

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

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SAMIR HASHMI,

Petitioner,

v.

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

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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**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS THE VERIFIED PETITION**

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 2

PROCEDURAL BACKGROUND..... 4

ARGUMENT 5

I. The federal Glomar doctrine should not apply to state FOIL requests 5

 a. The case law cited by the NYPD to support its Glomar response is not instructive when evaluating Mr. Hashmi’s FOIL request 6

 i. Federal case law and legislative history regarding Glomar are not instructive because the NYPD’s cases involve Glomar being “tethered” to FOIA exemptions not applicable to the NYPD or FOIL 7

 1. The case law cited by the NYPD that invoke Glomar via FOIA Exemption 1 is not instructive when construing FOIL’s law enforcement exemptions 8

 2. The case law cited by the NYPD that invoke Glomar via FOIA Exemption 3 is not instructive when construing FOIL’s law enforcement exemptions 9

 b. The NYPD cannot raise Glomar to neither confirm nor deny the existence of documents relevant to Mr. Hashmi’s FOIL Request because news reports have publicly established that individuals like Mr. Hashmi were surveilled 12

II. Even if the court accepts that the federal Glomar doctrine can apply to state FOIL requests, Glomar should not be applicable here..... 13

 a. The NYPD’s blanket denial of Mr. Hashmi’s FOIL Request is a violation of FOIL’s broad and well-established right of public access to state agency records.. 13

 i. The NYPD should not be able to assert a blanket exemption under N.Y. Pub. Off. Law § 87(2)(e)(i) because their case law is misleading and their argument is impermissibly broad 17

 ii. Proper disclosure under FOIL would not reveal non-routine criminal investigative techniques and would not be used by petitioners for terrorist activities. 21

 iii. The NYPD erroneously relies on N.Y. Pub. Off. Law § 87(2)(f) because disclosure of Mr. Hashmi’s records would not endanger the life or safety of any person.. 24

III. No court has ever permitted a state or local law enforcement agency to use Glomar,
and to allow otherwise would be inapposite to the purposes of FOIL.26

CONCLUSION.....28

TABLE OF AUTHORITIES

Case Law

AALDEF v. NYPD
41 Misc. 3d 471 (Sup. Ct. N.Y. 2013) 21, 25

ACLU v. Dep't of Def.
389 F. Supp. 2d 547 (S.D.N.Y. 2005) 8, 11, 26, 27

ACLU v. DOJ
681 F.3d 61 (2d Cir. 2012) 18

Arabian Shield Dev. Co. v. CIA
1999 WL 118796 (N.D. Tex. 1999) 9, 18

Bassiouni v. CIA
392 F.3d 233 (7th Cir. 2004) 9, 23

Bellamy v. N.Y.C. Police Dep't
87 A.D.3d 874 (1st Dep't 2011) 24

Capital Newspapers v. Burns
505 N.Y.S.2d 576 (1986) 14

Church of Scientology of N.Y. v. State of N.Y.
403 N.Y.S.2d 224 (N.Y. App. Div. 1978) 19

Commonwealth of Puerto Rico v. United States
490 F.3d 50 (1st Cir. 2007) 11

Daily Orange Corp. v. CIA
532 F. Supp. 122 (N.D.N.Y. 1982) 9, 18

Earth Pledge Found. v. CIA
988 F. Supp. 623 (S.D.N.Y. 1996) 8, 11, 18

Fink v. Lefkowitz
47 N.Y.2d 567 (1979) 14, 15, 22

Fitzgibbons v. CIA
911 F.2d 755 (D.C. Cir. 1990) 10, 11, 18

Gardels v. CIA
689 F.2d 1100 (D.C. Cir. 1982) 5, 10

Gordon v. FBI
388 F. Supp. 2d 1028 (N.D. Cal. 2005) 18

Gould v. NYC Police Dep't
653 N.Y.S.2d 54 (N.Y. 1996) 14, 15

In re Dinler
607 F.3d 923 (2d Cir. 2010) 11

Johnson v. N.Y.C. Police Dep't
257 A.D.2d 343 (1st Dep't 1999) 15

<i>Judicial Watch, Inc. v. Dep't of Def.</i>	
857 F. Supp. 2d 44 (D.C. Cir. 2012)	8, 9
<i>Legal Aid Society v. NYC Police Dep't</i>	
274 A.D.2d 207 (N.Y. App. Div. 2000).....	19
<i>Leshner v. Hynes</i>	
19 N.Y.3d 57 (2012)	5, 6, 19
<i>Minier v. CIA</i>	
88 F.3d 796 (9th Cir. 1996).....	5, 11
<i>N.Y. Civil Liberties Union v. N.Y.C. Police Dep't</i>	
866 N.Y.S.2d 93 (2008)	15, 25
<i>N.Y. Times Co. v. DOJ</i>	
915 F. Supp. 2d 508 (S.D.N.Y. 2013).....	26
<i>N.Y. Times Co. v. N.Y.C. Police Dep't</i>	
No. 116449/10, 2011 WL 5295044 (N.Y. Sup. Ct. Oct. 3, 2011)	24
<i>Loevy & Loevy v. N.Y.C. Police Dep't</i>	
957 N.Y.S.2d 628 (2013)	19
<i>Phillippi v. CIA</i>	
546 F.2d 1009 (D.C. Cir. 1976)	8, 10
<i>Washington Post Co. v. N.Y. State Ins. Dep't</i>	
61 N.Y.2d 557 (1984)	14
<i>Wilner v. NSA</i>	
592 F.3d 60 (2d Cir. 2009).....	passim
<i>Wolf v. CIA</i>	
473 F.3d 370 (D.C. Cir. 2007)	8, 11

Statutes

5 U.S.C. § 552(b)(1)	8
5 U.S.C. § 552(b)(3)	9
N.Y. Pub. Off. Law § 87(2)	14, 15
N.Y. Pub. Off. Law § 87(2)(e)(iv)	passim
N.Y. Pub. Off. Law § 87(2)(f)	passim
N.Y. Pub. Off. Law §§ 84, 87(2)	14
N.Y. Pub. Off. Law §§ 84-90.....	1
N.Y. Public Officers Law § 87(2)(e)(i)	passim

Other Authorities

<i>Glomar Denials Under FOIA: A Problematic Privilege and A Proposed Alternative Procedure of Review</i>	
56 U. Pitt. L. Rev. 165 (1994).....	27

*Piercing Glomar: Using the Freedom of Information Act and the Official Acknowledgment
Doctrine to Keep Government Secrecy in Check*
64 Admin. L. Rev. 673 (2012) 27

The ACLU's Hollow FOIA Victory over Drone Strikes
21 Geo. Mason L. Rev. 1 (2013)..... 27

PRELIMINARY STATEMENT

Petitioner Samir Hashmi submits this Memorandum of Law in opposition to Respondent New York City Police Department's ("NYPD") Motion to Dismiss. The NYPD filed its Motion to Dismiss in response to Mr. Hashmi's Freedom of Information Law¹ ("FOIL") Article 78 Petition, in which Mr. Hashmi requested access to records created and held by the NYPD in relation to its surveillance of him, as well as the NYPD's surveillance of the Rutgers Muslim Student Association, for which Mr. Hashmi served on the board. Mr. Hashmi specified in his FOIL request that he did not oppose receiving records with exempt material redacted.

In response, the NYPD has not only refused to disclose the records Mr. Hashmi is entitled to but is attempting to apply the federal Glomar doctrine to avoid even acknowledging it has *any* records on *any* Muslim it surveilled. The NYPD's arguments go beyond violating its well-established duties under FOIL. If the court agrees 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. Glomar has never been applied to *any* state freedom of information law, and this Court should not allow such precedent to begin here.

As this Memorandum of Law will argue, this Court should conduct an *in camera* inspection of responsive records and deny the NYPD's Motion to Dismiss, specifically the NYPD's Glomar response, a federal doctrine inapplicable to FOIL and misleadingly raised by the NYPD. The NYPD should fulfill its obligation under FOIL and disclose to Mr. Hashmi the records he is entitled to, with proper exempt material redacted.

¹ N.Y. Pub. Off. Law §§ 84-90.

STATEMENT OF FACTS

As detailed in Mr. Hashmi's Article 78 Petition, this FOIL request stems from the NYPD's well-documented domestic surveillance program. According to a series of Pulitzer Prize winning investigative articles published by the Associated Press (the "AP Reports"),² since 2002 the NYPD has engaged in a domestic surveillance program and practice of 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. Such surveillance included the widespread use of informants in Muslim communities without any evidence of wrongdoing.

As documented extensively in the NYPD's own records and in reporting by the Associated Press, NYPD officers and informants have routinely monitored mosques and businesses frequented by Muslims, including restaurants and bookstores.³ The NYPD built databases tracking where Muslims lived, shopped, ate, and gathered.⁴ The NYPD paid infiltrators to surveil people, through photos and notes, simply because they are Muslims.⁵ The NYPD also 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.⁶ As the then-Assistant Chief Galati testified under oath at his

² AP's Probe Into NYPD Intelligence Operations, Associated Press, *available at* <http://www.ap.org/Index/AP-In-The-News/NYPD> (last accessed October 9, 2013).

³ Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, Associated Press, August 23, 2011, *available at* <http://www.ap.org/Content/AP-in-the-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas>.

⁴ 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>.

⁵ Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, *supra* note 3.

⁶ *Id.*

June 2012 deposition, none of the information gathered by the NYPD has led to an investigation or commencement of criminal proceedings.⁷

The NYPD's surveillance included an undercover operation to monitor the Muslim student group at Rutgers University in New Brunswick, New Jersey.⁸ Mr. Hashmi was a Muslim student at the Newark Campus of Rutgers University during the period the NYPD's surveillance of his school occurred and was a board member of the Rutgers University Muslim Student Association. Hashmi Aff. ¶ 2. As a student leader, Mr. Hashmi organized lectures and events for the benefit of the university's Muslim and non-Muslim students. Hashmi Aff. ¶¶ 4, 6. He frequently spoke out against religious extremism and violence in Islam and helped organize and lead campus events against terrorism. Hashmi Aff. ¶ 4.

Mr. Hashmi also has a longstanding commitment to community service. During his time at Rutgers, Mr. Hashmi helped organize charitable events and volunteered with the Student Government Association. Hashmi Aff. ¶ 5. He continued his community service work after college by organizing a blanket drive for the needy in Newark and helping clean the Passaic River, for which the City of Clinton's health officer awarded him with a certificate for outstanding community service. *Id.*

Mr. Hashmi's volunteer work also extends to working with law enforcement. Mr. Hashmi joined a group of several Muslim communities who reached out to the Bergen County Police Department ("BCPD") to ask what Muslims could do to best assist law enforcement. Hashmi Aff. ¶ 13. In response, the BCPD organized a Community Emergency Response Team

⁷ 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>.

⁸ Matt Apuzzo and Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, *supra* note 3.

training class. *Id.* Mr. Hashmi was part of the first group of graduates from this program, which consists of the first entirely-Muslim emergency responders in the country. *Id.* Mr. Hashmi is an upstanding member of the community who has never been involved or affiliated in any criminal or terrorist activity.

PROCEDURAL BACKGROUND

As described more fully in Mr. Hashmi's Article 78 Petition, he submitted his FOIL Request on October 23, 2012 to the FOIL Unit of the NYPD. The Request consisted of seven requests, which seek information regarding records and investigations pertaining to the NYPD's surveillance of Mr. Hashmi as well as investigations into the Rutgers Muslim Student Association for which Mr. Hashmi was the Treasurer. Mr. Hashmi also made clear 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".

The NYPD denied Mr. Hashmi's Request in its entirety. In response, Mr. Hashmi appropriately exhausted his administrative remedies and timely filed his Article 78 Petition on November 26, 2013, to force the NYPD to comply with its obligations under FOIL. On February 13, 2014, the NYPD filed its Motion to Dismiss Mr. Hashmi's Article 78 Petition. The NYPD alleged that this Court should permit it to raise a Glomar response, a federal doctrine specific to FOIA in which 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 raised this argument—which disregards years of well-established New York precedent—by attempting to tie it to three state FOIL exemptions: N.Y. Public Officers Law § 87(2)(e)(i) (disclosure would interfere with an ongoing law enforcement investigation); N.Y.

Pub. Off. Law § 87(2)(e)(iv) (disclosure would reveal non-routine criminal investigative techniques); and N.Y. Pub. Off. Law § 87(2)(f) (disclosure would endanger the life or safety of any person). Because of the reasons stated herein, the NYPD's Motion to Dismiss should be denied in its entirety and the NYPD should be forced to comply with its FOIL obligations by disclosing to Mr. Hashmi the records to which he is entitled.

ARGUMENT

I. The federal Glomar doctrine should not apply to state FOIL requests.

The NYPD attempts to circumvent its legally-mandated duties under FOIL by raising a Glomar response. Glomar is a legal doctrine derived from federal case law that permits a *federal* agency to refuse to confirm or deny the existence of records where to answer the inquiry would itself cause harm cognizable under a FOIA exemption. *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982), *Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009). To properly employ the Glomar response to a FOIA request, an agency must “tether” its refusal to respond to one of the nine FOIA exemptions. *Wilner*, 592 F.3d at 68. 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 *acknowledgement* of such documents.” *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996) (emphasis added); *Wilner*, 592 F.3d at 68.

In addition to applying a federal-only doctrine to state FOIL requests, the NYPD attempts to “tether” its Glomar response to three specific FOIL exemptions: 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). These provisions are part of FOIL's law enforcement exemption and are similar to the law enforcement exemptions found in FOIA. *Leshner v. Hynes*, 19 N.Y.3d 57 (2012). Although New York case law holds that courts should find federal case law and legislative history “instructive” when

construing specific FOIL provisions that are “patterned” after analogous FOIA provisions, *see Leshner*, 19 N.Y.3d 57, accepting the NYPD’s Glomar response would require this Court to accept *all* FOIA case law and legislative history “instructive” when construing *any* FOIL provision—even FOIL provisions not “patterned” after FOIA. Notably, no court in the entire country has permitted a federal Glomar response to be applied to state or local freedom of information laws. The NYPD’s argument thus goes far beyond well-established precedent and would allow the NYPD to impermissibly apply a narrowly tailored federal doctrine to itself.

The NYPD’s other justifications for applying Glomar are similarly inapplicable. It is illogical for the NYPD to neither confirm nor deny its surveillance of Mr. Hashmi took place, as news articles have clearly identified the Muslim Students Association at Rutgers as being surveilled during the time Mr. Hashmi served on its board.⁹ Nor is it logical for the NYPD to allege, as it does throughout its brief, that Mr. Hashmi will use his FOIL records to further terrorist means. Mr. Hashmi has no criminal record and no ties with any terrorist organization, a fact that the NYPD glazes over. To accept the NYPD’s argument that it should be allowed to raise a Glomar response is not only antithetical to the purpose of FOIL but offensive.

a. The case law cited by the NYPD to support its Glomar response is not instructive when evaluating Mr. Hashmi’s FOIL request.

The NYPD cites a number of federal cases involving Glomar and claims such cases should be instructive here. Yet every case the NYPD cites involves Glomar being “tethered” to FOIA Exemptions 1 and/or 3, which both permit a federal agency’s nondisclosure based on classification of the documents at issue. The NYPD concedes that as a municipal agency, it does not possess this classification authority and therefore cannot rely on FOIA Exemptions 1 and 3 as a basis for nondisclosure under FOIL:

⁹ Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, *supra* note 3.

Where, as here, a City agency would seek to invoke the Glomar doctrine, the available exemptions are somewhat more limited than they would be for a federal agency, as municipal agencies do not have authority to classify documents and so may not invoke a statute that makes its documents confidential. Accordingly, because classification of categories of information is unavailable to the NYPD, here NYPD must rely on other available exemptions found in FOIL [specifically, FOIL's law enforcement exemptions].

See MTD, at 11. The NYPD therefore cannot rely on federal case law invoking Glomar in connection with the classification of documents under FOIA Exemptions 1 and/or 3.

In addition, the NYPD has not provided any case law to support its assertion that the federal case law it cites on FOIA Exemptions 1 and 3 should be instructive when construing FOIL's law enforcement provisions. The cases the NYPD does cite reveal that FOIA Exemptions 1 and 3 are unique to FOIA and to specific federal agencies only. These cases "tethering" Glomar to FOIA Exemptions 1 and 3 are therefore irrelevant to an analysis of FOIL's law enforcement exemptions.

Finally, as explained below, the remaining case law the NYPD cites in an attempt to invoke Glomar do not actually involve Glomar, and often do not even involve FOIA or FOIL. These cases are similarly not instructive when evaluating Mr. Hashmi's FOIL request.

- i. Federal case law and legislative history regarding Glomar are not instructive because the NYPD's cases involve Glomar being "tethered" to FOIA exemptions not applicable to the NYPD or FOIL.**

The NYPD attempts to "tether" its Glomar response to FOIL's law enforcement exemptions. However, all of the cases the NYPD cited to involve a federal court analyzing a Glomar response "tethered" to FOIA Exemptions 1 and/or 3.

However, the federal case law the NYPD has cited for FOIA Exemptions 1 and 3 is not "instructive" when evaluating the FOIL law enforcement exemptions at issue. Both Exemptions

1 and 3 are unique to FOIA, federal law, and federal agencies; they therefore have no analog in FOIL and cannot be used by the NYPD as a backdoor to applying Glomar.

A. The case law cited by the NYPD that invoke Glomar via FOIA Exemption 1 is not instructive when construing FOIL's law enforcement exemptions.

FOIA Exemption 1 permits the nondisclosure of records that are “(A) *specifically authorized* under criteria established by an *Executive order* to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified *pursuant to such Executive order.*” 5 U.S.C. § 552(b)(1) (emphasis added). “An agency may invoke Exemption 1 in withholding records only if it complies with classification procedures established by the relevant executive order and withholds only such material as conforms to the other’s substantive criteria for classification.” *Judicial Watch, Inc. v. Dep’t of Def.*, 857 F. Supp. 2d 44, 55 (D.D.C. 2012) (citing references omitted).

The NYPD concedes that it does not have authority to classify documents as is required for nondisclosure under Exemption 1. Yet all of the cases the NYPD cites to in which a federal agency “tethers” its Glomar response to Exemption 1 involve a blanket nondisclosure pursuant to an Executive order specifically requiring the federal agency involved to classify the documents at issue. *See Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976) (allowing the CIA’s Glomar response under Exemption 1 because the CIA could classify documents pursuant to Executive order 11652); *Wilner*, 592 F.3d 60 (2d Cir. 1009) (evaluating NSA’s Glomar response tethered to Exemption 1 pursuant to Executive order 13292); *ACLU v. Dep’t of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005) (reviewing CIA’s Glomar response tethered to Exemption 1 pursuant to Executive order 12958, which allows Director of CIA to classify documents); *Wolf v. CIA*, 473 F.3d 370 (D.C. Cir. 2007) (same); *Earth Pledge Found. v. CIA*, 988 F. Supp. 623 (S.D.N.Y.

1996) (authorizing CIA’s reliance on Executive order 12356 in relation to Glomar); *Daily Orange Corp. v. CIA*, 532 F. Supp. 122 (N.D.N.Y. 1982) (upholding CIA’s Glomar response tethered to Exemption 1 pursuant to Executive order 12065); *Judicial Watch, Inc.*, 857 F. Supp. 2d 44 (D.C. Cir. 2012) (allowing CIA’s Glomar response under Exemption 1 because the CIA could classify documents pursuant to Executive order 13526); *Arabian Shield Dev. Co. v. CIA*, 1999 WL 118796 (N.D. Tex. 1999) (allowing CIA’s Glomar response under Exemption 1 because the CIA could classify documents pursuant to Executive order 12958); *Bassiouni v. CIA*, 392 F.3d 244 (7th Cir. 2004) (upholding CIA’s Glomar response under Exemption 1 because of Executive order 12958).

These cases involve nondisclosure pursuant to classification, an act the NYPD has conceded it cannot engage in. *See* MTD, at 11. In addition, the NYPD cites to no Executive order that permits it to merely provide a blanket nondisclosure, nor does it explain why such an Executive order would apply to the FOIL law enforcement exemptions it raised. These cases are thus not instructive when construing Mr. Hashmi’s FOIL Request.

B. The case law cited by the NYPD that invoke Glomar via FOIA Exemption 3 is not instructive when construing FOIL’s law enforcement exemptions.

The remainder of cases the NYPD cited to invoke Glomar involve FOIA Exemption 3, which, like FOIA Exemption 1, requires classification powers the NYPD concedes it does not possess. Exemption 3 allows nondisclosure of documents “specifically exempted from disclosure by statute . . . if that statute (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” 5 U.S.C. § 552(b)(3). Courts evaluating Glomar via Exemption 3 have made clear that this FOIA exemption

[P]resents considerations *distinct and apart from the other eight exemptions* . . . Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute’s coverage. The required scope of review is *further narrowed* in the case of statutes falling within [the second part of Exemption 3, that the statute “refers to particular types of matters to be withheld”] because *the congressional intent to withhold is made manifest in the withholding statute itself*.

Fitzgibbons v. CIA, 911 F.2d 755, 761-62 (D.C. Cir. 1990) (emphasis added). Exemption 3 is thus narrowly applied and has a unique status among FOIA’s exemptions because nondisclosure must be pursuant to a specific congressional order requiring the federal agency to classify the documents at issue.

Like FOIA Exemption 1, FOIA Exemption 3 is not available to the NYPD. As a municipal agency the NYPD does not have the authority to classify documents itself. *See* MTD at 11. In addition, the NYPD has not and cannot point to any case law that requires Exemption 3—a provision without any FOIL analog—to be “instructive” when analyzing the FOIL law enforcement exemptions at issue here. It is thus improper for the NYPD to apply Exemption 3’s uniquely broad scope to itself.

The cases the NYPD cites further support this fact: all of the cases cited by the NYPD in which the federal court analyzes a Glomar response “tethered” to Exemption 3 involve a federal agency classifying documents pursuant to congressionally-mandated statutes that specifically apply to federal agencies, not the NYPD. *See Phillippi*, 546 F.2d 1009 (D.C. Cir. 1976) (permitting CIA’s nondisclosure under Exemption 3 and National Security Act); *Wilner*, 592 F.3d 60 (2d Cir. 1009) (allowing NSA’s Glomar response via Exemption 3 based on classification required under National Security Act); *Gardels v. CIA*, 689 F.2d 1100 (D.C. Cir. 1982) (allowing CIA’s Glomar response via Exemption 3 based on classification required under

National Security Act); *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005) (upholding CIA's Glomar response under Exemption 3 and National Security Act because the statute provides CIA a "broad sweep" of power); *Wolf*, 473 F.3d 370 (D.C. Cir. 2007) (emphasizing the "greater deference afforded [to the CIA] under the National Security Act" in upholding CIA's Glomar response via Exemption 3); *Earth Pledge Found.*, 988 F. Supp. 623 (S.D.N.Y. 1996) (holding that Central Intelligence Act specifically authorizes Director of CIA to provide Glomar response via Exemption 3); *Minier*, 88 F.3d 796 (9th Cir. 1996) (upholding TSA's Glomar response tethered to Exemption 3 via congressional statute specifically permitting TSA to avoid disclosure).

The NYPD is *not* the CIA or its equivalent. Congress has not vested the NYPD with the same "sweeping" powers it has provided to specifically-enumerated federal agencies via statutes like the National Security Act and Central Intelligence Act. The NYPD has not shown why a municipal agency like itself should be able to avail itself to FOIA Exemption 3, which involves considerations "distinct and apart" from all other FOIA exemptions. *See Fitzgibbons*, 911 F.3d at 761. No other state or local agency has ever been permitted to argue otherwise. This Court should thus disregard the NYPD's reliance on federal case law that is specific to the unique nondisclosure abilities of federal agencies.¹⁰

¹⁰ Similarly, the NYPD cites to a number of cases with language on surveillance when discussing FOIL's law enforcement exemptions that upon close reading do not involve either FOIA or FOIL at all. For example, *Commonwealth of Puerto Rico*, cited for its language on extending the law enforcement privilege to "confidential government surveillance information", does not involve a FOIA or FOIL request. *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50 (1st Cir. 2007). This case involves a common-law law enforcement privilege raised by the government in response to a subpoena against it. Such First Circuit dicta has no authority over a New York court's interpretation of FOIL's law enforcement exemptions. Similarly, *In re Dinler*, cited extensively by the NYPD for its language that the NYPD could avoid disclosing surveillance-related documents that stemmed from a terrorism-related investigation, does not involve FOIA or FOIL but the common-law law enforcement privilege raised in response to a writ of mandamus. *In re Dinler*, 607 F.3d 923 (2d Cir. 2010).

- b. The NYPD cannot raise Glomar to neither confirm nor deny the existence of documents relevant to Mr. Hashmi's FOIL Request because news reports have publicly established that individuals like Mr. Hashmi were surveilled.**

The NYPD constantly invokes its Glomar response in conjunction with FOIL's law enforcement exemptions by arguing that to confirm or deny the existence of records responsive to Mr. Hashmi's Request would be tantamount to revealing information not already publicly known. Any information revealed by the NYPD, the argument goes, would interfere with an ongoing investigation, disclose non-routine criminal investigative techniques and endanger the life and safety of others.

In addition to the reasons above, the NYPD's argument fails because the NYPD's surveillance of Mr. Hashmi *is* already public knowledge. As evidenced by the AP Reports, Mr. Hashmi's college and Muslim Students Association was surveilled during precisely the time Mr. Hashmi served as a board member there.¹¹ In fact, Mr. Hashmi's FOIL Request is pursuant to such publicly known information. Officer Galati, who submitted the NYPD's supporting affidavit, has himself acknowledged the existence of NYPD's surveillance and stated during sworn testimony that such surveillance has not led to an investigation or commencement of any criminal proceedings.¹² The NYPD's argument that it can neither confirm nor deny whether records exist relating to Mr. Hashmi's Request is therefore misplaced, because the AP Reports have already made clear such records *do* exist.

In pursuit of this argument, the NYPD has again improperly equated itself with a federal agency. While federal agencies have the power to neither confirm nor deny the existence of a document pursuant to their authority to classify documents, *see infra* Section I, the NYPD

¹¹ Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, *supra* note 3.

¹² 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>.

concedes that as a municipal agency it does not possess similar classification powers. *See* MTD at 11. Thus, the NYPD cannot raise a Glomar response to Mr. Hashmi's Request. The NYPD's surveillance of Mr. Hashmi is already publicly known so by satisfying its disclosure obligations under FOIL with appropriate redactions, the NYPD would not be risking the release of new information that would interfere with an ongoing investigation, reveal non-routine criminal investigative techniques or endanger the life and safety of others.

II. Even if the court accepts that the federal Glomar doctrine can apply to state FOIL requests, Glomar should not be applicable here.

Even if the NYPD could raise a Glomar response to FOIL requests, it should not be able to raise a Glomar response to Mr. Hashmi's Request because the NYPD takes an impermissibly broad construction of FOIL's law enforcement exemptions. To accept the NYPD's arguments would not just go against the express statutory purpose of FOIL but negate well-established precedent that requires state agencies to redact exempt information instead of withholding it entirely. By attempting to use FOIL's law enforcement exemptions to completely avoid disclosure, the NYPD is granting itself unrestricted authority to avoid its duties under FOIL and deny Mr. Hashmi from seeking the records he has a right to access.

a. The NYPD's blanket denial of Mr. Hashmi's FOIL Request is a violation of FOIL's broad and well-established right of public access to state agency records.

New York's FOIL mandates that all records of a public agency are presumptively available for inspection. *See* N.Y. Pub. Off. Law §§ 84, 87(2) (“[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible . . . The people's right to know the process of government decision making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.”). The New

York Court of Appeals has upheld this law, repeatedly holding 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 v. Burns*, 505 N.Y.S.2d 576, 578 (1986); *Gould v. NYC Police Dep’t*, 653 N.Y.S.2d 54, 57 (N.Y. 1996). Further,

FOIL was enacted in furtherance of the public’s vested and inherent ‘right to know’ [and] affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information to ‘make intelligent, informed choices with respect to both the direction and scope of governmental activities’ and with an effective tool for exposing waste, negligence and abuse on the part of government officers.

Capital Newspapers, 505 N.Y.S.2d at 565-66 (citing *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979)).

An agency that seeks to withhold a record has the burden of proving that the requested record falls squarely within an enumerated exception. N.Y. Pub. Off. Law § 87(2); *see also* Comm. on Open Gov’t FOIL-AO-4903 (stating that withholding agency must meet FOIL’s burden of proof by demonstrating harmful effects that would arise from disclosure of records). To meet this burden, the agency must articulate “particularized and specific” facts justifying its belief that the requested records are exempt from disclosure. *Id.* Conclusory averments, without more, are insufficient to satisfy this burden. *Washington Post Co. v. New York State Ins. Dep’t*, 61 N.Y.2d 557, 567 (1984); *Matter of Buffalo Broad. Co., v. N.Y. State Dep’t. of Corr. Servs.*, 155 A.D.2d 106, 110 (3rd Dep’t 1990).

Even if an agency provides “particularized and specific” facts supporting its claim that portions of the requested records are exempt, this does not mean the records are entirely exempt from disclosure. FOIL expressly mandates that an agency may deny access to records “or portions thereof.” N.Y. Pub. Off. Law § 87(2). The Court of Appeals has clearly held that

“blanket exemptions” for particular documents, or types of documents, are “inimical” to FOIL’s policy of openness. *Gould*, 89 N.Y.2d at 275.

Instead, when a document contains both confidential and non-confidential material, a court may, consistent with FOIL, order its disclosure subject to redaction of personal information necessary to protect a person’s safety. *N.Y. Civil Liberties Union v. N.Y.C. Police Dep’t*, 866 N.Y.S.2d 93 (2008) (holding that NYPD erroneously used law enforcement exemption to deny FOIL request seeking records relating to stop and frisk program because documents were clearly subject to FOIL and could be disclosed with proper redaction of personal information concerning officers involved). Alternatively, if appropriate and necessary to determine whether the withheld documents fall entirely within the scope of the asserted exceptions, the court can conduct an *in camera* inspection of representative documents and order the disclosure of all non-exempt material, appropriately redacted. *Gould*, 653 N.Y.S.2d at 275.

Importantly, the Court of Appeals has repeatedly held that records kept by police departments should be disclosed, even when some of the information is exempt. *See, e.g., Gould*, 653 N.Y.S.2d at 58 (holding that NYPD 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”); *Johnson v. N.Y.C. Police Dep’t*, 257 A.D.2d 343, 349 (1st Dep’t 1999) (rejecting NYPD’s blanket exemption that disclosing complaint follow-up reports would be a threat to witness safety and ordering disclosure if records with names and identifying information redacted); *Fink*, 47 N.Y.2d at 572-73 (ordering disclosure of manual for investigators to identify nursing home fraud, with specialized techniques subject to law enforcement exemption redacted).

Here, the NYPD has cited three FOIL exemptions for nondisclosure: N.Y. Pub. Off. Law § 87(2)(e)(i) (exempts disclosure of information that would interfere with law enforcement investigations); N.Y. Pub. Off. Law § 87(2)(e)(iv) (exempts disclosure of information that would reveal non-routine criminal investigative techniques or procedures); and N.Y. Pub. Off. Law § 87(2)(f) (exempts disclosure of information that would endanger the life or safety of any person).

These exemptions should not apply to many of the records responsive to Mr. Hashmi's Request because, as an initial matter, they do not satisfy the threshold requirement of being "completed for law enforcement purposes". The NYPD monitored Mr. Hashmi when he was a student at Rutgers in New Jersey. The NYPD's deputy commission for legal matters has conceded that NYPD officers are "not acting as police officers in other jurisdictions", which makes the "law enforcement purpose" exemption unavailable for this extraterritorial activity.¹³

The NYPD has failed to satisfy its burden under FOIL when raising these exemptions. Instead of providing a particularized and specific justification for denying Mr. Hashmi's Request, the NYPD relies on emotionally-laden arguments by citing to 27 various terrorist acts as a "justification" for nondisclosure. *See Galati Aff.* ¶¶ 16-17. These terrorist attacks trace back to the beginning of 2003 and, as the NYPD repeatedly emphasizes, involved Muslims. Crucially, however, the NYPD fails to link these terrorist attacks in any way to Mr. Hashmi. Instead, the NYPD's implication is that because Mr. Hashmi is of Muslim background, his FOIL Request is somehow in furtherance of the terrorist attacks listed. This sweeping argument is well beyond what is permissible under FOIL's "particularized and specific" justification standard. It also ignores the important fact that Mr. Hashmi has no criminal history and uses his free time not

¹³ Matt Apuzzo and Adam Goldman, *See Something, Say Something, Uncover NYPD Spying*, Associated Press, July 25, 2012, available at <http://bigstory.ap.org/article/what-confused-911-caller-outs-nypd-spying-nj>.

to thwart the police but to assist them, as demonstrated by his volunteer work with Bergen County's Community Emergency Response Team.

By accepting the NYPD's logic, the NYPD can avoid its obligations under FOIL to Mr. Hashmi because he is Muslim merely by citing unrelated terrorist attacks to imply such members of the public are using FOIL for terrorist ends. FOIL's exemptions have never been used so broadly, indefinitely and in such a potentially discriminatory manner. In fact, no court has ever allowed Glomar to be used in conjunction with state or local freedom of information laws anywhere in the country. The Court should deny the NYPD's Motion to Dismiss and ensure such precedent does not begin here.

- i. The NYPD should not be able to assert a blanket exemption under N.Y. Pub. Off. Law § 87(2)(e)(i) because their case law is misleading and their argument is impermissibly broad.**

The NYPD raises N.Y. Pub. Off. Law § 87(2)(e)(i) as a basis for nondisclosure under FOIL. N.Y. Pub. Off. Law § 87(2)(e)(i) states that an agency may properly deny access to records or portions thereof that are compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations. The NYPD improperly applies this exemption by relying on non-binding case law and advocating that this exemption be applied well beyond its intended scope.

Instead of satisfying its burden to provide a "particularized and specific" justification for denying Mr. Hashmi's Request under N.Y. Pub. Off. Law § 87(2)(e)(i), the NYPD spends the first four pages of its argument citing case law that does not even deal with FOIL, let alone FOIL's narrowly construed § 87(2)(e)(i) exemption. Such cases are misleading and constitute nothing more than non-binding dicta. For example, the NYPD cites a number of federal cases in which Glomar was raised by a federal agency in response to a FOIA request about its

surveillance activities; in a leap of logic, the NYPD implies these cases are analogous to its instant use of § 87(2)(e)(i). *See, e.g., Arabian Shield*, 1999 WL 118796; *Wilner*, 592 F.3d at 75; *Earth Pledge Found.*, 988 F. Supp. at 626; *Daily Orange Corp.*, 532 F. Supp. at 124-126. This argument is misleading because, as discussed above, all of these cases deal with FOIA Exemptions 1 and/or 3, neither of which are available to the NYPD or applicable to FOIL, let alone applicable to FOIL's narrowly construed exemptions.¹⁴ Similarly, the NYPD cites *ACLU v. DOJ* in support of its misleading position that the Second Circuit permitted the CIA to withhold documents under FOIA's "similar law enforcement exemption". MTD at 15. The NYPD's assertion is blatantly incorrect, as the Second Circuit clearly permitted the CIA to withhold documents under FOIA Exemptions 1 (via Executive order 12958) and 3 (via the National Security Act). *See ACLU v. DOJ*, 681 F.3d 61 (2d Cir. 2012).

The NYPD also cites at length from *Fitzgibbons* regarding "the need to maintain secrecy with respect to sources and methods of intelligence information." *See* MTD at 14. Importantly, the NYPD omits the context of the cited language. A complete reading of the case shows the cited language is clearly specific to the Director of the CIA's powers under FOIA Exemption 3 and the National Security Act. *Fitzgibbons*, 911 F.2d at 763. As discussed above, the NYPD cannot rely on FOIA Exemption 3. The NYPD also does not have the same congressionally-mandated authority the Director of the CIA holds. Thus, although the NYPD misleadingly cites this case in the context of discussing § 87(2)(e)(i), *Fitzgibbons* is inapplicable to the construction of FOIL's narrowly construed law enforcement exemption.

Non-misleading and actually binding authority demonstrates that the NYPD has improperly asserted a blanket nondisclosure under § 87(2)(e)(i), an exemption which applies

¹⁴ The NYPD also cites case law in this section that does not even involve Glomar or FOIL. For example, *Gordon v. FBI*, 388 F. Supp. 2d 1028 (N.D. Cal. 2005) is cited on page 13 under the NYPD's discussion of Glomar, but the case does not even mention Glomar at all.

only to ongoing criminal investigations. *See, e.g., Legal Aid Society v. NYC Police Dep't*, 274 A.D.2d 207, 214 (N.Y. App. Div. 2000) (holding that disclosure of records “to a defendant in a pending criminal prosecution would interfere with that proceeding”). New York courts have held that § 87(2)(e)(i) does not apply to completed investigations in which no further action is contemplated. *See, e.g., Church of Scientology of N.Y. v. State of N.Y.*, 403 N.Y.S.2d 224, 226 (N.Y. App. Div. 1978) (disclosure would not interfere with law enforcement 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”). Thus, the NYPD must release records for investigations that are completed and either (a) did not result in further action or (b) resulted in a criminal prosecution that has been fully resolved.

The Court of Appeals of New York has further held that generic determinations of likely interference with a criminal investigation are not sufficient for withholding documents. Specifically, “not . . . every document in a law enforcement agency’s criminal case file is automatically exempt from disclosure simply because kept there. The agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents.” *Leshner*, 19 N.Y.3d at 67 (2012). Further, the Court of Appeals has made clear that “the agency must . . . fulfill its burden under § 89(4)(b) to articulate a factual basis for the exemption.” *Id. Loevy & Loevy v. N.Y.C. Police Dep't*, 957 N.Y.S.2d 628 (2013) (denying NYPD’s blanket exemption under § 87(2)(e)(i) because despite filing an affidavit to prove there was an ongoing investigation, the NYPD had failed to specify any generic harm that would be caused by production of the documents).

Importantly, N.Y. Pub. Off. Law § 87(2)(e)(i) does not give the NYPD *carte blanche* to withhold all documents concerning current investigations. As noted above, if a responsive record contains both exempt information and non-exempt information relating to current investigations, the NYPD must produce the responsive records with the exempt information redacted. Instead of complying with FOIL's directive, the NYPD claims that even acknowledging the *existence* of any documents would allow "an individual bent on unlawful activity" and has

considered criminal acts against New York City, including acts of terrorism, [to] monitor the capabilities, strategies, and operations tactics of the NYPD and its Intelligence Bureau with the goal of developing counter-measures which will allow for their criminal objectives to be achieved.

Galati Aff. ¶¶ 20, 24. This speculative argument ignores the fact that the NYPD has cited zero evidence that Mr. Hashmi is "an individual bent on unlawful activity" or that his FOIL Request is to further "acts of terrorism" or his "criminal objectives." Even a cursory review of his work shows that contrary to the NYPD's insinuations about the dangerous intentions behind Mr. Hashmi's FOIL Request, Mr. Hashmi has long been an outspoken critic of religious extremism, violence, and terrorism. Hashmi Aff. ¶ 4. Mr. Hashmi also has no criminal history. He has a right under FOIL to receive records responsive to his Request. The NYPD cannot label him as facilitating terrorism by using irrelevant facts as a means for providing a blanket exemption under § 87(2)(e)(i).

The NYPD has failed to satisfy its burden for properly raising this exemption. It has not demonstrated that Mr. Hashmi is still part of an ongoing investigation. Mr. Hashmi's Request concerns surveillance dating back to 2006; presumably, if the surveillance was part of an ongoing investigation that revealed any actual wrongdoing on Mr. Hashmi's behalf, the NYPD

would have taken action by now. In fact, Officer Galati, who submitted the NYPD's supporting affidavit, has admitted during sworn testimony that the NYPD's surveillance has not led to an investigation or commencement of any criminal proceedings.¹⁵ To accept the NYPD's "ongoing investigation" argument would therefore allow them to avoid disclosure indefinitely, as it is only for the NYPD to disclose whether their investigation is or is not "ongoing". Such an outcome would be antithetical to the purpose of openness and transparency behind FOIL.

Finally, Mr. Hashmi's case is also distinguishable from *Asian American Legal Defense*, in which the petitioners sought *all* records relating to the NYPD's surveillance of *any* Muslim individuals. *See AALDEF v. NYPD*, 41 Misc. 3d 471 (Sup. Ct. N.Y. 2013). Mr. Hashmi's request is much narrower, as it only seeks documents pertaining to him, and his Request specified that he did not object to the redaction of nonexempt material that could adversely impact any ongoing investigation.

ii. Proper disclosure under FOIL would not reveal non-routine criminal investigative techniques and would not be used by petitioners for terrorist activities.

The NYPD claims Petitioner's Request is exempted pursuant to N.Y. Pub. Off. Law § 87(2)(e)(iv), which applies to information that would "reveal criminal investigative techniques or procedures, except routine techniques or procedures."

The NYPD's claim is wholly inaccurate. First, the requested records do not "fall squarely within the ambit" of § 87(2)(e)(iv) because these requests largely do not seek details about investigative techniques and procedures. The requests simply seek intelligence gathered specifically on Petitioner Hashmi. *See* FOIL Request. In the event any responsive record contains both exempt information and non-exempt information, the NYPD must produce the

¹⁵ 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>.

responsive records with the exempt information concerning non-routine investigative techniques redacted. *Fink*, 419 N.Y.S.2d at 472 (N.Y. 1979) (ordering disclosure of a manual created to instruct investigator regarding nursing home fraud, with specialized techniques subject to law enforcement exemption redacted).

Second, proper disclosure would not reveal any exempt investigative decisions or techniques. Mr. Hashmi does not contest that effective law enforcement demands that violators of the law not be apprised of the non-routine procedures by which an agency obtains its information. However beneficial its thrust, the purpose of FOIL is not to enable persons to use agency records to frustrate pending or threatened investigations, nor is it to use that information to construct a defense to impede a prosecution. Indicative, but not necessarily dispositive, of whether investigative techniques are non-routine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel. *Fink*, 419 N.Y.S.2d 467. Here, however, disclosure of the requested documents would not provide any roadmap of investigative decisions or techniques that could undermine future investigations. The investigative decisions and techniques have largely been revealed already by the AP Reports. Although thousands of NYPD documents were released, the NYPD has failed to explain why Mr. Hashmi's records—but not the voluminous AP documents—constitute dangerous “strands” of information for would-be terrorists to thwart the NYPD's activities.

Instead of its blanket exemption, the NYPD should therefore disclose to NYPD the records he is entitled to. Unlike the FOIL request in *AALDEF*, Mr. Hashmi does not seek information regarding techniques used to carry out surveillance. Contrary to what the NYPD alleges, Mr. Hashmi also does not seek specific operational details, the names of informants or

undercover officers, or any sensitive information that would reveal non-routine criminal investigative techniques. Such information can and should be redacted while the remainder of the nonexempt records are disclosed.

Finally, Mr. Hashmi does not intend to use his FOIL request to “evade detection”. The NYPD repeatedly alleges that requiring it to comply with its FOIL obligations would “immeasurably improv[e] the prospect of another successful terrorist attack on the City.” MTD at 23-24. The implication that Mr. Hashmi will use his FOIL records to further terrorist purposes is not only entirely contradictory to his status as a law-abiding member of the public with no criminal record, it is offensive. It also ignores the reality that Mr. Hashmi’s main activity during his time on the Muslim Students Association board at Rutgers was to educate students about Islam’s prohibition *against* violence and terrorism, an issue Mr. Hashmi feels very passionately about. Hashmi Aff. ¶ 4.

The NYPD goes a step further, arguing that under § 87(2)(e)(iv), the NYPD should not have to respond to Mr. Hashmi’s request by comparing it to other FOIL requests. *See* MTD 22-23. In support, the NYPD cites AALDEF’s “mass FOIL campaign”, which encourages Muslim Americans to submit FOIL requests. *Id.* The NYPD continues that requiring it to respond to each FOIL request from Muslims regarding the NYPD’s surveillance would result in information being disclosed to “North Korea’s secret police”, “Iran’s counterintelligence service”, and “agents of al Qaeda and its affiliates.” MTD at 23 (citing *Bassiouni*, 392 F.3d at 246).¹⁶

This argument is unduly broad and discriminatory. To imply that Mr. Hashmi is exercising his FOIL rights to further the activities of North Korea’s secret police, Iran’s

¹⁶ The NYPD misleadingly cites *Bassiouni* in support of its § 87(2)(e)(iv) arguments. *Bassiouni* deals with the CIA raising a Glomar response pursuant to FOIA Exemption 1, which, as discussed above, is not applicable to the NYPD’s FOIL argument.

counterintelligence service or al Qaeda and its affiliates is completely unsubstantiated. It also ignores any facts specific to Mr. Hashmi, such as his long-standing work arguing against religious extremism and violence, his complete lack of affiliation at all times with any individuals—Muslim or non-Muslim—who harbor extremist or violent ideologies, and his continuous commitment to volunteering with law enforcement. Hashmi Aff. ¶ 13. Mr. Hashmi is not even affiliated with AALDEF’s “mass FOIL campaign.”

The NYPD’s argument, if accepted by this court, would allow the NYPD to disregard its duties under FOIL to Mr. Hashmi.¹⁷ Such precedent is inapposite to the purposes of FOIL and should not be permitted.

iii. The NYPD erroneously relies on N.Y. Pub. Off. Law § 87(2)(f) because disclosure of Mr. Hashmi’s records would not endanger the life or safety of any person.

N.Y. Pub. Off. Law § 87(2)(f) exempts responsive records from disclosure that, “if disclosed could endanger the life or safety of any person.” Again, the NYPD’s blanket refusal to produce responsive documents under this exemption is invalid.

For this safety exemption to apply, the NYPD must demonstrate at the least “a possibility of endangerment”. *Bellamy v. N.Y.C. Police Dep’t*, 87 A.D.3d 874, 875 (N.Y. Sup. Ct. App. Div. 1st Dep’t 2011). However, this “possibility” must be more than “speculative.” *N.Y. Times Co. v. City of New York Police Dep’t*, No. 116449/10, 2011 WL 5295044 (N.Y. Sup. Ct. Oct. 3, 2011).

Assuming that the undercover officers, informants and members of the public contributing to the NYPD’s surveillance programs were given promises of anonymity, the

¹⁷ The NYPD’s troubling characterization of Muslims is also reflected in its widely-circulated report called *Radicalization in the West: The Homegrown Threat*, which espouses the view that American Muslims are prone to radicalization. See Mitchell Silber & Arvin Bhatt, NYPD Intelligence Division, *Radicalization in the West: The Homegrown Threat* (2007).

NYPD's concerns about public safety can be addressed by appropriately redacting any information revealing the identities of such individuals from the documents. Mr. Hashmi merely seeks to uncover the substantive intelligence the NYPD has gathered on him. Details regarding who provided the intelligence and how is not essential to the Request. *N.Y. Civil Liberties Union*, 866 N.Y.S.2d 93 (releasing a database of 850,000 records of police stops noting that “[w]ith proper redaction of personal information concerning the officers who made the stop and/or the individuals stopped, the records are clearly subject to FOIL disclosure”).

With proper redaction of personal information concerning the officers who surveilled Mr. Hashmi, the records are clearly subject to FOIL disclosure and the NYPD has not met its burden to show that the database falls squarely within the claimed exemptions. *See N.Y. Civ. Liberties Union v. N.Y.C. Police Dep’t*, 2008 NY Slip Op 51279(U) [20 Misc. 3d 1108(A.); *Buffalo Broad.*, 155 A.D.2d at 112 (rejecting prison’s blanket exemption under § 87(2)(f)). The NYPD should not be allowed to simply proffer emotionally-laden “justifications” not grounded in reality to rely on this exemption. Although the NYPD cites to 27 different terrorist plots in the City in support for its blanket exemption under § 87(2)(f), it has failed to explain why these events are in any way linked to Mr. Hashmi. The NYPD fails to cite any facts specific to Mr. Hashmi, including the key fact that while he was under NYPD surveillance at Rutgers, Mr. Hashmi spent his time on the Muslim Students Association board being an outspoken critic of religious extremism and violence. Hashmi Aff. ¶ 4. Without any link between Mr. Hashmi’s exercise of his FOIL rights to any intent of his to use his FOIL records to endanger the life and safety of others, the NYPD’s argument is erroneous.

Finally, unlike the broad FOIL request in *AALDEF*, Mr. Hashmi is only seeking records relevant to him. A much narrower universe of documents is implicated, allowing the

NYPD to easily review and redact them as permissible under FOIL. To accept the NYPD's arguments would be tantamount to allowing blanket exemptions under § 87(2)(f).

III. No court has ever permitted a state or local law enforcement agency to use Glomar, and to allow otherwise would be inapposite to the purposes of FOIL.

In addition to the reasons above, the NYPD's Glomar response should be denied. No court in the nation has ever permitted a state or local law enforcement agency to invoke the Glomar doctrine. The NYPD should be no exception.

Further, when the Glomar doctrine is applied on the federal level, it is often used problematically in a manner that would be antithetical to the purposes of FOIL. Glomar is an extremely powerful and problematic tool for concealing information from the public. Federal law enforcement and intelligence agencies have routinely invoked the doctrine to shield controversial programs, including those involving unlawful conduct, from public scrutiny. *See, e.g., Wilner*, 592 F.3d at 75 (Glomar response to requests for documents on the Terrorist Surveillance Program, predecessor to the controversial PRISM program, despite concerns the response was issued to conceal the alleged illegality of the program); *N.Y. Times Co. v. DOJ*, 915 F. Supp. 2d 508, 552 (S.D.N.Y. 2013) (Glomar response to requests for legal memoranda outlining the Government's justification for targeting American citizens in drone strikes); *ACLU v. Dep't of Def.*, 389 F. Supp. 2d at 564-65 (S.D.N.Y. 2005) (Glomar response to requests for information on the Government's rendition and torture of terrorism suspects).¹⁸ Indeed, 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

¹⁸ *See also* Douglas Jehl, *Report Warned C.I.A. on Tactics in Interrogation*, N.Y. Times, Nov. 9, 2005, available at <http://www.nytimes.com/2005/11/09/politics/09detain.html> (reporting on a classified CIA Inspector General report finding that "the techniques [used to interrogate terror suspects after 9/11] appeared to constitute cruel, inhuman and degrading treatment[.]" which may have "violat[e]d some provisions of the international Convention Against Torture.").

knows, or that which is more embarrassing than revelatory of intelligence sources or methods.”
ACLU v. Dep’t of Def., 389 F. Supp. 2d at 561.

Permitting the NYPD to invoke the Glomar doctrine is also likely to exacerbate the NYPD’s already abysmal track record in responding to FOIL requests. *See* Bill DeBlasio, Office of the Public Advocate, *Breaking Through Bureaucracy: Evaluating Government Responsiveness to Information Requests in New York City* 6, 13 (2013), available at http://advocate.nyc.gov/sites/advocate.nyc.gov/files/deBlasioFOILReport_0.pdf (giving the NYPD an “F” on responsiveness to public information requests and stating that the NYPD failed to fully cooperate with the Public Advocate’s inquiries into its FOIL practices). The doctrine invites abuse and, as in the federal context, could allow the NYPD to cover up potentially illegal activity, especially when the NYPD does not have any guidelines or oversight to monitor its activities as compared to federal agencies.¹⁹ In short, the Glomar doctrine should not be imported to the New York FOIL system as a matter of public policy.

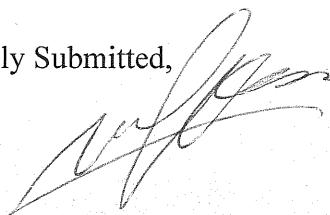
Finally, permitting the NYPD’s Glomar response would undermine the entire purpose of open governance behind FOIL and create a discriminatory roadblock against Muslims seeking to exercise their statutory rights. While the constitutionality of the NYPD’s surveillance is still being litigated, the NYPD cannot restrict the public’s right to learn about its activities. To hold otherwise would undermine the very purpose of FOIL. The NYPD’s Motion to Dismiss should therefore be denied in its entirety.

¹⁹ *See generally* Andrew Christy, *The ACLU’s Hollow FOIA Victory over Drone Strikes*, 21 Geo. Mason L. Rev. 1 (2013) (calling for reforms to overly broad Glomar responses by Government agencies); Michael D. Becker, Comment, *Piercing Glomar: Using the Freedom of Information Act and the Official Acknowledgment Doctrine to Keep Government Secrecy in Check*, 64 Admin. L. Rev. 673 (2012) (same); Nathan Freed Wessler, Note, “(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 (2010) (same); John Y. Gotanda, *Glomar Denials Under FOIA: A Problematic Privilege and A Proposed Alternative Procedure of Review*, 56 U. Pitt. L. Rev. 165 (1994) (same).

CONCLUSION

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

Respectfully Submitted,



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