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.

BRIEF OF PETITIONER-APPELLANT

LAW FIRM OF OMAR T. MOHAMMEDI, LLC
Attorneys for Petitioner-Appellant
233 Broadway, Suite 801
New York, New York 10279
(212) 725-3846
omohammedi@otmlaw.com
ekimundi@otmlaw.com

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QUESTION PRESENTED

Talib Abdur-Rashid ("Mr. Abdur-Rashid" or "Appellant") filed a detailed request under the Freedom of Information Law ("FOIL") to the New York Police Department ("NYPD"). He sought records of activities unrelated to criminal investigations involving the NYPD's surveillance of him, as well as the Mosque of Islamic Brotherhood, for which Mr. Abdur-Rashid is an Imam. Did the Trial Court err by allowing the NYPD to invoke the Glomar response to "neither confirm, nor deny" the existence of the requested records?

The Trial Court's unprecedented holding created a blanket exemption outside FOIL and raised several subsidiary issues – namely the Trial Court committed reversible error when it held that:

(a) The NYPD properly invoked the Glomar doctrine not to "reveal whether documents responsive to Petitioner's FOIL request exist, and should not be disturbed as it has a rational basis in the law."

(b) The NYPD properly tethered their invocation of Glomar response to one of the nine Freedom of Information Act ("FOIA") exemptions, specifically to exemption 7.

(c) The Affidavit of Thomas Galati, the chief of the Intelligence Bureau for the NYPD, met the requirements for establishing a Glomar response. The Trial Court held it did not need to give weight to the Affidavit.

(d) The NYPD properly invoked Glomar doctrine because the requested records may contain source revealing information.

(e) The NYPD has "sufficiently demonstrated that applying the Glomar doctrine to Petitioner's FOIL request is in keeping with the spirit of similar appellate court cases."

These errors, whether taken individually or together, require reversal of the Trial Court's decision.

PRELIMINARY STATEMENT

Mr. Abdur-Rashid is the Imam of the Mosque of Islamic Brotherhood Inc., located in Harlem, New York City. The Mosque was particularly targeted for surveillance in the days following the Sean Bell verdict in 2008.

Mr. Abdur-Rashid filed a detailed request under FOIL consisting of fifteen items. The request sought information regarding records and investigations pertaining to the NYPD's surveillance of Mr. Abdur-Rashid, if any, as well as investigations into Mosque of Islamic Brotherhood, if any.

The requested records are subject to disclosure under FOIL. FOIL imposes a broad disclosure obligation on government agencies that makes all government records including police records, presumptively open for public inspection. Recognizing that the requested records may contain sensitive information, Mr. Abdur-Rashid specified that, to the extent that any information in the requested records fell within a statutory exemption, he did not oppose receiving "all reasonably segregable nonexempt portions of the documents", pursuant to N.Y. Pub. Off. Law §§ 87(2), 89(2) (exemption under FOIL).

Despite Mr. Abdur-Rashid's entitlement to the requested records, the NYPD after nearly eight month of deliberate delays in responding denied Mr. Abdur-Rashid's request in its entirety. Mr. Abdur-Rashid appropriately

exhausted his administrative remedies and timely filed an Article 78 Petition under the New York Civil Practice Law and Rules ("CPLR"), asking the NYPD to comply with its obligations under FOIL.

In response, the NYPD filed a Motion to Dismiss Mr. Abdur-Rashid's Article 78 Petition. The NYPD argued that the Trial Court should permit it to raise a Glomar response, a federal doctrine specific to FOIA. Pursuant to Glomar, a federal agency, under a particular set of circumstances, is permitted to neither confirm nor deny the existence of the requested records when disclosing whether such documents exist would itself vitiate a FOIA exemption.

The NYPD lacks the authority to invoke the Glomar doctrine. The Trial Court erred when it endorsed the NYPD's invocation of the Glomar response. The Trial Court committed five critical errors, each of which warrants reversal.

First, the Trial Court abused its discretion when it failed to require the Respondents to show why the state statute FOIL exemptions, which have been sufficient over the years, were inapplicable to the Petitioner's FOIL requests. The Trial Court abused its discretion when it accepted the Glomar doctrine at face value in its "first impression" decision.

Second, the legal precedent before the Trial Court demonstrates with certainty that Glomar is a federal doctrine inapplicable to state or city agencies.

The Glomar doctrine is only applicable, in limited circumstances, to federal intelligence gathering agencies such as the Federal Bureau of Investigations ("FBI") and the Central Intelligence Agency ("CIA").

Third, the Trial Court erred when it accepted the NYPD's arguments that the Affidavit of the Chief of the Intelligence Bureau for the NYPD, Thomas Galati (the "Galati Affidavit") met the requirement under the Glomar doctrine. At the same time, the Court held that it did not have to give the same substantial weight to the Affidavit, which federal courts have done when they found Glomar applicable. The Trial Court held that a determination of whether the Affidavit passes the Glomar test, was outside the scope of its function. The Trial Court stated - "[a]lthough federal cases note that a court must accord "substantial weight" to the agency's Affidavits, this Court only looks to federal cases for guidance in interpreting the requirements and is not required to give the same substantial weight to the affidavits." R at 15. (Decision at 874).

Fourth, the Trial Court failed to subject the validity of the NYPD contentions to an *in camera* review.

Fifth, the Trial Court ignored the legal precedent that the NYPD could produce documents in a redacted format to safeguard the privacy and protect sensitive information under FOIL exemption. (N.Y. Pub. Off. Law § 87(2),

89(2)). As argued hereunder, the Court of Appeals and the Appellate Departments have consistently held that this is a proper action when responsive documents contain both exempt and non-exempt information.

The Trial Court's ruling was contrary to the controlling law when it held that "Respondents have sufficiently demonstrated that applying the Glomar doctrine to Petitioner's FOIL request is in keeping with the spirit of similar appellate court cases." The Appellate Court has never ruled that the Glomar doctrine could be tethered to FOIL.

The NYPD cannot claim "it cannot confirm or deny" the existence of the requested records. The Appellant respectfully requests this Court directs the Trial Court to require the NYPD to comply with FOIL and its exemptions, as provided under N.Y. Pub. Off. Law § 87 (2). In the alternative, Appellant respectfully requests that this Court direct the Trial Court to conduct *in camera* review to determine whether the requested records warranted any heightened protection and to issue an order compelling the NYPD to produce all responsive records with any exempt information redacted under pursuant to N.Y. Pub. Off. Law § 87.

STATEMENT OF THE CASE

FACTUAL BACKGROUND

Since 2002 the NYPD has engaged in a domestic surveillance program and religious profiling that targeted Muslim individuals, places of worship, businesses, schools, student groups and other establishments located in and throughout New York, New Jersey and Connecticut. The details of this program were first revealed in a series of Pulitzer Prize winning investigative articles published by the Associated Press ("AP Reports")[1]. According to the reports, one staple of the NYPD's new domestic surveillance program was the widespread placement of informants in Muslim communities without any evidence of wrongdoing[2]. The NYPD would recruit informants by targeting certain ethnicities and/or nationalities, arrested for minor crimes and subsequently used the arrest to pressure them into becoming informants[3].

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[1] *AP's Probe Into NYPD Intelligence Operations*, Associated Press, available at http://www.ap.org/Index/AP-In-The-News/NYPD (last visited April 9, 2015).

[2] 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-covertlyin-Muslim-areas. (last visited April 9, 2015).

[3] *Id.*

According to the Associated Press, the NYPD officers and informants routinely monitored Mosques and businesses frequented by Muslims, including restaurants and bookstores[4]. The NYPD built databases tracking Muslims, where they - lived, shopped, ate and gathered[5]. The NYPD paid infiltrators to surveil people, through photos and notes, simply because they were Muslims[6]. The NYPD further instructed officers and informants to spy on and record the First Amendment-protected speech and activities of Muslim religious and community leaders and members, including students and activists[7].

The NYPD particularly monitored Mosques. Video surveillance cameras were mounted outside Mosques, to record every person who entered to worship[8].

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[4] *Id.*

[5] 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. (last visited April 9, 2015).

[6] Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas, supra* note 2.

[7] *Id.*

[8] Adam Goldman & Matt Apuzzo, *With Cameras, Informants, NYPD Eyed Mosques*, Associated Press, February 23, 2012, *available at* http://www.ap.org/Content/AP-In-The-News/2012/Newark-mayor-seeks-probe-of-NYPD-Muslim-spying. (last visited April 9, 2015).

Maps created and maintained by the NYPD identified not only the location of Mosques, but the "ethnic orientation, leadership and group affiliations," as well[9].

Assistant Chief Thomas Galati, then the commanding officer of the Intelligence Division, admitted in his June 2012 deposition in an unrelated litigation that the Demographics Unit[10] (renamed the Zone Assessment Unit in 2010) would "gather information on people even when there is no evidence of wrongdoing, simply because of their ethnicity and native language"[11]. He also testified that, contrary to earlier statements the NYPD issued, none of the information gathered by the Demographics Unit has led to an investigation or the

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[9] Adam Goldman & Matt Apuzzo, *Documents Show NY Police Watched Devout Muslims*, Associated Press, September 6, 2011, available at http://www.ap.org/Content/AP-In-The-News/2011/Documents-show-NY-police-watched-devout-Muslims. (last visited April 9, 2015).

[10] The Demographics Units, along with the Terrorist Interdiction Unit and the Special Services Unit, are three units within the Intelligence Division that are heavily involved in the NYPD's covert domestic surveillance program. The NYPD had previously denied the existence of the Demographics Unit. See Matt Apuzzo & Adam Goldman, *Inside the Spy Unit that NYPD Says Doesn't Exist*, Associated Press, August 31, 2011, available at http://www.ap.org/Content/AP-In-The-News/2011/Inside-the-spy-unit-that-NYPD-says-doesnt-exist. (last visited April 9, 2015).

[11] Adam Goldman & Matt Apuzzo, 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. (last visited April 9, 2015).

commencement of criminal proceedings[12]. The Demographic Unit was ultimately disbanded[13].

Mr. Abdur-Rashid is the Imam of the Mosque of Islamic Brotherhood Inc. The Mosque of Islamic Brotherhood is located in Harlem, New York City. It is the lineal descendant of the Muslim Mosque Inc., founded by Malcolm X in 1964. According to NYPD Intelligence Reports uncovered by the Associated Press, the Mosque of Islamic Brotherhood was particularly targeted for surveillance in the days following the Sean Bell verdict in 2008[14]. The NYPD instructed its sources to be alerted to any rhetoric regarding the verdict, especially

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

> Q. If they make an assessment of what's being brought in, warrants, some action, does that indicate that an investigation has commenced?
> A. Related to Demographics, I can tell you that information that have come in has not commenced an investigation.
> Q. You're saying that based on what has occurred during your tenor, correct? (96:16-19, 20-25)
> A. Yes. (97:2)

[13] 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; (both last visited April 9, 2015).

[14] See Intelligence Division Report, Deputy Commissioner's Briefing, April 25, 2008, available at http://hosted.ap.org/specials/interactives/documents/nypd/dci-briefing-04252008.pdf. (last visited April 9, 2015).

to target Mosques such as the Islamic Brotherhood.[15] Members of that Mosque are predominantly African-Americans.

Born a Baptist in Greensboro, North Carolina in 1951, Mr. Abdur-Rashid is an African-American. He was raised in the South Bronx during the 1960s. He was an active member of the Lutheran Church until he was eighteen (18) years old. Mr. Abdur-Rashid became a Muslim in 1971 at twenty (20) years. He served as the President of the Islamic Leadership Council of Metropolitan New York from 2011 to 2015. Nationally, Mr. Abdur-Rashid serves as the Vice President of the Muslim Alliance in North America.

Mr. Abdur-Rashid has no history of criminal activities. He has been a highly regarded civil rights leader in the community for years. This noble effort does not provide any basis or justification for the NYPD to surveil Mr. Abdur-Rashid. The only conceivable reason for the NYPD's surveillance is Mr. Abdur-Rashid's status as a Muslim African-American leader who has spoken out against the NYPD's profiling of Muslims and non-Muslims.

[15] *Id.*

THE PROCEEDINGS

1) The FOIL Request and its Denial

Pursuant to N.Y. Pub. Off. Law § 84 et seq., Mr. Abdur-Rashid submitted a FOIL request to the NYPD on October 23, 2012 (the "FOIL Request")[16]. R. at 41. It consisted of fifteen (15) requests seeking information regarding records pertaining to the NYPD's surveillance of Imam Talib W. Abdur-Rashid as well as its surveillance of the Mosque of Islamic Brotherhood.

Mr. Abdur-Rashid did not oppose receiving redacted documents to the extent that any information in the requested records fell within FOIL statutory exemptions. His verbatim request was for the release of "all reasonably segregable nonexempt portions of the documents". R at 42. (FOIL Request).

The NYPD acknowledged receipt of the FOIL Request on November 13, 2012. They estimated that they would respond within 20 business days. R at 46. (Letter from Richard Mantellino dated November 13, 2012). On December 12, 2012, the NYPD unilaterally revised and extended this estimate to February 13, 2013. R at 47. (Letter from Richard Mantellino dated December 12, 2012). On February 13, 2013, the NYPD again unilaterally revised and extended this estimate to March 19, 2013. R at 48. (Letter from Richard Mantellino dated

[16] The FOIL Unit gave the Request # 2012-PL-6546, and File # Abdul-Rashid, T.

February 13, 2013). On March 19, 2013, the NYPD for the third time unilaterally revised and extended the response date to April 23, 2013. R at 49. (Letter from Richard Mantellino dated March 19, 2013).

On June 28, 2013, after nearly eight months of deliberate delays, the NYPD denied Mr. Abdur-Rashid's Request ("FOIL Denial"). R at 50. (Letter from Richard Mantellino dated June 28, 2013). The FOIL Denial did not provide particularized justifications. It simply parroted the statutory general provisions that purportedly exempted the requested records from disclosure. Specifically, the NYPD claimed that FOIL did not require disclosure of the requested records because Mr. Abdur-Rashid: (a) did not include a certification of identity of Petitioner and was not accompanied by the written statement of Talib W. Abdur-Rashid consenting - disclosure to the Firm, as his attorney; (b) failed to "reasonably describe" the records sought; (c) sought records that are exempt pursuant to the state or federal statute; (d) sought records that, if disclosed, would result in an unwarranted invasion of privacy; (e) sought records that are exempt pursuant to the law enforcement exemption; (f) sought records that are exempt pursuant to the inter-agency and intra-agency materials exemption; and (g) sought records that are exempt pursuant to public safety exemption.

Mr. Abdur-Rashid timely appealed the denial of the Request. On July 19, 2013, he submitted a letter to the Records Access Appeals Officer, Jonathan David, to challenge the June 28, 2013 denial. R at 52. (Letter from Petitioner's counsel to Jonathan David dated July 19, 2013). The letter argued that the NYPD's denial of the Request was not supported by either facts or the governing law and explained that FOIL required more than bare recitation of the statutory exemptions. A "reasonable proof of identity" was attached to the initial October 23, 2012, FOIL Request. Mr. Abdur-Rashid fully completed and signed the form.

The NYPD denied the appeal in a letter dated August 7, 2013 (the "Appeal Denial"). R at 54. (Letter from Jonathan David, dated August 7, 2013). The NYPD failed and refused to acknowledge and produce a single document - redacted or otherwise. The NYPD's complete denial of the appeal was premised on the assumption that FOIL provided blanket exemptions from disclosure of the requested records.

2) The Article 78 Proceeding

Mr. Abdur-Rashid commenced an Article 78 proceeding on November 26, 2013, to force the NYPD to comply with its obligations under FOIL and provide him with documents responsive to his Request. R at 19. ("Notice of Verified Petition"). Mr. Abdur-Rashid again offered to receive redacted documents, or in the alternative, have a group of "randomly selected responsive records" reviewed

in camera. R at 22. ("Verified Petition"). On February 13, 2014, the NYPD filed a Motion to Dismiss Mr. Abdur-Rashid's Article 78 Petition. R at 87. ("Notice of Motion to Dismiss").

The NYPD argued that the Trial Court should permit it to raise a Glomar response to Mr. Abdur-Rashid petition. On March 27, 2014, Mr. Abdur-Rashid filed an opposition to the Respondents' Motion to Dismiss. R at 148. ("Opposition to Motion to Dismiss"). In his opposition, Mr. Abdur-Rashid argued that the NYPD went beyond violating its well-established duties under FOIL. He argued that if the Trial Court agreed to apply Glomar - a unique federal doctrine specific to FOIA - to a New York State FOIL issue, the NYPD would exponentially expand its powers and escape judicial scrutiny any time it wants to avoid its FOIL obligations. Such a precedent would undermine the very purpose of FOIL and the intent of the legislature. On April 9, 2014, the NYPD filed their reply in further support for the Motion to Dismiss. R at 191. ("Reply Brief").

In April 2014, following the disbanding of the demographic unit, Mr. Abdur-Rashid requested the Trial Court to allow him to supplement his filing to provide new information related to the disbanding. The Court considered the

matter fully briefed and declined Mr. Abdur-Rashid's request to file a sur-reply. The Trial Court only granted parties an opportunity for oral arguments[17].

During the oral arguments, in response to the NYPD's assertion that it should benefit from Glomar doctrine, the Trial Court stated:

> "It's interesting that you are asking me for the application of the Glomar Defense or the exemption, which would imply to me that if the application was granted, the subjects or the target will reasonably believe that he or she is under investigation; and, therefore, will go about, say in the future, or presently, in conforming their conduct with that in mind. So, it seems like you are asking for having your cake and eating it too. Just by making the application, I think that sends a message to the target that, yes, there is something going on. We know about you. We don't want to turn anything over. Be that as it may, that is my thinking after hearing your argument." R at 216 (Oral Arg. Transcript 12:11-24).

Notwithstanding this insight, the Trial Court allowed the NYPD to have its cake and eat it too. The Trial Court granted the NYPD its motion to dismiss and denied Mr. Abdur-Rashid's request in its entirety. R at 16. ("Decision"). On October 22, 2014, Petitioner filed a timely Notice of Appeal and Pre-Argument Statement.

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[17] Even though the matter was fully briefed in the sister case - *Hashmi v. New York City Police Dep't*, 46 Misc. 3d 712, 998 N.Y.S.2d 596, (Sup. Ct. 2014), the Trial Court in that case deemed important for Petitioner to supplement his filing so as to introduce new information and evidence. This evidence, just in Mr. Abdur-Rashid case, was not available at the time Mr. Hashmi filed his opposition to the Motion to Dismiss on March 27, 2014.

ARGUMENTS

LEGAL STANDARD

The Court of Appeals has repeatedly held that FOIL "expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies." *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 496 N.E.2d 665 (1986) *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 675 N.E.2d 808 (1996)(same); *M. Farbman & Sons, Inc. v. New York City Health & Hospitals Corp.*, 62 N.Y.2d 75, 79, 464 N.E.2d 437, 438-39 (1984)(same). FOIL "proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." *Fink v. Lefkowitz*, 47 N.Y.2d 567, 393 N.E.2d 463 (1979). To promote these principles, the Court of Appeals has reiterated that "*[a]ll* government records are thus presumptively open for public inspection and copying." *Gould*, 89 N.Y.2d at 274 (emphasis added); *Capital Newspapers Div. of Hearst Corp.*, 67 N.Y.2d 562(same). Police records are no exception. See, e.g., *Gould*, 89 N.Y.2d at 276 (holding that the NYPD's complaint follow-up reports are subject to disclosure under FOIL); *N.Y. Civil Liberties Union v. N.Y.C. Police Dep't*, Index No. 115928/09, Slip Op. at 11 (N.Y. Sup. Ct. Feb. 14, 2011) ("All government documents, including police records, are presumptively available for public inspection and copying. . . .")

("*N.Y.C. Civil Liberties Union I*"); see also *Capital Newspapers Div. of Hearst Corp. v. City of Albany*, 63 A.D.3d 1336, 1339, 881 N.Y.S.2d 214 (2009) *aff'd as modified*, 15 N.Y.3d 759, 933 N.E.2d 207 (2010) (holding that City of Albany must disclose police gun tag records); *Council of Regulated Adult Liquor Licensees v. City of New York Police Dep't*, 300 A.D.2d 17, 18, 751 N.Y.S.2d 438 (2002) (holding that the NYPD must disclose records concerning law enforcement history of certain nightclubs). Based on *Gould* and other Court of Appeals' precedent, Mr. Abdur-Rashid request is subject to disclosure under FOIL.

Mr. Abdur-Rashid is entitled to judicial review under FOIL and the NYPD has the burden of proving that a requested record "falls squarely within the ambit of one of [FOIL's] statutory exemptions" and is therefore not available for inspection. *Gould*, 89 N.Y.2d at 274. The Court of Appeals has held that "[t]o ensure [FOIL's policy of] maximum access to government documents, the exemptions are to be narrowly construed." *Id.* Indeed, it is well-settled that "blanket exemptions . . . are inimical to FOIL's policy of open government." *Id.* The NYPD has the burden to prove that a requested record falls squarely within a FOIL exemption "by articulating a particularized and specific justification for denying access." *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 501 N.E.2d 1 (1986).

In the instant case the NYPD not only refused to produce the requested documents or articulate whether FOIL exemptions exist, but relied on the Glomar doctrine. Under this doctrine the NYPD needs only to assert a "neither confirm, nor deny" response and evade its obligation under FOIL. As the Appellant will demonstrate below, the federal Glomar doctrine is controversial even when federal agencies correctly assert it in response to FOIA requests. Thus federal courts grant this reply in limited circumstances. See generally *Wolf v. C.I.A.*, 473 F.3d 370, 374 (D.C. Cir. 2007).

As discussed below, the Trial Court erred when it allowed the NYPD, a city law enforcement agency to invoke Glomar. The Trial Court erroneously endorsed a sweeping vision of police secrecy that denies Mr. Abdur-Rashid access to records collected under the surveillance program, even when the records bear no relation to investigation or wrongdoing. The Trial Court did not articulate why the well-established FOIL exemptions were not adequate for the NYPD.

The Trial Court's holding was incorrect as a matter of law. It is not supported by case law or the record developed before the Trial Court, nor is it inimical to FOIL's policy of open government. The Glomar doctrine does not

apply to FOIL requests and it is not available to state or city law enforcement agencies.

POINT I

THE TRIAL COURT ERRED WHEN IT IGNORED THE WELL ESTABLISHED FOIL LEGISLATION.

Mr. Abdur-Rashid made a FOIL request governed under FOIL legislation. The Trial Court, however, did not consider FOIL in issuing its Order. Instead the Trial Court attempted to rewrite the long and well established FOIL legislation.

In this first impression decision, the Trial Court made a reversible mistake by allowing the NYPD, a city law enforcement agency, to disregard FOIL. It permitted the NYPD to not only use Glomar - a doctrine available to federal intelligence agencies - but to tether it to FOIA.

As argued *infra* point III - accepting the NYPD's Glomar response would suggest accepting all FOIA case law and legislative history as "instructive" when construing any FOIL provision. This will open the door for the state courts to play a legislative role rather than a judicial one. The Court in *Hashmi* held that, "the adoption of Glomar" [to state FOIL request] "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." *Hashmi v. New York City Police Dep't,* 46 Misc. 3d 712, 722, 998 N.Y.S.2d 596 (Sup. Ct. 2014).

Inexplicably the Trial Court issued its holding after recognizing that legal precedent is clear that FOIA applies only to federal and not state agencies." *Reed v. Medford Fire Dep't, Inc.*, 806 F. Supp. 2d 594, 607 (E.D.N.Y. 2011) citing *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473 (2d Cir. 1999)." R at 15. (Decision at 875). Further, the Trial Court admitted that FOIL is already patterned after FOIA, and FOIL is the only legislation applicable to New York State and City agencies. In allowing the NYPD to use the Glomar doctrine, the Trial Court's holding contradicts the well-established judicial precedent and legislative intent which the Court itself cited. Yet, while citing all cases against Glomar application, the Trial Court held that the NYPD properly asserted and tethered Glomar to FOIA. The Court specifically stated:

> "Respondents are correct that FOIL is patterned after FOIA, but federal and New York state case law demonstrate that FOIA is not intended for state agencies. It should follow that when a local agency such as the NYPD is replying to a FOIL request, the Glomar doctrine is similarly inapplicable. Moreover, the Second Circuit 'has explicitly stated that it is beyond question that FOIA applies only to federal and not to state agencies." (quoting *Reed*, 806 F. Supp. 2d at 607 citing *Grand Cent. Partnership, Inc.*, 166 F.3d 473." R at 16. (Decision at 875).

The Trial Court in the sister case, of *Hashmi v. NYPD*, correctly rejected the NYPD's arguments – in contrast with the holding in the *Abdur-Rashid* case.

The *Hashmi* Court stated, "The adoption (of Glomar) would effect a profound change to a statutory scheme that has been finely calibrated by the legislature". *Hashmi*, 46 Misc. 3d at 722. The *Hashmi* court further held:

> "the insertion of the Glomar doctrine into FOIL would build an impregnable wall against disclosure of any information concerning the NYPD's anti-terrorism activities. The wall would be created by the procedures used to vet a Glomar response . . . which ensure that the 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 - 23.

A response to a FOIL request should be addressed under FOIL. Pursuant to N.Y. Pub. Off. Law § 87, upon request for record a New York State or City agency has one of three options:

> (1) Provide a copy of the requested records, which may be redacted if required.
>
> (2) Respond and state that due to FOIL exemptions the requested documents cannot be produced.
>
> (3) If the requested records do not exist, respond and state that the records do not exist.

A response of "cannot confirm or deny" does not apply to FOIL. The Trial Court's decision to allow the NYPD to assert Glomar and tether it to FOIA defeats the existence of FOIL. It is well settled that all records of a public agency are presumptively available for public inspection unless the documents in question fall squarely within one of the specific and narrowly construed

exemptions to disclosure set forth in N.Y. Pub. Off. Law § 87(2)[18]. See also *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d at 566; *Fink*, 47

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[18] N.Y. Pub. Off. Law § 87 (2) provides:

Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute;

(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;

(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;

(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;

(e) are compiled for law enforcement purposes and which, if disclosed, would:
(i) interfere with law enforcement investigations or judicial proceedings;
(ii) deprive a person of a right to a fair trial or impartial adjudication;
(iii) identify a confidential source or disclose confidential information relating to a criminal investigation; or
(iv) reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(f) if disclosed could endanger the life or safety of any person;

(g) are inter-agency or intra-agency materials which are not:
(i) statistical or factual tabulations or data;
(ii) instructions to staff that affect the public;
(iii) final agency policy or determinations; or
(iv) external audits, including but not limited to audits performed by the comptroller and the federal government; or
(h) are examination questions or answers which are requested prior to the final administration of such questions;

N.Y.2d, at 571; *M. Farbman & Sons, Inc.*, 62 N.Y.2d at 79–80. "Where an exemption is claimed, the burden lies with the agency 'to articulate particularized and specific justification', and to establish that 'the material requested falls squarely within the ambit of [the] statutory exemptions.'" *M Farbman & Sons*, 62 N.Y.2d, at 73 (quoting *Fink*, 47 N.Y.2d at 571).

While the Trial Court in *Abdur-Rashid's* case appropriately identified the FOIL exemptions that the NYPD could claim in response to the requested records, it failed to order the NYPD to assert them, namely:

(i) POL N.Y. Pub. Off. Law § 87(2)(e)(i) records compiled for law enforcement purposes, which if disclosed would interfere with law enforcement investigation;

(ii) POL N.Y. Pub. Off. Law § 87(2)(e)(iv) records compiled for law enforcement purposes, which if disclosed would reveal criminal investigative techniques or procedures; and

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(i) if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or
On December 1, 2014 subsections (j), and (k), were repealed

* (j) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

* (k) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-b of the vehicle and traffic law.
On September 20, 2015 subsections (1), was repealed

* (l) are photographs, microphotographs, videotape or other recorded images produced by a bus lane photo device prepared under authority of section eleven hundred eleven-c of the vehicle and traffic law.

(iii) POL N.Y. Pub. Off. Law § 87(2)(f) records, which if disclosed, could endanger the life or safety of a person. R at 14. (Decision at 873-874).

Such exemptions would have to fulfill the FOIL requirements, none of which would allow the NYPD to state they could “not confirm or deny" - a Glomar theory outside the realm of FOIL. The Respondents did not show how they could benefit from FOIL exemptions let alone claim they could "not confirm or deny."

The Trial Court failed to analyze the validity of the FOIL exemption under N.Y. Pub. Off. Law § 87(2)(e)(i), N.Y. Pub. Off. Law § 87(2)(e)(iv), and N.Y. Pub. Off. Law § 87(2)(f). Instead, the Court analyzed a similar FOIA exemption found in 5 U.S.C. §§ 552 (B)(7) (“exemption 7”) and then applied the Glomar doctrine. R at 14-15. (Decision at 874). The Trial Court abused its discretion, and made a mistake of law.

The NYPD could not assert the FOIL exemptions because none of them apply to Mr. Abdur-Rashid’s request. The requested records do not satisfy the threshold requirement of being “compiled for law enforcement purposes.” These records were compiled as a result of the claimed illegal surveillance. Nevertheless, assuming arguendo that the exemption applies and the NYPD is able to assert it, it is still required to follow specific procedures and provide

responses pursuant to FOIL § 87, which does not include "cannot confirm or deny."

In addition, by its plain language, N.Y. Pub. Off. Law § 87(2)(e)(i) does not apply to information collected about individuals and entities that bear no relationship to a criminal investigation. The Associated Press reports that the primary function of the Demographics Unit/Zone Assessment Unit was to collect information about "ancestries of interest" that is unrelated to any criminal investigation[19]. The NYPD could not show that Mr. Abdur-Rashid had any investigation against him, because there was and is none.

Further, N.Y. Pub. Off. Law § 87(2)(e)(i) does not apply to completed investigations in which no further action is contemplated. See, e.g., *Council of Regulated Adult Liquor Licensees*, 300 A.D.2d at 18 (section 82(2)(e)(i) did not prevent disclosure because "the information at issue is now almost two years old and is for the most part not relevant to any current or future investigation or prosecution of one of the named nightclubs"); *Church of Scientology of New York v. State*, 61 A.D.2d 942, 403 N.Y.S.2d 224, 226 (1978) *aff'd*, 46 N.Y.2d 906, 387 N.E.2d 1216 (1979) (disclosure would not interfere with law enforcement

[19] Matt Apuzzo and Adam Goldman, *Inside the spy unit that NYPD says doesn't exist*, Associated Press, Aug. 31, 2011, available at http://www.ap.org/Content/AP-In-The-News/2011/Inside-the-spy-unit-that-NYPD-says-doesnt-exist. (Last visited July 8, 2015).

investigations because "it is apparent from the facts submitted that the letters of complaint have already been responded to, have been the subject of inquiry, have resulted in no further action, and that there presently exists no intention to commence any further action with regard to them").

The NYPD was required to produce to Mr. Abdur-Rashid any surveillance documents that - (i) never resulted in a criminal investigation or judicial proceeding or (ii) resulted in a criminal investigation or judicial proceeding that has been fully resolved. Chief Galati, who submitted the NYPD's supporting Affidavit, has admitted during his sworn testimony that the NYPD's surveillance against the Muslim community in general had not led to an investigation or commencement of any criminal proceedings[20], let alone an investigation against Mr. Abdur-Rashid a renowned civil rights leader. As argued before the Trial Court (R at 158, 160, 171, and 174 (Opposition to Motion to Dismiss at 4, 6, 17, and 20)) and in this brief, the NYPD could not show that Mr. Abdur-Rashid had any investigation against him because there was and there is none. All the NYPD could argue that Mr. Abdur-Rashid application was part of a mass freedom of information Law campaign" R at 136. (Motion to Dismiss at 22). Such an

[20] 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. (Last visited May 26, 2015).

argument does not offer any basis that Mr. Abdur-Rashid was and is involved in any criminal activity which requires non-routine investigation.

The Court of Appeals has correctly held that N.Y. Pub. Off. Law § 87(2)(e)(iv) applies only to non-routine investigative procedures. Records reflecting routine techniques and procedures should be disclosed. *Fink*, 47 N.Y.2d at 571 (holding that only non-routine investigative techniques are exempt from disclosure); *Beyah v. Goord*, 309 A.D.2d 1049, 766 N.Y.S.2d 222, 226 (2003) (police reports that merely set forth "the routine process of contacting participants and witnesses" are not exempt from disclosure). The NYPD did not seek such an exemption under FOIL, even if it could demonstrate there was a non-routine investigation. Instead, the NYPD asserted the Glomar doctrine which is outside FOIL. The Trial Court erred in granting the NYPD's application.

The Trial Court failed to analyze whether NYPD were entitled to the FOIL "non-routine investigative procedures" exemption. It failed to require the NYPD to acknowledge if it had any information on Mr. Abdur-Rashid pursuant to

FOIL[21]. Instead, the Court erroneously analyzed FOIA exemptions and Glomar theory which regulate federal agencies.

Lastly, pursuant to N.Y. Pub. Off. Law § 87(2)(f), records which if disclosed would endanger the life and safety of a person, is equally not applicable. Mr. Abdur-Rashid, has no interest in information about the NYPD's informants. He consented to receive the requested documents with any exempt information redacted pursuant to N.Y. Pub. Off. Law § 87(2), as he was aware it might exist.

It is a well settled law that the NYPD must produce responsive records with the exempt information concerning non-routine investigative techniques redacted. *Fink*, 47 N.Y.2d at 571 (ordering disclosure of a manual created to instruct investigator regarding nursing home fraud, with specialized techniques subject to law enforcement exemption redacted). The Trial Court ignored Court of Appeals' precedent. (*Fink*, 47 N.Y.2d 567, and *Beyah* 766 N.Y.S.2d (stating routine investigative process and techniques are not exempt from disclosure).

[21] Pursuant to N.Y. Pub. Off. Law § 89(3) upon receipt of a request for records an agency has to acknowledge the receipt of the request, and respond by providing the records requested, deny the request and provide reasons for inability to grant the request, and where the agency does not possess the requested record, or the record cannot be found after diligent search certify to the same.

The NYPD did not demonstrate how its work would be compromised by its inability to invoke the Glomar response. If anything, "case law demonstrates that the NYPD has been able to protect sensitive information very well within the existing procedures that FOIL currently provides." *Hashmi* 46 Misc. 3d at 724 citing to. "*Matter of Bellamy v. New York City Police Dep't*, 87 A.D.3d 874, 875, 930 N.Y.S.2d 178 (2011) *aff'd*, 20 N.Y.3d 1028, 984 N.E.2d 317 (2013); *Matter of Legal Aid Soc. v. New York City Police Dep't*, 274 A.D.2d 207, 713 N.Y.S.2d 3 (2000); *Matter of Asian Am. Legal Def. & Educ. Fund v. New York City Police Dep't*, 41 Misc. 3d 471, 476, 964 N.Y.S.2d 888 (Sup. Ct. 2013) *aff'd*, 125 A.D.3d 531, 5 N.Y.S.3d 13 (N.Y. App. Div. 2015); *Urban Justice Center v. New York City Police Dep't*, 2010 NY Misc. Lexis 4258."

In *Hashmi* the Court specifically addressed the illegitimate use of Glomar as a shield to legitimate requests pursuant to FOIL by stating:

> "[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. Engrafting the Glomar doctrine onto FOIL would change this balance between the need for disclosure and the need for secrecy. Secrecy is a necessary tool that can be used legitimately by government for law enforcement and national security, but also illegitimately to shield illegal or embarrassing activity from public view. It is a legislative function to write a statute that strikes a balance embodying society's values." *Hashmi*, 46 Misc. 3d at 724.

Further, accepting the Glomar doctrine eliminates the NYPD's obligation to meet its burden of proof as required under N.Y. Pub. Off. Law § 89(3)(a). In pertinent part, N.Y. Pub. Off. Law § 89(3)(a) provides that upon request for record(s) and payment or offer to pay, if the requested record(s) does not exists, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." The Glomar response obviates the existence of certification requirement under N.Y. Pub. Off. Law § 89(3)(a), and is outside anything contemplated by the legislature in enacting FOIL.

By invoking the Glomar response to Mr. Abdur-Rashid's request, the NYPD has arbitrarily screened the documents and deemed them to be outside the scope of FOIL. However, Courts have held such conduct was inconsistent with the process set forth in the FOIL statute. *Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 253, 505 N.E.2d 932 (1987). Courts have vigorously held that in enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly defined to include all governmental records, there are means by which an agency may properly withhold from disclosure records found to be exempt under N.Y. Pub. Off. Law § 87 (2); § 89 (2), (3).

FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law § 89 (3) to prevent an unwarranted invasion of privacy (Public Officers Law § 89 (2)) or for one of the other enumerated reasons for exemption (Public Officers Law § 87 (2)). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency pursuant to Public Officers Law § 89 (4) (a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR article 78 (Public Officers Law § 89 (4) (b)). *Id*. The NYPD's invocation of Glomar, obviates the need to articulate specific exemptions and attempts to evade judicial scrutiny.

The Court of Appeals in the *Capital Newspapers, Div. of Hearst Corp. v. Whalen*, found that "the procedure permitting an unreviewable prescreening of documents . . . could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate FOIL request." *Capital Newspapers, Div. of Hearst Corp.*, 69 N.Y.2d at 254. In the instant litigation, the NYPD attempts "to block an entirely legitimate FOIL request."

Further, FOIL is more comprehensive than FOIA as it specifically defines the meaning of records (N.Y. POL § 86(4)[22]. FOIA does not. In allowing the NYPD to assert the Glomar doctrine and tether it to FOIA, the Trial Court undermines the comprehensive definition of records in FOIL which the legislature included in FOIL. This creates a major gap in the FOIL statute, which the New York State legislature intended not to create.

Glomar eliminates a governmental agency's obligation to meet its FOIL burden of proof on the existence or non-existence of requested documents. The Trial Court made a reversible error when it accepted the NYPD's invocation of Glomar to a FOIL request. A FOIL request mandates a FOIL response pursuant to N.Y. Pub. Off. Law §§ 85-89.

POINT II

THE TRIAL COURT ERRED WHEN IT JUSTIFIED THE USE OF GLOMAR BASED ON SOURCE REVEALING INFORMATION.

The Trial Court erred when it held that the NYPD correctly asserted Glomar "through Chief Galati's Affidavit, [since] respondents claim that disclosing the existence of responsive records would reveal information

[22] "Record" means any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

concerning operations, methodologies, and sources of information of the NYPD." R at 15. (Decision at 875). The NYPD in its motion to dismiss argued that it needed the option to submit a Glomar response. Otherwise the existence of its surveillance and other anti-terrorist strategies would be revealed and therefore undermined. R at 118 (Motion to dismiss at 4). According to the NYPD the mere acknowledgment of documents concerning surveillance would reveal the targets and scope of its anti-terrorism surveillance operations. R at 118 and 91. (Motion to dismiss at 4 and Galati Affidavit at ¶7).

The Galati Affidavit points to twenty-seven terrorist plots that law enforcement has disrupted since September 11, 2001. R at 94 – 100. (Galati Affidavit at ¶16). The NYPD argued that the individuals engaged in those plots could have found out if they were under surveillance by submitting a FOIL request. The NYPD further argued that a response, even one that would suppress any detail about the surveillance, would still notify the individuals that they were being watched, and then cause them to alter their behavior to evade detection. In response to such argument the sister Court in *Hashmi v. NYPD*, held that "the NYPD has been able to protect sensitive information very well within the existing procedures that FOIL currently provides." *Hashmi* 46 Misc. 3d at 724.

The Trial Court erred by not requiring the NYPD to offer a particularized and specific justification for the non-disclosure of records under FOIL. The NYPD could not assert Glomar just because there was a potential that the requested documents might contain source revealing information. FOIL is well equipped and stipulates to such an exemption under N.Y. POL § 87(2)(e)(iii) and (iv). Contrary to any precedent, the Trial Court gave a blanket exemption to the NYPD to use a federal doctrine to assert that it could "not confirm or deny" the existence of various records. This contradicts with the NYPD's obligation that "[w]here an exemption is claimed, the burden lies with the agency 'to articulate particularized and specific justification" and to establish that "the material requested falls squarely within the ambit of [the FOIL] statutory exemptions." *M Farbman & Sons,* 62 N.Y.2d, at 73 (quoting *Fink*, 47 N.Y.2d at 571). Without any authority or precedent the Trial Court decision relieves the NYPD of its burden under FOIL.

Further, as argued *supra* Point I, the Court further erred in that - the requested records could have been properly redacted. "An agency responding to a demand under the FOIL may not withhold a record solely because some of the information in that record may be exempt from disclosure; where it can do so without unreasonable difficulty, the agency must redact the record to take out the exempt information." N.Y. Pub. Off. Law § 85 et seq. *Schenectady County*

Society for Prevention of Cruelty to Animals, Inc. v. Mills, 18 N.Y.3d 42, 935 N.Y.S.2d 279 (2011). The Trial Court did not only permit the NYPD to withhold documents, but it went further to allow it to assert a "could not confirm nor deny" response as well. Such a holding undermines the N.Y. Pub. Off. Law § 84 et seq.

Granting a blanket exemption to the NYPD is contrary to the Court of Appeal's holding in *Gould v. New York City Police Department* that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government." 653 N.Y.S.2d 54, 57 (N.Y. 1996). The burden rests on the agency to demonstrate the applicability of an exemption (*Gould* 653 N.Y.S.2d 54). This requires a particularized and specific justification for denying access to demanded documents (*Capital Newspapers Div. of Hearst Corp.*, 67 N.Y.2d at 566) that is more than a "blanket" exemption (*Gould*, at 57; see also *Brown v. New York City Police Dep't*, 264 A.D.2d 558, 560, 694 N.Y.S.2d 385 (1999)).

POINT III

GLOMAR DOCTRINE IS AVAILABLE TO FEDERAL AGENCIES ONLY

The NYPD is a city law enforcement agency and not a federal intelligence gathering agency, such as the Central Intelligence Agency ("CIA") or the Federal Bureau of Investigation ("FBI").

Accepting the NYPD's Glomar response would suggest accepting all FOIA case law and legislative history as "instructive" when construing any FOIL provision. No state court in the entire country has permitted a federal Glomar response to be applied to state or local freedom of information law request. The Glomar response was developed at the federal level to protect national security interests. Absent Glomar doctrine, FOIA's procedures are similar to FOIL's. FOIA procedures stipulate, when an individual submits a request for records to a federal agency he expects to receive one of three responses:

> (1) the agency has identified responsive records and will release them, or
>
> (2) the agency has determined that there are no responsive records and informs the requestor of this fact, or
>
> (3) the agency has identified responsive records but has determined that they are exempt from disclosure under one of FOIA's nine statutory exemptions[23].

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[23] Those exemptions are set forth under 5 USC§552(b):

(b) This section does not apply to matters that are -

(1) (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;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute -

(A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information

(A) could reasonably be expected to interfere with enforcement proceedings,

(B) would deprive a person of a right to a fair trial or an impartial adjudication,

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,

(D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,

(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or

(F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

However, since 1975, a fourth non statutory response has arisen. Under this response agencies may refuse to confirm or deny whether responsive records exist on the grounds that acknowledging their very existence would itself reveal secret information relevant to intelligence rather than law enforcement operations. See generally, Circuit, *Phillippi v. CIA, (Phillippi I),* 546 F.2d 1009, (D.C. Cir. 1976).

Absent Glomar, if an agency denies a FOIA request, there is the opportunity for administrative and then judicial review of the denial. In litigation, a Defendant agency is typically required to provide the Plaintiff requester with a detailed Affidavit, called a Vaughn Index[24]. The Vaughn Index describes the contents of each withheld document (while shielding exempt information) and explaining the statutory basis for its exemption. The Vaughn Index thus provides the Plaintiff requester with some information to contest the agency's basis for withholding documents or portions of documents and allows

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(9) geological and geophysical information and data, including maps, concerning wells. Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

[24] Named for *Vaughn v. Rosen* (484 F2d. 820 [DC Cir. 1973])

the agency to carry its burden of proof. *In camera* inspection of the documents in question is often necessary to determine the validity of the claimed exemptions.

The Glomar doctrine permits the federal agency to depart from this usual procedure. The federal agency may issue a Glomar response if an answer to a FOIA inquiry confirming or denying the existence of responsive documents would cause the harm cognizable under a FOIA exemption. *Center for Constitutional Rights v CIA*, 765 F3d 161, 164 n5 (2d Cir. 2014). Since the agency does not wish to acknowledge the existence of the requested documents, it does not prepare a Vaughn Index.

In addition, under Glomar there is no *in camera* inspection of documents since the agency's position is that the documents may or may not exist. Instead the agency meets its burden by submitting an Affidavit showing that the requested material, if it exists, logically would fall within the claimed exemptions. The Affidavit must also set forth the harm that would ensue from merely acknowledging the existence of the requested records. *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68 (2d Cir. 2009). When an agency asserts a Glomar response, the discussion of exemption is more abstract and not anchored to any particular document. However, the reviewing court must accord "substantial weight" to the agency's Affidavit(s). *Wilner*, 592 F.3d at 68.

The History of Glomar

The federal agencies invoke Glomar response when they have responsive records but producing them would expose the federal government's deepest national security secrets. The Glomar response was first judicially recognized in two parallel FOIA cases in the D.C. Circuit, *Phillippi v. CIA, (Phillippi I),* 546 F.2d 1009, (D.C. Cir. 1976), and *Military Audit Project v. Casey*, 656 F.2d 724 (D.C. Cir. 1981). Both cases involved requests for information about a secret CIA program to raise a sunken Soviet submarine using a privately registered salvage ship named the Hughes Glomar Explorer.

The principle behind the Glomar response is that revealing the very fact of whether or not the federal government possesses records about a topic can sometimes reveal protected information, even if the underlying records would themselves be safe from disclosure under FOIA's exemptions. The Glomar response does not function independently of the FOIA statute, however: "[I]n order to invoke the Glomar response . . . , an agency must tether its refusal to one of the nine FOIA exemptions." *Wilner*, 592 F.3d at 71, (internal quotation marks and citation omitted); accord *Wolf v. C.I.A.*, 473 F.3d 370, 374 (D.C. Cir. 2007). In other words, "a government agency may ... refuse to confirm or deny the existence of certain records … if the FOIA exemption would itself preclude the *acknowledgment* of such documents." *Minier v. Cent. Intelligence Agency*, 88

F.3d 796, 800 (9th Cir. 1996) (emphasis added). Absent Glomar theory, 5 USC § 552(b) requires the federal agency to redact exempt information if it is "reasonably segregable" and produce the redacted document(s).

Since *Phillippi I*, federal courts have accepted the application of the Glomar response under very specific and distinct exceptions, which the NYPD cannot rely upon: (1) those relating to national security (justified by Exemptions 1 and 3), (2) those that would result in an "unwarranted invasion of personal privacy" (pursuant to Exemptions 6 and 7(C)),[25] and (3) those entailing the protection of the identities of confidential informants to federal law enforcement agencies (under § 552(c)(2)).[26]

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[25] In the privacy context, the concern is that the government would infringe upon an individual's privacy interest by acknowledging that the government has records about him or her, as when a request is made to the FBI for investigative records about an individual. Because it is presumed that an agency like the FBI would hold certain types of records about an individual only if he or she had been under investigation, acknowledging whether records exist would compromise the individual's privacy interest by "carry[ing] a stigmatizing connotation." Office of Information Policy, U.S. Dep't of Justice, OIP Guidance: The Bifurcation Requirement for Privacy "Glomarization," 17 FOIA UPDATE 2, (Spring 1996) [hereinafter Bifurcation Requirement], available at http://www.justice.gov/oip/blog/foia-update-oip-guidance-bifurcation-requirement-privacy-glomarization (Last visited March 24, 2015) (quoting Office of Info Policy, U.S. Dep't of Justice, OIP Guidance: Privacy "Glomarization," 7 FOIA UPDATE 3, 3 (1986)).

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

Federal Courts deem necessary to limit the application of Glomar doctrine to avoid difficulties in exercising their constitutional responsibility to check executive branch actions. 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). ("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 . . .").

Further, Glomar response deprives the public of FOIA information to which it is entitled, and encourages deep secrecy. Glomar has created difficulties for litigants seeking judicial review in their FOIA lawsuits against federal agencies. It has complicated the request process by making it nearly impossible even for a sophisticated requester to challenge an agency's denial in court[27].

The Trial Court in Abdur-Rashid has exacerbated the secrecy problem by permitting the NYPD a city agency to assert the Glomar response in a FOIL litigation. The NYPD has no legal basis to do so. As the Trial in *Hashmi* correctly held:

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[27] See Nathan Freed Wessler, *"[We] Can Neither Confirm nor Deny the Existence or Nonexistence of Records Responsive to Your Request": Reforming the Glomar Response Under FOIA,"* 85 N.Y.U. L. Rev. 1381, 1382 (2010).

> "engrafting the Glomar doctrine onto FOIL would change this balance between the need for disclosure and the need for secrecy. Secrecy is a necessary tool that can be used legitimately by government for law enforcement and national security, but also illegitimately to shield illegal or embarrassing activity from public view." *Hashmi* 46 Misc. 3d at 724-5.

The Trial Court's Order flouted these concerns and erred by allowing a city law enforcement agency to invoke Glomar.

The NYPD Does Not Possess The Classification Authority

In Mr. Abdur-Rashid's case, the NYPD, a city agency, did not and cannot demonstrate how the requested records were a matter of deepest national security secrets (to qualify under FOIA exemption 1 and 3); or would result in unwarranted invasion of privacy (to qualify under FOIA exemption 6 and 7(c)); or deal with the identities of confidential informants to federal law enforcement agencies (to qualify under § 552(c)(2)). All the NYPD could argue was that Mr. Abdur-Rashid's application should not be looked at in isolation and that it constituted part of a "mass freedom of information Law campaign." R at 136. (Motion to dismiss at 22). The NYPD concedes that as a municipal agency, it does not possess classification authority and therefore cannot rely on FOIA Exemptions 1 and 3 as a basis for nondisclosure under FOIL. R at 161. (Opposition to motion to dismiss at 7). The NYPD is not the CIA, or its equivalent. Congress has not vested the NYPD with the same "sweeping"

powers it has provided to specifically – enumerated federal agencies via statutes like the National Security Act and the Central Intelligence Act. R at 165. (Opposition to motion to dismiss at 11).

In addition FOIA exemption 7 is not applicable to his case. The NYPD has adequate remedies under FOIL's own law enforcement exemption. R at 168. (Opposition to motion to dismiss at 14). Most importantly, Mr. Abdur-Rashid explained at oral argument that just as the federal agencies could not evade or cover up for embarrassment or misconduct, the Trial Court should not allow the NYPD to do so here. FOIA cannot be used to cover up embarrassment. *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, 811 F. Supp. 2d 713, 758 (S.D.N.Y. 2011), amended on reconsideration (Aug. 8, 2011), (holding that redacted portions were not deliberative or predecisional, but rather more embarrassing for the agency to disclose, which was not an appropriate reason for withholding information). R at 227 and 228. (Oral Arg. at 23:21-24; 24:1-7). Even when Glomar is applicable to federal agencies, federal courts have found that the Glomar response would only be justified in unusual circumstances and only by a persuasive Affidavit. *N.Y. Times Co. v. Dep't of Justice*, No.13-422(L), 2014 WL 1569514 (2d Cir. Apr. 21, 2014). R at 223. (Oral Arg. at 19:8-17). Accepting Glomar response to a FOIL will take away the

ability for the State Judges to hear all evidence and review all records before making a decision.

POINT IV

THE TRIAL COURT ERRED WHEN IT GRANTED THE NYPD'S GLOMAR RESPONSE AND TETHERED IT TO FOIA'S EXEMPTION 7.

As argued *supra* Point III, in the vast majority of Glomar cases, the invocation of the doctrine is tethered to FOIA exemptions 1 and 3. FOIA exemption 1 protects "classified documents designated by "Executive Order." Municipal governance does not include an analogous category of documents. FOIA exemption 3 relates to documents "specifically exempted from disclosure by statute." FOIA exemption 3 is most often used in Glomar responses in conjunction with legislation that created the federal government's national security apparatus. For example, two statutes frequently invoked in conjunction with exemption 3 in Glomar responses - they are the National Security Act of 1947, which exempts from disclosure "intelligence sources and methods," (50 USC § 3024-1 (i) (1)) and the Central Intelligence Agency Act of 1949, which requires the CIA director to protect intelligence sources or methods.

These types of exemptions have no analog to the NYPD, a city agency regulated by FOIL. Federal decisions exists that tether a Glomar response to FOIA exemption 7, which does have an analog in FOIL's law enforcement

exemptions. (See, e.g. *People for the Ethical Treatment of Animals v. Nat'l Institutes of Health, Dep't of Health & Human Servs.*, 745 F.3d 535 (D.C. Cir. 2014); *Platsky v. Nat'l Sec. Agency*, 547 F. App'x 81 (2d Cir. 2013). The federal government's preeminent role in "national defense [and] foreign policy" was instrumental in shaping Glomar doctrine. (5 USC § 552 (b) (1)). This casts doubt on whether a judge should apply the doctrine to the NYPD.

In the instant matter, the Trial Court erroneously held that "Respondents have established that even acknowledging whether or not responsive records exist could impair the lives and safety of undercover officers and confidential informants. "The agency in question need only demonstrate a possibility of endanger[ment]' in order to invoke this exemption." (quoting *Matter of Bellamy v. New York City Police Dep't*, 87 A.D.3d 874, 875, 930 N.Y.S.2d 178 (2011) *aff'd*, 20 N.Y.3d 1028, 984 N.E.2d 317 (2013)." R at 15. (Decision at 875).

However, in the *Bellamy* the "possibility of endangerment" was referring to ongoing law enforcement investigations in a criminal case. The Court in *Bellamy* analyzed and found the existence of criminal investigation. The *Bellamy* Court stated that information regarding criminal charges that were pending could be withheld if disclosure would hinder the judicial process. The Trial Court in *Abdur-Rashid* did not address the fact that there was no ongoing law enforcement

investigation against Mr. Abdur-Rashid. In fact there has never been any criminal investigation against him, a fact the NYPD had not disputed.

More importantly, Glomar was neither raised nor analyzed in the *Bellamy* case. The NYPD in *Bellamy* did not assert Glomar. Instead, it acknowledged the existence of the document but refused to release them asserting the law enforcement exemption under FOIL. (N.Y. POL § 87 (2)(e)).

Assuming, arguendo, the law enforcement exemption was applicable to Mr. Abdur-Rashid's FOIL Request, the NYPD had sufficient exemptions under FOIL, specifically the Law Enforcement exemption (N.Y. POL § 87 (2)(e)). The NYPD did not and could demonstrate why this exemption would not be sufficient in response to Mr. Abdur-Rashid's Foil Request. Rejecting similar arguments the NYPD raised before the Trial Court in *Hashmi* case, Judge Moulton correctly 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.

Lastly, this Court should not provide the NYPD with the shroud of baseless secrecy they are looking for. In March 2015, the United States District Court for the Northern District of California, held that even "the FBI can no

longer withhold thousands of pages of surveillance files of Muslim communities by claiming the "law enforcement" exemption of the Freedom of Information Act." *Am. Civil Liberties Union of N. California v. Fed. Bureau of Investigation*, No. 10-CV-03759-RS, 2015 WL 1346680, at *4 (N.D. Cal. Mar. 23, 2015).

POINT V

THE TRIAL COURT ERRED IN ITS EVALUATION OF THOMAS GALATI'S AFFIDAVIT

When establishing a Glomar response, even federal agencies must submit Affidavits that "describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Wilner*, 592 F.3d at 73. "Conclusory Affidavits that merely recite statutory standards, or are overly vague or sweeping will not, standing alone, carry the agency's burden." *Larson v. Department of State*, 565 F.3d 857 (D.C. Cir. 2009).

Even in situations where the federal courts consider the application of Glomar - that is where there exists an executive order, or on issues of national security, courts must accord substantial weight to the federal agency's Affidavit concerning the details of the classified status of the disputed record. *Wolf* 473 F.3d 370. Generally when reviewing such submissions, courts are required to

afford “substantial weight” (*Wilner*, 592 F.3d at 68) to agency’s Affidavits as long as they contain “reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.” *Larson*, 565 F.3d, at 862 (quoting *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984)).

Chief Galati submitted an Affidavit that had no relevance nor bearing on Mr. Abdur-Rashid. The Affidavit was not specific to Mr. Abdur-Rashid and could easily be interchanged for any record request by a Muslim. The Affidavit did nothing more than articulate thwarted terrorist attempts in general. The Affidavit was simply a “fear mongering document” –implying that all Muslims, including Mr. Abdur-Rashid should be treated as potential terrorists. The Affidavit demonstrated the NYPD’s bad faith and egregious profiling attitude based on religion.

When a Glomar response is applicable to federal agencies, federal courts have to accord “substantial weight” to the Affidavit. The Trial Court did not deem necessary to do so here. The Trial Court held“[a]lthough federal cases note that a court must accord "substantial weight" to the agency's Affidavits, this court only looks to federal cases for guidance in interpreting the requirement and is not

required to give the same substantial weight to the Affidavits." Citing to *Davis v. United States Dep't of Homeland Sec*., 2013 D.S. Dist. LEXIS 91386, 14,33 (E.D.N.Y. June 27, 2013). R at 15. (Decision at 893).

This holding does not only undermine the existence of FOIL but it ignores all federal precedents which offered "substantial weight" to Affidavits to determine if Glomar is applicable in certain circumstance. (See *Wolf*, 473 F.3d 370, and *Wilner*, 592 F.3d). In Abdur-Rashid, the Trial Court merely accepted the Affidavit as a formality.

POINT VI

THE TRIAL COURT'S HOLDING UNDERMINED THE FOIL LEGISLATION

The Trial Court erred when it held that the NYPD's Glomar response kept the "spirit of similar Appellate Court cases." R at 16. (Decision at 875). There is no precedent in any of the fifty state courts including New York that have applied the federal Glomar doctrine to a state Freedom of Information request. The Trial Court could not cite to one single decision that did.

This being a novel application of FOIA to a FOIL request, the Trial Court should have been guided by FOIL legislation and balanced the requester's right of access against the agency's interest in nondisclosure by conducting an *in camera* review which would prevent the contents of the documents being

compromised prior to the ruling. (See generally *Johnson v. New York City Police Dep't*, 257 A.D.2d 343, 349, 694 N.Y.S.2d 14 (1999)). As discussed *supra*, New York State FOIL and the exemptions thereunder are sufficient.

Allowing a Glomar response at the state level would lead to excessive secrecy, lack of court oversight and a more difficult process for requesters to navigate. Glomar response gives the NYPD an unfair advantage. The Trial Court in Hashmi correctly held:

> "the insertion of the Glomar doctrine into FOIL would build an impregnable wall against disclosure of any information concerning the NYPD's anti-terrorism activities. The wall would be created by the procedures used to vet a Glomar response …, which ensure that the 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 722-23.

The introduction of the Glomar response has had a marked negative impact on FOIA law at the federal level. To allow such a theory to a city agency will set a dangerous precedent and will undermine the existence of FOIL. It is well documented that "the danger of Glomar responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods." *Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d at 561.

We pray this Court will reverse the Trial Court's holding in the *Abdur-Rashid* matter and agree with the Trial Court's holding in *Hashmi 46 Misc. 3d at 724.* The adoption of Glomar would effect a profound change to a statutory scheme that has been finely calibrated by the Legislature. A decision on the adoption of Glomar is one better left to the State Legislature, not the Judiciary. *Hashmi* 46 Misc. 3d at 724. The Trial Court in *Abdur-Rashid* decided upon itself to take on the role of the legislature and pass new law, allowing the NYPD to apply Glomar and tether it to FOIA.

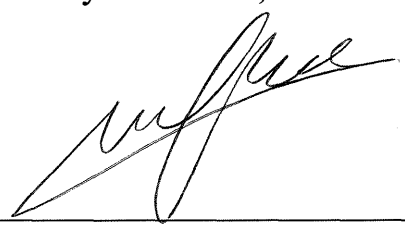
The NYPD cannot benefit from Glomar by simply using the word terrorism broadly, in response to specific requests made by a law-abiding citizen such as Mr. Abdur-Rashid. As the sister Court in *Hashmi* held, using Glomar would build "an impregnable wall against disclosure of any information concerning the NYPD's anti-terrorism activities." *Hashmi*, 46 Misc. 3d, at 723.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Trial Court and order the NYPD to produce all responsive records with any exempt information redacted. Alternatively, this Court should reverse, remand, and instruct the Trial Court to review a sampling of potentially responsive records *in camera* and order the NYPD to produce all responsive records with the exempt information redacted, if any.

Dated: New York, New York
July 21, 2015

Respectfully submitted,



Omar T. Mohammedi
Elizabeth K. Kimundi
Law Firm of Omar T. Mohammedi, LLC
233 Broadway, Suite 801
New York, New York, 10279
Tel: (212) 725-3846
Fax: (212) 202-7621

Attorneys for Petitioner-Appellant
Talib W. Abdur-Rashid

CERTIFICATE OF COMPLIANCE

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

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DB

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

----------X

TALIB W. ADBUR-RASHID,

Petitioner,

-against-

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

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CIVIL APPEAL PRE-ARGUMENT STATEMENT

Index No. 101559/2013

Petitioner-Appellant, TALIB W. ADBUR-RASHID, respectfully submits this Pre-Argument Statement pursuant to § 600.17(a) of the Rules of the Appellate Division, First Department:

1. Title of Action: The title of the action is as captioned above.

2. Full Names of Parties: The full names of the original parties are as stated in the caption above.

3. Name, Address, and Telephone Number of Counsel for Petitioner-Appellant:

Omar T. Mohammedi
Law Firm of Omar T. Mohammedi, LLC
233 Broadway, Suite 801
Woolworth Building
New York, NY 10279
Tel: (212) 725-3846
Fax: (212)202-7621

4. Name, Address, and Telephone Number of Counsel for Respondent:

Zachary W. Carter
Jeffery S. Dantowitz
Corporation Counsel of the City of New York
Attorney for Respondents
100 Church Street, Room 2-121
New York, New York 10007
(212) 356-0876

5. Court and County From Which Appeal Is Taken: This appeal is taken from the Decision and Judgment of the Supreme Court of the State of New York; County of New York (Hunter, J.) dated September 11, 2014 (the "Order") and entered in the Office of the County Clerk of the County of New York on September 25, 2014. A true and correct copy of the Notice of Entry of the Order is attached hereto as Exhibit A.

6. Nature of Cause of Action: TALIB W. ADBUR-RASHID seeks NYPD records of activities unrelated to criminal investigations involving the New York Police Department ("NYPD") surveillance of him, as well as the NYPD's surveillance of the Mosque of Islamic Brotherhood, for which Mr. Abdur-Rashid is Imam. The mosque, located in Harlem, New York City, is the lineal descendant of the Muslim Mosque Inc., founded by Malcolm X in 1964. Mr. Abdur-Rashid's request emanated from a series of Pulitzer Prize –winning articles in August 2011 that revealed the NYPD's extensive spying of Muslims in New York and other locations in the Northeast. In an effort to better understand the nature of the NYPD's covert surveillance program, Mr. Abdur-Rashid submitted requests for documents and information under the Freedom of Information Law ("FOIL") on October 23, 2012. The request was particularly important because uncovered NYPD Intelligence Reports showed that the Mosque of Islamic Brotherhood was particularly targeted for surveillance in the days following the Sean Bell verdict in 2008. The NYPD instructed its sources to be alert to any

rhetoric regarding the verdict, especially in the mosques that had been flagged, which included the Mosque of Islamic Brotherhood.

On June 28, 2013, the NYPD denied the request without offering particularized justification for the denial. Mr. Abdur-Rashid appealed the NYPD's blanket denial on July 19, 2013 through the NYPD's Records Access Appeals Officer, but the NYPD denied the appeal on August 7, 2013. On November 26, 2013, Mr. Abdur-Rashid commenced a proceeding under Article 78 of the Civil Practice Law and Rules ("Article 78 petition") to compel the NYPD to comply with its obligations under FOIL and provide Petitioner with documents and information responsive to a limited subset of his request.

7. Result Reached in the Court Below: On September 11, 2014, the Supreme Court dismissed Mr. Abdur-Rashid Article 78 petition in its entirety, holding that Respondents decision to invoke the Glomar doctrine, thereby not reveal whether documents responsive to Petitioners FOIL request exist should not be disturbed as it has a rational basis in the law.

8. Grounds for Seeking Reversal: By dismissing the Article 78 petition in its entirety, based on Respondents invocation of Glomar, the Supreme Court created a blanket exemption for every NYPD record created since 2001 that relates to the NYPD's surveillance of Mr. Abdur-Rashid and the Mosque of Islamic Brotherhood. The Supreme Court's blanket exemption is contrary to the Court of Appeal's clear holding in *Gould v. New York City Police Department* that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government." 653 N.Y.S.2d 54, 57 (N.Y. 1996). To make matters worse this having been a case of first impression, the Supreme Court created this blanket exemption without any regard to the specific facts related to the Petitioner. The Supreme Court overlooked the requirements of FOIL by failing to ascertain the validity of the NYPD's

arguments, and by failing to review any of the requested records to determine if they fell within an exemption. The Supreme Court simply accepted at face value the NYPD's assertion concerning the requested records and ignored Mr. Abdur-Rashid request for an *in camera* review of randomly selected responsive documents.

Mr. Abdur-Rashid grounds for appeal also include, without limitation, the following:

a) The Supreme Court erred in holding Respondents decision to invoke the Glomar doctrine, thereby not "reveal whether documents responsive to Petitioners FOIL request exist should not be disturbed as it has a rational basis in the law." Glomar doctrine permits federal agencies to neither confirm nor deny the existence of records requested pursuant to the federal Freedom of Information Act ("FOIA"). Respondents are local New York State law enforcement agency responding to a FOIL request, and cannot avail themselves to exemptions available only to federal agencies.

b) The Supreme Court erred in determining that the affidavit of Thomas Galati, the chief of the Intelligence Bureau for the NYPD, met the requirements for establishing a Glomar response. Specifically, the requirement that the affidavit in support of non-disclosure must show with reasonable specificity, why the requested documents fall within the exemption. *N.Y. Times Co. v. Dep't of Justice*, No.13-422(L), 2014 WL 1569514 (2d Cir. Apr. 21, 2014). The Court in its decision states that New York courts may look to federal case law for guidance when deciding issues pertaining to FOIL exemptions patterned after federal FOIA. However, the Supreme Court in its decision erred by overlooking one of the most important aspects of Glomar, the burden on the party resisting disclosure to demonstrate with "reasonable specificity" details that the information being withheld logically falls within the claimed exemption. *Wilner v. National Sec. Agency*, 592 F.3d 60, 73(2nd Cir. 2009). The

Court simply stated that "although federal case note that a Court must accord "substantial weight" to the agency's affidavits, this Court only looks to federal cases for guidance in interpreting the requirement and is not required to give the same substantial weight to the affidavits."

c) The Supreme Court erred by allowing the NYPD to apply the Glomar doctrine , a doctrine which federal agencies invoke in specific circumstances, pursuant to strict federal mandatory procedures. Here, the Court permitted the NYPD, a city agency to invoke Glomar when the NYPD did not and cannot comply with the requisite mandatory procedures as required by federal law.

d) The Supreme Court erred in finding that Respondent had tethered their invocation of Glomar response to one of the nine FOIA exemptions. Specifically to exemption 7. See 5 U.S.C. §§552 (b)(7). The NYPD pleadings did not adequately tether the invocation of Glomar to exemption 7, sufficiently to prevail in a motion to dismiss.

e) The Supreme Court erred in finding that Respondents have demonstrated that requested records may contain source revealing information, because Petitioner in his request, specifically accepted to receive the requested documents, with exempt information and material redacted.

f) The Supreme Court erred in determining that the NYPD "have sufficiently demonstrated that applying the Glomar doctrine to Petitioner's FOIL request is in keeping with the spirit of similar appellate court cases."

g) The Supreme Court in its application of Glomar erred by ignoring the well-established state statute under FOIL. The Court did not use Glomar/federal law as

instructive, but rather used it to overlook FOIL statute, and overlook the law enforcement exception under FOIL.

h) The Supreme Court erred in allowing Respondents to invoke Glomar response.

Dated: New York, New York
October 22, 2014

Respectfully Submitted,

By: _____

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