the trial Court's

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[3] At the trial Court level, the NYPD exhaustively argued that Glomar was a judicial doctrine and urged the trial Court to defer to the NYPD's judgment on the invocation of the Glomar response to Mr. Abdur-Rashid's FOIL request. Now at the appeal level, the NYPD has changed its arguments and claims that Glomar is a pre-exiting exemption under FOIL. As argued in greater detail in this brief, this Court should not allow such abuse of law by the NYPD.

[4] The NYPD is attempting to unilaterally re-write the FOIL statute by using a theory outside FOIL's realm, in response to Mr. Abdur-Rashid's FOIL request for non-exempt records following the NYPD's surveillance of him and the Mosque of Islamic Brotherhood. In its respondents brief, the NYPD cites to inapplicable cases and presents misplaced arguments. NYPD Br. at 13 argues that their response is based on common sense intuition. The problem with that argument is simply a matter of each party's subjective interpretation of what is or is not common sense.

[5] *Hashmi v. New York City Police Dep't,* Index No. 101560/2013, is a similar case as the Abdur-Rashid case. Both cases are on appeal before this Court. Since both cases arise out of similar petitions, raise similar legal issues and involve the same counsel, in the interest of consitency and judicial economy, the parties consent that the two appeals should be heard together.

decision and Order the NYPD to appropriately respond to the FOIL request and produce non-exempt records.

ARGUMENTS

POINT I

THE NYPD USE OF THE GLOMAR RESPONSE IN ANSWER TO A FOIL REQUEST FAILS TO MEET THE REQUIREMENTS OF THE PUBLIC OFFICERS LAW

It is not in dispute that FOIL is patterned after FOIA. Further it is not in dispute that the Glomar response has become an acceptable non-statutory response to a FOIA request. *See* Abdur-Rashid Br. at 38-42. What is in dispute is whether the NYPD can assert Glomar in response to a FOIL request. The NYPD currently urges this Court to find in FOIL "pre-existing exemptions . . . that permit[s] an agency, when presented with a particular kind of request, to neither confirm nor deny whether responsive records exist." *See* NYPD Br. at 12. However, the NYPD does not cite to any section of the FOIL statute in support of its claim. As argued in the Abdur-Rashid Br.at 22, upon request for records an agency has only three response options and Glomar is not one of them.

POINT II

THE NEW YORK STATE LEGISLATURE INTENDED NOT TO INCLUDE GLOMAR IN FOIL

FOIL does not allow an agency to claim it can "neither confirm nor deny" the existence of the requested records. This Court should not usurp the legislative function by allowing the NYPD to unilaterally amend the New York Public Officers Law ("N.Y. Pub. Off. Law" or "POL") and respond in a manner not permitted by the law.

In its brief the NYPD asserts that the Glomar response is embedded in FOIL. (NYPD Br. at 13). Such an argument has no basis in fact or law. The NYPD's arguments in this litigation keep flip flopping. Its core argument before the trial Court was that Glomar is a judicial doctrine, hence did not have to be enumerated as a FOIL exemption. *See* R at 126. The NYPD at the June 24, 2015, oral argument stated:

> "The Glomar Doctrine is well established judicial doctrine established with respect to the Federal Freedom of Information Act. Glomar Defense allows the federal agency to neither confirm nor deny the existence of a responsive record. If in doing so, that response itself actually would implicate one of the recognized exemptions. . . . Glomar Defense is, as I said, judicially created. In this case the NYPD is seeking to do something very, very similar. (*See* Oral Hrg Tr. 3:24-25, 4:1-14. R at 207-208).

Now the NYPD argues the opposite. It argues that Glomar inherently exists in FOIL. Whatever the argument and their flip flopping nature, the NYPD cannot assert a "neither confirm nor deny" response.

The New York FOIL legislation went into effect on September 1, 1974. In 1975 it was amended to parallel the federal Freedom of Information Act ("FOIA"). In 1977 it was repealed and replaced with a significantly changed law. Since then it has undergone a series of amendments in 1982, 2005 and 2008[6]. However, none of the amendments included an exemption to disclosure that permits an agency to say it can "neither confirm nor deny" the existence of records responsive to a request. Significantly, the 1977 overhaul of the statute was after the landmark *Phillippi v. CIA,* (*Phillippi* I), 546 F.2d 1009, (D.C. Cir. 1976) case that ushered in the Glomar doctrine. Yet even after that significant ruling became federal law, the New York State Legislature still did not see fit to engraft the Glomar response into New York State FOIL. The inaction of the legislature shows a clear intent not to adopt the Glomar doctrine.

The Pub. Off. Law sections 87(2), and 89 (2) stipulate against disclosure of exempt records. None of the enumerated exemptions provide for a "neither confirm nor deny" response. The NYPD Br. at 20 urges this Court to decline Mr.

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[6] See Committee on Open Government "40 Years of FOIL and the Committee on Open Government." Available here : http://www.dos.ny.gov/coog/pdfs/Timeline2014.pdf. Last visited September 16, 2015.

Abdur-Rashid's invitation to ignore the legislature's sound policy determination. Mr. Abdur-Rashid has only invited the Court to interpret FOIL as written. Glomar is not a FOIL response.

As argued in detail below, Mr. Abdur-Rashid submits that it is the NYPD's invitation to this Court to broaden the scope of FOIL that this Court should decline. Simultaneously, it is the NYPD's invitation to this Court to play the role of legislature that this Court should also decline.

The NYPD attempts to argue that its assertion of Glomar reflects the legislature's judgment on the public's general interest in disclosure and the government's need to keep matters confidential as a matter of public policy (NYPD Br. at 14). This statement could not be further from reality. Information that should not be disclosed as a matter of public policy would require the NYPD to assert a FOIL exemption. Glomar is not a FOIL exemption. As argued in Abdur-Rashid Br. at 34 and 48, the sister Court in *Hashmi v. NYPD*, held:

> "nothing . . . indicates 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 FOIL currently provides." *Hashmi* 46 Misc. 3d at 724.

The NYPD cites to the Courts holding in *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (NYPD Br. at 15) in support of their legislative intent analysis. However, the holding in *John Doe Agency* supports Mr. Abdur-

Rashid's position. In *John Doe Agency,* the applicable law was the federal standard applied under FOIA and not FOIL. In that case a defense contractor which had received a grand jury subpoena for certain records which had been the subject of a prior government audit brought a FOIA action to obtain the related records from the government. The matter went to the Supreme Court. In analyzing congressional purpose the *John Doe Agency* court stated:

> "[o]n more than one occasion, the Court has upheld the Government's invocation of FOIA exemptions. *See EPA v. Mink, supra*; *Robbins Tire, supra; Reporters Committee, supra; FBI v. Abramson*, 456 U.S. 615, 102 S.Ct. 2054, 72 L.Ed.2d 376 (1982). In the case last cited, the Court observed: "Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information," and therefore provided the "specific exemptions under which disclosure could be refused." *Id.*, at 621, 102 S.Ct. at 2059. Recognizing past abuses, Congress sought "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy."" *John Doe Agency* 493 U.S. 146, at 152.

Here the enactment of FOIL serves the public interest in having access to government records and protects the public against violations of their constitutional rights. The exemptions under FOIL serve to strike a balance, between the need of the public to know and the need for agencies to maintain some information as confidential. Contrary to the NYPD's legislative intent argument,

FOIL does not allow a "neither confirm nor deny" response. *See* generally Abdur-Rashid Br. at 22-24.

The NYPD also cites to the court's holding in *Prisoners' Legal Servs. of New York v. New York State Dep't of Corr. Servs.*, 73 N.Y.2d 26, 31, 535 N.E.2d 243 (1988) (NYPD Br. at 15). However, in *Prisoners' Legal Servs. of New York*, the issue revolved around the storage location of personnel records (with the Inmate Grievance Resolution Committee, verses in the employment records or in their personnel files) and the application of the "personnel record" exemption. *Prisoners' Legal Servs. of New York* Court held, "whether a document qualifies as a personnel record . . . depends upon its nature and its use in evaluating an officer's performance--not its physical location or its particular custodian. *Id* at 32. In Mr. Abdur-Rashid's matter the requested records are within the NYPD's possession and the exemptions that would apply to personnel records do not apply here. In addition the Court's holding in *Prisoners' Legal Servs. of New York*, is not applicable in Mr. Abdur-Rashid's matter, because in *Prisoners' Legal Servs. of New York*, Glomar was not asserted.

In further support of their legislative intent analysis the NYPD cites to *Gelbard v. Genesee Hosp.*, 87 N.Y.2d 691, 697 (1996). In *Gelbard* a physician commenced a breach of contract action against defendant hospital seeking an order requiring the hospital to restore his staff privileges. However, the physician had

not exhausted his administrative remedies under Public Health Law. Specifically he had not sought a review from the Public Health Council. The Court of Appeals, affirming the Supreme Court's decision, held "that the Public Health Council [PHC] must . . . review plaintiff's complaint before a court can order the restoration of his staff privileges." *Id* at 694. The Court further held "[t]he statutory requirement of threshold PHC review is too important to be circumvented by artful pleading." *Id.* at 697.

In the case at bar, Mr. Abdur-Rashid exhausted his administrative remedies (*See* Abdur-Rashid Br. at 4, 12-14), then commenced an Article 78 proceeding pursuant to New York Civil Practice Law and Rules ("CPLR"), which is specifically authorized by N.Y. Pub. Off. Law § 89(4)(b). The only party "circumventing" the rules of procedure and the FOIL legislation is the NYPD, with their "artful pleading," inappropriately invoking Glomar, a foreign doctrine to FOIL exemptions. We respectfully urge this Court not to allow the NYPD to use their "artful pleading" and "circumvent" FOIL legislation, or effect change to a statutory scheme that has been finely calibrated by the New York State legislature. *See Hashmi v. NYPD* 46 Misc. 3d at 722 ("The adoption (of Glomar) would effect a profound change to a statutory scheme that has been finely calibrated by the legislature. Therefore the decision to adopt the Glomar doctrine is one better left

to the State Legislature, not the Judiciary.") *See also* Abdur-Rashid Br. at 20, and 22.

By its inaction, the New York State legislature clearly stated its intent not to adopt the Glomar Doctrine into FOIL. Therefore the NYPD's argument must fail.

POINT III

FOIL EXEMPTIONS SHOULD BE NARROWLY CONSTRUED

It is well settled law in this Court that "[P]ursuant to FOIL, government records are presumptively available to the public unless they are statutorily exempted by Public Officers Law § 87(2)" (citing to *Matter of Fappiano v. New York City Police Dept.,* 95 N.Y.2d 738, 746, 724 N.Y.S.2d 685, 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, 580 N.Y.S.2d 715, 588 N.E.2d 750 [1992])." *Thomas v. New York City Dep't of Educ.*, 103 A.D.3d 495, 496, 962 N.Y.S.2d 29, 31 (2013) (emphasis added.). *See* also Abdur-Rashid Br. at 18, and 22-23.

The NYPD Br. at 22 alleges that Mr. Abdur-Rashid is seeking to write into FOIL new categorical requirements. To the contrary Mr. Abdur-Rashid is seeking that this Court - apply the carefully calibrated statutory scheme envisioned in FOIL. *See* Abdur-Rashid Br. at 22 -23 and footnote 18. None of the enumerated

responses allows an agency, not even the NYPD, to use a "neither confirm nor deny" response to a FOIL request. The NYPD wants to add this "new provision" by asserting that "nothing in the statute imposes any per se requirement that the agency confirm or deny the existence of records whenever it denies a request." (NYPD Br. at 21). To the contrary, Mr. Abdur-Rashid argues that the certification provision and the fact that the agency has the burden to prove that requested information falls within an exemption establishes a requirement that the agency state whether records exist or not.

Despite this Court's holding that FOIL exemptions should be narrowly construed, the NYPD is arguing that FOIL exemptions should have a broader interpretation. By design the NYPD attempts to undermine the FOIL legislation by stating that the NYPD could object to a FOIL request, in any manner even through responses not permitted under FOIL exemptions.

In addition, contrary to the NYPD argument, in NYPD Br. at 21 – 26, Glomar is a not a mere procedural issue on how an agency responds to a record request. There are statutory and procedural guidelines that are applied to the federal agencies who, pursuant to an Act of Congress or Executive Order, invoke Glomar as a response to a request under FOIA. (5 U.S.C.§ 552(b)(1) and (b)(3)). The NYPD attempts to undermine the legislature and its ability to discern between a procedural matter as to how the NYPD should respond to a FOIL request and a

federal substantive theory originating from an Executive Order or act of Congress pursuant to 5 U.S.C.§ 552(b)(1) and (b)(3).

In addition, the application of Glomar, a substantive doctrine, to FOIL, without the adoption of a statutory structure to protect the rights of the public, would have a detrimental legal effect in New York State. For instance, the application of Glomar to FOIL would deny the New York courts the ability to analyze the validity of the asserted exemptions under FOIL. It will give the NYPD a blank check without enumerated authority, as explained in Abdur-Rashid Br. at 44-45. There will be no judicial scrutiny to ascertain if the documents actually fit within an exemption or whether exempt portions of the documents can be redacted. Therefore, the NYPD's argument that FOIL does not specify how an agency would respond to FOIL request must fail.

The NYPD Br. at 23 alleges that Mr. Abdur-Rashid is picking isolated clauses from FOIL and taking them out of context. A reading of the N.Y. Pub. Off. Law § 89(3)(a), demonstrates that the certification requirement is mandatory when an agency claims the requested documents do not exist and upon request, when documents are provided. The argument in the Abdur-Rashid Br. at 31, demonstrates the inappropriateness of introducing Glomar in response to a FOIL request since FOIA does not have a certification requirement, and doing so would eliminate FOIL's certification requirement. The NYPD cites to the Court's

holding in *Rattley v. New York City Police Dep't*, 96 N.Y.2d 873, 874, 756 N.E.2d 56, 58 (2001), in support of its argument against the certification provision. In *Rattley*, counsel for the police department submitted an affirmation in support of the department's claim. The affirmation stated that despite a "thorough and diligent search," certain documents could not be found, and that with the exception of lab reports, petitioner had "been provided with all documents responsive to his requests." The *Rattley* Court specifically held "the Department satisfied the certification requirement by averring that all responsive documents had been disclosed and that it had conducted a diligent search for the documents it could not locate." *Id* at 875. The NYPD's citation to the *Rattley* case supports Mr. Abdur-Rashid's position since *Rattley* confirms the requirement to certify. The question now becomes, how can an agency present the required certification of whether documents are in its possession or not, if it is able to "neither confirm nor deny" the existence of these documents?

The NYPD in its Br. at 19 cites to *New Jersey Media Group, Inc. v. Bergen County Prosecutor's Office*, No. BER-L-6741-13, 2013 WL 6122922 (N.J. Super. Ct. Nov. 15, 2013) to support its argument that Glomar is a circumscribed response to a FOIL request. However, the *New Jersey Media Group, Inc.* case is not applicable to the case at bar. First, the Court in *New Jersey Media Group, Inc.* ruled based on a New Jersey statute which contained provisions different from

FOIL. Second, the *New Jersey Media Group* case was instituted by a third party – a news agency, not the individual who was the subject of the investigation. The news agency sought the records of an individual who may have been subject to one or more criminal investigations, but was neither charged nor arrested.

In the *New Jersey Media Group* case, the applicable law was the Open Public Records Act (N.J.S.A 47:1A-1 to 13 ("OPRA")). In upholding the agency's refusal to even acknowledge the existence of records responsive to the request, the Court cited to a specific provision of OPRA that prohibits 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). The New Jersey legislature, by enacting OPRA, expressed its clear intent to permit New Jersey agencies to respond in this fashion.

As argued extensively in the Abdur-Rashid's Br. and this reply, FOIL does not have a specific statutory provision like OPRA that allows an agency to refuse to release names of individuals where a criminal investigation neither results in a charge or an arrest. Further, unlike the *New Jersey Media Group* where privacy issues were paramount, in Mr. Abdur-Rashid's case, privacy issues are not relevant. He is the one requesting documents about him (as the victim of the surveillance) and the Mosque of Islamic Brotherhood, not a third party.

More importantly, The New Jersey Court did not rely on Glomar or federal cases that permit the federal agencies to assert Glomar under narrow circumstance. This Court should not usurp the legislative function by allowing state agencies to use the Glomar Doctrine in response to a FOIL request.

POINT IV

GLOMAR IS A RESPONSE AUTHORIZED FOR USE BY FEDERAL AGENCIES, AND ONLY IN RESPONSE TO A FOIA REQUEST

The Glomar response is a judicial doctrine applicable to federal agencies only (Abdur-Rashid Br. at 36-46). The Glomar response has never been applied in response to a State FOIL request, a position the NYPD does not dispute. *See* NYPD Br. at 28.

As argued in the Abdur-Rashid Br. at 42, the Glomar response is applied under very specific and distinct exceptions, which the NYPD cannot rely upon: (1) those relating to national security (justified by Exemptions 1 and 3), (2) those that would result in an "unwarranted invasion of personal privacy" (pursuant to Exemptions 6 and 7(C)), and (3) those entailing the protection of the identities of confidential informants to federal law enforcement agencies (under 5 U.S.C.§ 552(c)(2)). In addition as argued in Abdur-Rashid Br. at 44 - 45 the NYPD is not the CIA or the FBI, it does not possess classification authority, hence it cannot invoke the Glomar response to a FOIL request for records. As argued in Abdur-

Rashid Br. at 46 – 49, the Glomar response is considered by federal courts where there exists an executive order, or on issues of national security (act of Congress). Further, as it is, the NYPD has already conceded that it does not possess classification authority (Abdur-Rashid Br. at 44), therefore it should follow that Glomar is not a response available to the NYPD in response to a FOIL request[7].

The NYPD's assertion that their use of a Glomar response in reply to Abdur-Rashid is equivalent to an infringement on attorney work product privilege or a fifth amendment right against self-incrimination (NYPD Br. at 17) is an artful distraction. First and foremost, attorneys, unlike the NYPD do not act under color of state. Since the NYPD is a city law enforcement agency, it has to comply with rules and regulations such as those under FOIL. Second, 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. The attorney work product comparison is 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, and other guidelines for the court to determine whether

[7] Even the trial Court determined that Glomar was not available to state agencies, but then erroneously went on to create a Glomar-like response in State law.

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. As for the NYPD's Fifth Amendment comparison – it serves no purpose here. Mr. Abdur-Rashid requested documents about himself and the Mosque where he serves as an Imam. He even consented to receive the documents with exempt information redacted. The only incriminating information discoverable in the document production would be incriminating the NYPD of illegal surveillance, which it may be trying to avoid. Mr. Abdur-Rashid has no issue with an *in camera* review (Abdur-Rashid Br. at 6, and 54). This Court should not permit the NYPD to use Glomar to cover up its embarrassment. *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, 811 F. Supp. 2d 713, 758 (S.D.N.Y. 2011). *See* Abdur-Rashid Br. at 45. *See also* Abdur-Rashid Br. at 30.

The NYPD Br. at 39 cites to *Hunt v. CIA,* 981 F.2d 1116, 1119 (9th Cir. 1992) in support of its argument that a response confirming that responsive records exist would be "tantamount" to a disclosure that the requestor was subject to surveillance. The Court of Appeals in *Hunt* dealt with the application of the Glomar response by the Central Intelligence Agency (CIA). In *Hunt* the Court stated:

> "Congress vested in the Director of Central Intelligence very broad authority to protect all sources of intelligence information from disclosure. . . . the practical necessities of modern intelligence gathering - the very reason Congress entrusted this Agency with sweeping power to protect its "intelligence sources and methods." Disclosure of the subject matter of the Agency's research efforts and inquiries may compromise the Agency's ability to gather intelligence as much as disclosure of the identities of intelligence sources." *Id* at 1119.

For the reasons argued herein above the NYPD does not have the same power as the CIA. Further, Congress vested intelligence gathering agencies with the power to protect intelligence sources and information. The NYPD cannot and will not be able to assert that Congress, the New York Legislature, the Mayor or any local authority has vested it with the same power.

The question at hand is - if FOIL provisions have been sufficient all along for FOIL requests and there was never need for the Glomar response, why allow the Glomar response to be invoked now when a Muslim man submits a FOIL request? The NYPD's designation of Abdur-Rashid's request as part of a major campaign to unravel the NYPD's techniques is ludicrous and has no basis in law or fact. This Court should not grant the NYPD, an opportunity to hide its wrong doing and operate under a shroud of secrecy; thereby undermining the stated purpose of FOIL. *See* Abdur-Rashid Br. at 43-44. Mr. Abdur-Rashid is not a terrorist. He is an open book. He is a very visible individual with passion for civil rights.

The NYPD argues that Glomar is consistent with the Legislature's decision to carve out enumerated exemptions (NYPD Br. at 16). The NYPD arguments are flawed and un-substantiated. As argued above FOIL already has specific exemptions to disclosure (N.Y. Pub. Off. Law § 87 (2), and § 89 (2)).

POINT V

MR. ABDUR-RASHID'S REQUEST IS INDEPENDENT OF THE AALDEF REQUEST

The NYPD Br. incorrectly tries to convince this Court its recent decision in the Asian American Legal Defense and Education Fund ("AALDEF") (*Asian Am. Legal Def. & Educ. Fund v. New York City Police Dep't*, 125 A.D.3d 531, 5 N.Y.S.3d 13 (N.Y. App. Div. 2015)) is applicable to Mr. Abdur-Rashid. In *AALDEF* this Court did not address the applicability of the Glomar response, because the NYPD did not invoke the Glomar doctrine. Instead, the NYPD relied on FOIL exemptions to object to the request. The irony in the NYPD's reliance on the *AALDEF* decision in the case at bar, is that in *AALDEF* the NYPD acknowledged the existence of the requested records and turned over the non-exempt records.

In *AALDEF*, the Petitioners sought "a trove" of documents[8], whilst Mr. Abdur-Rashid only seeks documents on himself and the Mosque of Islamic Brotherhood, which he leads. Unlike *AALDEF*, who failed to meet their "burden . . . to reasonably describe the documents requested so that they can be located", Mr. Abdur-Rashid specifically and reasonably defined the documents he was requesting. (*See Mitchell v. Slade,* 173 A.D.2d 226, 227, 569 N.Y.S.2d 437, 438 (1991)) In fact, the NYPD's use of *AALDEF* only supports Abdur-Rashid's claim. *AALDEF* asked for NYPD operations and surveillance documents. By contrast Mr. Abdur-Rashid's request seeks information on himself and the Mosque he leads. In *AALDEF,* the NYPD was successful in claiming FOIL exemptions. More importantly no harm or damage was caused to the NYPD when it acknowledged the existence of exempted documents under FOIL and produced non-exempt documents. Therefore, a response to Mr. Abdur-Rashid's request under FOIL will not cause the damage the NYPD claims it may.

Just as the NYPD was able to protect sensitive documents under FOIL, law-enforcement or public policy exemptions without harm pursuant to (N.Y. Pub. Off. Law § 87 (2), and § 89 (2)), they should be able to do the same in response to Mr.

[8] The AALDEF request consisted of four general requests and 26 specific requests seeking information regarding record keeping and retention, policy guidelines and statistics pertaining to the NYPD's surveillance of Muslim individuals, business, and organizations throughout New York City and the surrounding areas—on September 30, 2011.

Abdur-Rashid's request. Under the FOIL law-enforcement or public safety exemption, (*Id.)* an agency must first acknowledge the existence of the requested records, which the NYPD acknowledged in *AALDEF.*

If an approved FOIL response was sufficient to protect sensitive information including the NYPD's counter-terrorism operations when faced with a broad ranging *AALDEF* request, it should be sufficient in response to Mr. Abdur-Rashid. The Court in *Hashmi v. NYPD* confirms this this argument when it held that:

> "nothing . . . indicates 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 FOIL currently provides. (*See, e.g., Matter of Bellamy v. New York City Police Department*, 87 A.D.3d 874, 930 N.Y.S.2d 178 [1st Dep't 2011]; *Matter of Legal Aid Society v. New York City Police Department,* 274 A.D.2d 207, 713 N.Y.S.2d 3 [1st Dep't 2001]; *Matter of Asian American Legal Defense and Educ. Fund v. New York City Police Dep't,* 41 Misc.3d 471, 964 N.Y.S.2d 888; *Urban Justice Center v. New York City Police Dep't,* 2010 WL 3526045, 2010 N.Y. Misc. Lexis 4258.) Crucially, these existing procedures 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. *See* Abdur-Rashid Br. at 48.

If the logic applied in *AALDEF* is applied in Mr. Abdur-Rashid's case, (NYPD Br. at 38) then this Court should reverse the Trial Court's holding and Order the NYPD to apply FOIL in response to the request.

NYPD Br. at 39, cites to *Gardels v. CIA*, 689 F.2d 1100, 1106 (D.C. Cir. 1982), in support of its argument that Mr. Abdur-Rashid's request is part of a mass campaign. Mr. Abdur-Rashid contends the NYPD's position is not informed by the law, rather by discriminatory intent, and religion based generalizations. Just because the requester here and the requesters in the AALDEF matter are Muslims, the NYPD is claiming their counter-terrorism operations could end up in the wrong hands. Abdur-Rashid challenges the NYPD to offer any evidence they have to link him to terrorism or any other criminal behavior before making such bold fear-inducing statements. Such assertions have no basis in law or in fact. NYPD Br. at 41, argues that violators not be apprised of the non-routine procedures by which the agency obtains its information, but offers no evidence to demonstrate that Mr. Abdur-Rashid is a violator, unless they consider someone who is Muslim to be a violator.

FOIL legislation was enacted for the very purpose the NYPD wants to avoid in NYPD Br. at 18 (any third party could force the NYPD to reveal information). The NYPD is once more attempting a great flip flop here. As argued above in *AALDEF*, the request was by a third party, but the NYPD still responded under FOIL. By contrast here the subject of the records, Mr. Abdur-Rashid is requesting information about himself. In a very bizarre and speculative argument the NYPD now claims that if they are not allowed to invoke Glomar, any third party could

make a request for records. It is well settled that FOIL offers the requester such as Mr. Abdur- Rashid the ability to make the request pursuant to N.Y. Pub. Off. Law § 84. The NYPD is simply arguing that the existence of FOIL is problematic. The NYPD should lobby the legislature to eliminate or amend FOIL. Until then, Mr. Abdur-Rashid is entitled to make requests about himself and the NYPD is required to produce the information, subject to the specific and enumerated exemptions under FOIL (N.Y. Pub. Off. Law §§ 87(2), and 89(2)).

Lastly, the NYPD attempts to undermine the right of a requester to a record about himself or herself (NYPD Br. at 39) by exploiting the fear associated with terrorism. Such speculative arguments from an agency designed to "protect and serve" hints at discrimination. This Court should not condone or accept such a dangerous inference.

POINT VI

THE NYPD AS A LAW ENFORCEMENT AGENCY DOES NOT HAVE ADEQUATE SAFEGUARDS PROSCRIBED FOR INTELLIGENCE AGENCIES

In its Br. at 32 – 33, the NYPD acknowledges that as a city agency it does not have the inherent power or authority to classify records or activities, nor is it shielded from disclosure by any specialized non-disclosure statute. This is exactly why the NYPD cannot assert a "neither confirm nor deny" response. The NYPD

Br. proceeds to enumerate a list of safeguards, which it claims are embedded in FOIL, however, in its list of seven safeguards, the NYPD does not cite to FOIL. Instead, the NYPD seems to cherry pick the federal provisions that suit its interests, incorporates them into a FOIL exemption, and argues that the legislature intended for them to be in FOIL.

The NYPD's alleged safeguards (NYPD Br. at 33- 35) all fail. From its enumerated federal safeguards, it is evident the NYPD is attempting to replace FOIL with FOIA and establish Glomar as an appropriate state response. The NYPD, as a city agency governed under FOIL, cannot meet the burden of proof required to assert the federal Glomar response. Glomar is not a "particularized exemption" under FOIL. Erroneous decisions such as the one by the trial Court in this matter only embolden the NYPD's position, and this Court, in the interest of justice, should reverse that decision.

An 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.

Another example of the NYPD usurping the role of the legislature is its attempt to impose the federal official acknowledgment waiver doctrine (NYPD Br.

at 35) as a safeguard. Again, this Court should not permit the NYPD to take on the role of the legislature.

Lastly, the NYPD's suggested safeguards are not warranted. FOIL has specifically stipulated safeguards and exemptions from disclosure. The NYPD undermines the legislature when it argues that the existing FOIL safeguards should be ignored and replaced by a new set of NYPD's stipulated safeguards. In *Hashmi v. NYPD* Judge Moulton held:

> "[T]he legislature created FOIL to give New York's citizens some insight into the functioning of their government. In doing so, it set up safeguards to protect against the disclosure of documents that could interfere with the proper operation of law enforcement." Hashmi, 46 Misc. 3d at 724.

POINT VII

ABUSES TO THE LAW WILL OCCUR IF THIS COURT UPHOLDS THE TRIAL COURT DECISION

Contrary to the arguments in NYPD Br. at 30, it is not for Mr. Abdur-Rashid to identify aspects of FOIL that differ from FIOA. It is the NYPD who must offer evidence of why the Court should allow them to assert a federal doctrine in a state FOIL request. The burden of proof is on the NYPD. The NYPD cannot simply tell a court to defer to the NYPD's judgment on the application of Glomar. *See* R at 143-147. The NYPD has to offer evidence where state courts have allowed the invocation of the Glomar doctrine. However, since this was a matter of first

impression (Decision on appeal, R at 12), at the very least the NYPD is meant to demonstrate the grounds upon which it asserts the Glomar doctrine, and here it did not because, it cannot. However, even in federal cases, Glomar has been narrowly applied to avoid abuse. As courts have held, an unchecked Glomar doctrine is a breeding ground for abuse. *See Am. Civil Liberties Union v. Dep't of Def.,* 389 F. Supp. 2d 547, 562 (S.D.N.Y. 2005). (Abdur-Rashid Br. at 43). This Court should not allow such a potential abuse without judicial scrutiny, especially when the NYPD appears to be advocating a complete dismissal of protections under FOIL.

NYPD Br. at 32 attempts to convince this Court to follow FOIA instead of FOIL. The NYPD seems to argue that FOIA should apply because FOIL's existence is futile. However the NYPD provides no legal basis to support its position.

CONCLUSION

For the reasons set forth in the Opening brief and in this Reply Brief, Appellant Mr. Abdur-Rashid respectfully requests this Court find that the trial Court erred by allowing the NYPD, a state law enforcement agency, to invoke Glomar. Mr. Abdur-Rashid further respectfully requests this Court compel the NYPD to respond to his FOIL request and Article 78 Petition.

Dated: New York, NY
September 25, 2015

Respectfully submitted,

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