TO BE ARGUED BY:
OMAR T. MOHAMMEDI

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

SAMIR HASHMI,

Petitioner-Respondent,

-against-

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

Respondents-Appellants.

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

RESPONDENT'S BRIEF

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

[Reproduced on Recycled Paper]

Supreme Court, New York County, Index No. 101560/2013

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax: (718) 522-4024
1-800-531-2028 - Email: appeals@dickbailey.com -Website: www.dickbailey.com

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

Statutes

PRELIMINARY STATEMENT

The New York State Public Officer Law ("POL"), Article 6, Sections 84-90, also known as the Freedom of Information Law ("FOIL"), governs the disclosure requirements for state and municipal agencies in the State of New York, including the New York City Police Department (NYPD). The stated purpose of FOIL is to allow the public access to records of the government, POL § 84. FOIL offers exemptions where the agency has a legitimate interest in keeping documents secret and POL § 87(2) provides specific situations where the agency can deny access to records or portions thereof.

The Court of Appeals, the state's highest court, expressed its general view of the intent of the Freedom of Information Law in *Gould v. New York City Police Department*, 87 NY2d 267 (1996):

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 see, Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (*id*., 275).

At issue in this case is not whether the information requested by the Petitioner-Respondent was exempt from disclosure, but rather whether a state or

local agency can take advantage of the Glomar Doctrine which allows federal agencies, under specific circumstances and stipulated statutes, to "neither confirm nor deny" the existence of records in response to federal Freedom of Information Act ("FOIA") request. The question is whether the Glomar Doctrine can be used by a state or local agency in response to a FOIL request. Specifically, can a state or local agency disregard the requirements of FOIL and respond by neither admitting nor denying the existence of records responsive to the request; thereby thwarting the adversarial process and court oversight inherent in FOIL? Also at issue is whether this court should usurp clear legislative intent not to incorporate this federal doctrine into FOIL, by allowing the NYPD to take advantage of responses previously only available under FOIA?

In the lower court decision currently being considered on this appeal (*Hashmi v. NYPD*, 46 Misc.3d 712 (2014)), the Honorable Peter H. Moulton determined that the Glomar Doctrine is not available in response to requests made under FOIL. He refused to usurp the role of the legislature by applying in this case the Glomar doctrine that does not exist in FOIL, holding that

> "The 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 disclosure of documents that could interfere with the proper operation of law enforcement. Engrafting the Glomar doctrine into FOIL would change this balance between the need for disclosure and the need for secrecy." *Hashmi* at 724.

In their brief, in addition to spending a lot of time arguing that the requested information is exempt from disclosure, Respondents-Appellants spend a lot of effort arguing that Petitioner-Respondent's FOIL request is part of a larger request by the Asian American Legal Defense and Education Fund ("AALDEF"). As he demonstrates below, Petitioner-Respondent submits that this issue is factually untrue and irrelevant.

Ironically, in response to the AALDEF request, the NYPD actually supplied records and acknowledged the existence of other records that they claimed were exempt; all while presumably protecting public safety, privacy and criminal investigations. *See Hashmi* at 724, citing *Matter of Bellamy v. New York City Police Department*, 87 A.D.3d 874 (1st Dep't 2011); *Matter of Legal Aid Society v. New York City Police Department*, 274 A.D.2d 207 (1st Dep't 2001); *Matter of Asian American Legal Defense and Educ. Fund v. New York City Police Dep't*, 41 Misc.3d 471 (2013); *Urban Justice Center v New York City Police Dep't*, 2010 N.Y. Misc. LEXIS 4258 (Sup. Ct. NY County 2010).

Petitioner-Respondent is merely looking for the same consideration, i.e., that Respondents-Appellants follow the New York State Public Officers Law. As Justice Moulton pointed out in *Hashmi* at page 724, there is nothing in the record indicating that the NYPD's work has been compromised by its inability to assert a Glomar response. To the contrary, case law, including in AALDEF case,

demonstrates that the NYPD has been able to protect sensitive information very well within the existing procedures that FOIL currently provides.

Additionally, Respondents-Appellants argue that the use of the Glomar Doctrine as a response to a FOIL request is "common sense," which begs the question; why after almost 40 years since the Glomar Doctrine was first introduced,[1] is the NYPD attempting to use this common sense theory, in response to a Muslim requester, as a basis to convince this Court to allow it to impose a federal legal theory that has no basis in fact or law under FOIL? Why has this common sense theory suddenly become relevant? This Court should be very skeptical about the NYPD's attempt to unilaterally re-write the FOIL statute by using a theory outside FOIL's realm in response to Mr. Hashmi's FOIL request for non-exempt records following the NYPD's surveillance of him and the Muslim Students Association at Rutgers University. In its brief, the NYPD attempts to incite fear because a Muslim is making a legitimate request for records on him pursuant to FOIL. The NYPD has used the same Glomar theory in *Abdur-Rashid* (101559/13 N.Y. County) which is before this Court on appeal as well. Ironically, in the two cases the requesters are Muslims.

[1] The Glomar doctrine was first adopted in two cases involving FOIA requests that sought information about the CIA's use of Howard Hughes' salvage ship the "Glomar Explorer" in recovering a Soviet nuclear submarine. In *Phillippi v CIA*, (546 F.2d 1009 [D.C. Cir. 1976]) and *Military Audit Project v Casey*, (656 F.2d 724 [D.C. Cir. 1981]) the D.C. Circuit allowed the CIA and Department of Defense to neither confirm nor deny the existence of documents involving the use of the Glomar Explorer.

The Petitioner-Appellant does not wish to bother this Court with duplicate arguments filed in *Abdur-Rashid's* appeal brief and reply brief.[2] The NYPD has filed briefs in both cases with identical analysis and legal theory. Nevertheless, the Petitioner-Appellant wishes to incorporate by reference *Abdur-Rashid's* appeal brief and reply brief.

Just as in *Abdur-Rashid*, the NYPD here cites to inapplicable cases. It essentially asks this Court to repeal FOIL, ignore years of precedent, enact FOIA and adopt the related federal case law (Respondents-Appellants brief at page 27). In other words, the NYPD is asking this Court to assume the role of the legislature because of its unfounded and unsupported common sense theory. The Petitioner-Respondent asks that this Court uphold the decision of Justice Moulton and remand the matter back to the lower court for a determination regarding whether the requested records are exempt under FOIL.

QUESTION PRESENTED

Did the lower court err in determining that a state or local government agency, the New York City Police Department, may not respond to a request under FOIL using the Glomar Doctrine without specific legislative intent?

[2] In a 9/11/14 decision, Justice Hunter dismissed Mr. Abdur-Rashid's Article 78 Proceeding (101559/2013). Mr. Abdur-Rashid appealed that decision on July 21, 2015, the NYPD submitted a Response on September 4, 2015, and Mr. Abdur-Rashid submitted a Reply on September 25, 2015.

STATEMENT OF THE CASE

On October 23, 2012, Petitioner-Respondent, a student at Rutgers University and the Treasurer of the University's Muslim Student Association ("Rutgers MSA"), made a request for records relating to surveillance of himself and the Rutgers MSA from the New York City Police Department.

On November 13, 2012, the NYPD provided their first response to the request wherein they acknowledged receipt of the request, indicated that they were investigating the request, and advised that a determination would be issued within 20 business days.

It was not until June 28, 2013, six months after the determination was due, that the NYPD issued a determination denying the Petitioner-Respondent's request. The reasons for the denial were as follows: A lack of certification of the identity of the Petitioner-Respondent. Acknowledging the existence of records would constitute an unwarranted invasion of privacy. The failure to consent by the Petitioner-Respondent to the release records to his attorney. The release would interfere with law enforcement investigations or judicial proceedings. The release of records would identify a confidential source or confidential information. The release of records would reveal non-routine criminal investigative techniques. The release of records would endanger the life or safety of any person. The release of records would constitute an unwarranted invasion of privacy. The records are pre-

decisional inter-agency or intra-agency materials and are specifically exempted from disclosure by state or federal statute.

Inexplicably, the NYPD specifically referenced all federal statutes instead of the FOIL statue in its denial of Mr. Hashmi's request when it included the following: FOIA exemption for inter and intra–agency communication (5 USC 552(b)(5)) even though a similar exemption exists under FOIL. A provision stating that, "The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure," (50 USC 403-1(i)(1)). A provision that states that the Office of the Director of National Intelligence shall have a General Counsel, (50 USC 403-3(c)(5)). And lastly, The NYPD cited to a federal provision outlining the penalties for disclosure of classified information, not available to the NYPD, (50 USC 421). This response gives the impression that the NYPD believes itself to be a federal agency dealing with national security issues, as well as having been granted Congressional authority to classify documents. Fortunately, Respondents-Appellants acknowledge that they have no such authority in their brief at page 29.

On July 19, 2013, Petitioner-Respondent appealed the June 28, 2013 determination. On August 7, 2013, Jonathan David, Record Appeals Officer for the NYPD, submitted a 4-page response denying the Petitioner-Respondent's appeal. The stated reasons for the denial included the Petitioner-Respondent's failure to

certify his identity or consent to release of documents to his attorney and failure to reasonably describe the records sought. The alleged vagueness of the request presumably prevented the NYPD from searching for and locating the requested records, yet they went on to say that the records would be exempt under POL § § 87 - 89. It is not clear how the NYPD was able to evaluate whether the requested records were exempt since, according to them, the request was so vague that records could not be located. So much for the detailed explanation the NYPD was required to offer when denying access to records pursuant to POL § 89(4). If their failure to satisfy the requirements of the law in this matter is indicative of future action, this Court should be extremely reluctant to increase the Respondents-Appellants authority, while at the same time, decreasing over-sight through application of the Glomar Doctrine. The NYPD has the burden to prove how any FOIL exemption applies to the record request, which necessitates an acknowledgement as to whether or not records exist (POL § 89(3)). If this Court allows the use of the Glomar Doctrine in this case, it will be ignoring years of precedent regarding the narrow application of exemptions and the burden of proof regarding whether an exemption applies. In addition, if this Court allows the use of the Glomar Doctrine in this case, it will be ignoring the plain language of FOIL requiring the agency to certify that the records provided are accurate or that after a thorough search, records could not be found. *See*, POL§ 89(3).

Petitioner-Respondent commenced an Article 78 proceeding seeking judicial review of the NYPD denial of his FOIL request. Respondents-Appellants moved for dismissal of the Petition in lieu of responding. Supreme Court, New York County Justice Peter H. Moulton denied the Motion to Dismiss in a 19 page detailed analysis supporting his opinion, *Hashmi* at 724.

ARGUMENT

POINT I

STATE AND LOCAL AGENCIES MUST CERTIFY WHETHER RECORDS EXIST IN RESPONSE TO A FOIL REQUEST.

In deciding the Petitioner-Respondent's Article 78 Petition**,** the Honorable Peter H. Moulton, Justice of the Supreme Court, New York County, appropriately determined that state and local agencies may not provide a circumspect response to a document request under FOIL. In this case, the NYPD responded to the Petitioner-Respondent's request for records about himself and a student organization he belonged to by neither confirming nor denying the existence of records. This response is available in very special circumstances under federal law and only to federal agencies in answer to a request made pursuant to the federal Freedom of Information Act (5 U.S.C. 552, commonly referred to as "FOIA").

Justice Moulton; focusing on the roles of the legislature and the judiciary, as well as the negative impact of allowing state and local agencies to avail themselves

of Glomar, determined that the Glomar response is not available under FOIL. Justice Moulton warned about the "impregnable wall" that would be created (*Hashmi* at 722) and the lack of over-sight and likelihood of abuse (*Hashmi* at 724); ultimately determining that it is up to the legislature, not the courts, to adopt the principles of the Glomar Doctrine. Justice Moulton (page 724) also pointed out that there is no evidence that the current statutory structure has hampered the NYPD's ability to protect confidential information and criminal investigations.

A. The Agency is Required to Reveal the Existence of Documents in Their Possession.

Even though it is well settled that FOIL was modeled after its federal counterpart, FOIA; the two statutes contain differences that are directly relevant to the issue at bar. Respondents-Appellants propose that the Court disregard FOIL and related precedent, arguing that the Court follow FOIA instead. This approach, however, ignores several provisions enacted into FOIL by the State Legislature, as well as, years of precedent as explained below. Unlike FOIA, Public Officers Law § 89 (3), requires that an agency,

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

Unlike its federal counterpart, the New York State Public Officers Law clearly requires that the agency acknowledge whether or not the records exist, *see*, *Key v.*

Hynes, 613 N.Y.S.2d 926, 205 A.D.2d 779 (1994) (a certification containing conclusory allegations that a record could not be found are not sufficient); and *Rattley v. NYPD*, 96 N.Y.2d 873 (2001) (acknowledging the need for a certification but stating that the Public Officers Law does not dictate the manner of the certification). These cases and a plain reading of POL § 89 (3) clearly support the lower court decision, and the Petitioner-Respondent's argument that the inclusion of this certification requirement in FOIL requires agencies to state whether or not they have records in their possession. There is no similar certification provision in FOIA. Therefore, state and local agencies cannot take advantage of the federal Glomar Doctrine.

The Appellants' brief completely ignores the FOIL certification requirement. Allowing the NYPD or any other state or local agency to take advantage of this federal doctrine is counter to the clear reading of the statute and relevant case law, will undermine the purpose of FOIL, and ignores the legislative inaction when enacting and amending the FOIL statute. The NYPD is asking this Court to allow state or local agencies to operate without judicial review of its FOIL responses to requesters such as Hashmi in this case.

B. Petitioner-Respondent's Request is Independent of the AALDEF Request.

In their brief, the NYPD attempts to undermine the right of a member of the public to obtain a record about him or herself by exploiting the fear associated with

terrorism. Such speculative arguments from an agency designed to "protect and serve" hint at discrimination. The only possible purpose for this argument is to distract the Court from the statutory exemptions already in existence in New York State Law.

The NYPD argues that this Court's recent decision in the Asian American Legal Defense and Education Fund ("AALDEF") (*Asian Am. Legal Def. & Educ. Fund v. New York City Police Dep't*, 125 A.D.3d 531, 5 N.Y.S.3d 13 (N.Y. App. Div. 2015)) is applicable to Mr. Hashmi; we agree. In *AALDEF* this Court did not address the applicability of the Glomar response, because the NYPD did not invoke the Glomar doctrine. Instead, the NYPD appropriately relied on the exemptions contained in FOIL to object to the request. The irony in the NYPD's reliance on the *AALDEF* decision in this case is that in *AALDEF*, the NYPD acknowledged the existence of the requested records and turned over the non-exempt records. Mr. Hashmi is merely looking for the same consideration for his request.

In *AALDEF*, the Petitioners sought "a trove" of documents,[3] whilst Mr. Hashmi only seeks documents on himself and the Muslim Student Association for which he acted as Treasurer. Unlike *AALDEF*, who failed to meet their "burden .

[3] The AALDEF request consisted of four general requests and 26 specific requests seeking information regarding record keeping and retention, policy guidelines and statistics pertaining to the NYPD's surveillance of Muslim individuals, business, and organizations throughout New York City and the surrounding areas, many of which did not relate to the individual requester.

. . to reasonably describe the documents requested so that they can be located", Mr. Hashmi specifically and reasonably defined the documents he was requesting. (*See Mitchell v. Slade*, 173 A.D.2d 226, 227, 569 N.Y.S.2d 437, 438 (1991)) In fact, the NYPD's use of *AALDEF* only supports Mr. Hashmi's claim. *AALDEF* asked for NYPD operations and surveillance documents. By contrast Mr. Hashmi's request seeks information on himself and the Rutgers MSA. In *AALDEF*, the NYPD was successful in claiming FOIL exemptions. More importantly no harm or damage was caused to the NYPD when it acknowledged the existence of exempted documents under FOIL and produced non-exempt documents. Similarly, a response to Mr. Hashmi's request under FOIL will not cause the damage the NYPD claims. The AALDEF case exemplifies Justice Moulton's decision that in the past the NYPD was able to protect sensitive information pursuant to FOIL stipulated exemptions without any harm when he 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. (*See, e.g., Matter of Bellamy v. New York City Police Department*, 87 A.D.3d 874, 930 N.Y.S.2d 178 [1st Dep't 2011]; *Matter of Legal Aid Society v. New York City Police Department*, 274 A.D.2d 207, 713 N.Y.S.2d 3 [1st Dep't 2001]; *Matter of Asian American Legal Defense and Educ. Fund v. New York City Police Dep't*, 41 Misc.3d 471, 964 N.Y.S.2d 888; *Urban Justice Center v. New York City Police Dep't*, 2010 WL 3526045, 2010 N.Y. Misc. Lexis 4258.) Crucially, these existing

> procedures provide some modicum of oversight by allowing the requester to formulate arguments in opposition to a claim of exemption, and by allowing a court to actually view responsive documents to ensure they fall within an exemption." *Hashmi*, 46 Misc. 3d at 724.

C. Without a Specific Provision, State and Local Agencies Cannot Invoke Glomar.

The only case cited by the NYPD that even comes close to supporting their position is *North Jersey Media Group, Inc. v. Bergen County Prosecutor's Office*, No. BER-L-6741-13, 2013 WL 6122922 (N.J. Super. Ct. Nov. 15, 2013).[4] Unfortunately for Respondents-Appellants; the *North Jersey Media Group, Inc.* case is not applicable to the case at bar. First, the Court in *North Jersey Media Group, Inc.* ruled based on a New Jersey statute which, unlike FOIL contained specific provisions that permitted the agency to withhold documents. The provisions included a limitation on the type of information that can be released regarding a crime where no arrest was made; and a provision that permits the release of the name of a suspect only after arrest (*Open Public Records Act*, N.J.S.A 47:1A-3). Second, the *North Jersey Media Group* case was instituted by a third party – a news agency, not the individual who was the subject of the investigation.

[4] Erroneously identified as *New Jersey Media Group, Inc.* in Respondents-Appellants brief.

In the *North Jersey Media Group* case, the news agency sought the records of an individual who may have been subject to one or more criminal investigations, but was neither charged nor arrested. Unlike the *North Jersey Media Group* where privacy issues were paramount, in this case, privacy issues are not relevant. Mr. Hashmi is the one requesting documents about himself (as the victim of the surveillance), not a third party. Therefore, *North Jersey Media Group* is clearly distinguishable and not applicable to the case at bar.

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

POINT II

THE FEDERAL GLOMAR DOCTRINE IS NOT EMBEDDED INTO THE EXISTING EXEMPTIONS PERMITTED BY FOIL.

Respondents-Appellants argue in their brief (pages 11 & 14) that it is "common sense" that an agency be permitted to answer a FOIL request with a circumspect response when the information requested falls within one of the enumerated exceptions. This position is completely unsupported in the law and contrary to their position in the lower court, where they argued that Glomar was a federal judicial invention that should be adopted by the state judiciary. Adopting

this reasoning would require this Court to assume the role of the legislature, in that the Court will be repealing FOIL and enacting a Glomar theory within FOIA.

The purpose of the Freedom of Information Law is to further governmental transparency and protect the public's right to know. Accordingly, any FOIL exemptions are interpreted narrowly, *see Matter of Markowitz v Serio*, 11 N.Y.3d 43, 51 (2008).

It is well settled law in this Court that "[P]ursuant to FOIL, government records are presumptively available to the public unless they are statutorily exempted by Public Officers Law § 87(2)" (citing to *Matter of Fappiano v. New York City Police Dept.*, 95 N.Y.2d 738, 746, 724 N.Y.S.2d 685, 747 N.E.2d 1286 [2001]). "Those exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption" (*Matter of Hanig v. State of N.Y. Dept. of Motor Vehs*., 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 [1992])." *Thomas v. New York City Dep't of Educ*., 103 A.D.3d 495, 496, 962 N.Y.S.2d 29, 31 (2013) (emphasis added.).

FOIL imposes a broad duty of disclosure upon government agencies. Government records are "presumptively open" to the public, statutory exemptions to disclosure are "narrowly construed," and the agency must articulate a "particularized and specific justification" for nondisclosure, *see, Matter of New*

York Civil Liberties Union v City of Schenectady, 2 N.Y.3d 657, 661 (2004) (citing Gould).

Contrary to the FOIL statute and precedent cited above, the Respondents-Appellants are asking this Court to view FOIL exemptions expansively, rather than narrowly as precedent requires.

Arguments relating to "common sense," the citation of FOIA decisions, and analogies to unrelated principles, such as attorney-client privilege and the right against self-incrimination are insufficient to overcome the clear intent of FOIL. The attorney work product doctrine and the Fifth Amendment right against self-incrimination both have bases under statute, unlike the NYPD's attempt to apply Glomar here. The attorney work product comparison is particularly misplaced since attorneys cannot assert a privilege and escape review as the NYPD is attempting to do here. Where an attorney asserts the work product privilege, he or she is under the obligation to produce a privilege log identifying the subject matter of the privilege, the type of documents, the author, and recipient if applicable for the court to determine whether or not the privilege claim is valid. Here, the NYPD is trying to usurp the adversarial process and defeat judicial scrutiny, thereby defeating the purpose of our established laws under a democratic society. Allowing agencies to invoke this federal doctrine will foster an environment of secrecy and distrust which is the exact opposite of the transparency intended by the legislature

in enacting FOIL. This Court should not permit the NYPD or any other state or local agency to usurp the role of the legislature and write additional exemptions to disclosure into FOIL, see *Hashmi* at 722.

A. This Court Should Not, Nor Should it Allow the NYPD to Usurp the Legislative Function by Adopting the Glomar Doctrine in Response to a Request Under FOIL.

In his opinion, Justice Moulton determined that the adoption [of Glomar] would effect a profound change to a statutory scheme that has been finely calibrated by the legislature. He went on to say that the decision to adopt the Glomar doctrine is one better left to the State Legislature, not to the Judiciary, *Hashmi* at 722.

The Glomar Doctrine has been around since 1976; *see Phillippi v. CIA*, (*Phillippi I*), 546 F.2d 1009, (D.C. Cir. 1976). The New York Legislature's FOIL legislation went into effect on September 1, 1974. In 1975 it was amended to parallel the federal Freedom of Information Act. Significantly, in 1977, the legislature caused a substantial revamp to FOIL but did not include Glomar. Thereafter, FOIL underwent series of amendments in 1982, 2005 and 2008[5]. At no time has the State Legislature decided to adopt the Glomar Doctrine by including it

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

in FOIL despite numerous opportunities to do so; a clear indication of their intent **not** to incorporate the doctrine into state law.

The Public Officers Law sections 87(2), and 89 (2) stipulate against disclosure of exempt records. None of the enumerated exemptions provide for a "neither confirm nor deny" response.

Respondents-Appellants counter this argument by suggesting to the Court that "common sense" dictates that the application of the doctrine is already embedded in FOIL, so there was and is no need for the legislature to act[6]. This Court should not, as the NYPD suggests, repeal FOIL and enact FOIA into state law.

The New York Court of Appeals stated in *Majewski v. Broadalbin- Perth Central School District*, 91 N.Y. 2d 577 (1998)," … the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." The plain language in the certification requirement in POL § 89 (3) clearly requires state and local agencies to acknowledge that either the records provided are accurate or that the records could not be found after diligent search.

[6] Again we note that during the lower court proceedings, the NYPD argued that Glomar was an invention of the federal judiciary and argued that the state judiciary should adopt the same rationale. Having failed in that argument, the NYPD now argues that the legislature always intended that agencies be able to avail themselves of the "neither admit nor deny" response to a FOIL request since it is already embedded into the exemptions.

When faced with a record request, POL§ 89 (3) (a) gives the agency three options. It can make the record available, deny the request or acknowledge receipt of the request and advise the requestor of the need for a reasonable time to either provide the record or deny the request. POL§ 89 (3) (a) continues:

> " …[T]he entity shall provide a copy of such record and certify to the correctness of such copy … or as the case may be, shall certify that it does not have possession of such record, or that the record cannot be found after diligent search."

How can an agency certify that it does not have possession of records, as required, if they are permitted to neither admit nor deny the existence of records?

POL § 89 (4) requires the agency to explain why records in their possession are exempt from disclosure. How can this FOIL requirement be met if the agency is permitted to neither admit nor deny the existence of records?

Nowhere in the plain reading of the POL can the Court infer that the intent of the legislature was to allow an agency to neither admit nor deny the existence of records. Such an inference would render specific statutorily enacted provisions of the statute useless. Clearly, when attempting to determine the intent of the legislature, courts should never opt for an intent that negates specific provisions of the statute, *see, Id* at 587, (the general principle that legislation is to be interpreted so as to give effect to every provision. A construction that would render a

provision superfluous is to be avoided). The NYPD is asking this Court to do just that to FOIL.

When determining legislative intent, this Court should not rely on conjecture and speculation about what may have been in the minds of the legislature as the Respondents-Appellants suggest. It should rely on the plain language of the statute and the fact that the state legislature had many opportunities to amend the statute in the manner the Respondents-Appellants suggest, but chose not to.

B. 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 above-caption is a quote from Justice Moulton's decision (*Hashmi* at 722. Justice Moulton went on to say that the Glomar response virtually stifles an adversarial proceeding (*Hashmi* at 723). For these reasons, among others discussed, Justice Moulton correctly held that Respondents-Appellants could not avail themselves of the Glomar Doctrine when responding to a request under FOIL.

Currently, when a FOIL request is denied under the clearly defined and narrowly interpreted exemptions, see, *NY City Civil Liberties Union*, the requester has the ability to challenge the denial in court with an Article 78 Petition (POL § 89(5)(d)). The presumption is that the records are accessible and the agency has

the burden of proving an exemption. If a court is unable to determine from the parties' papers whether withheld documents fall within the claimed exemptions, it must conduct its own inspection of the withheld documents *in camera* and order disclosure of any non-exempt, appropriately redacted material, *see*, *Matter of Xerox Corp. v Town of Webster*, 65 N.Y.2d 131, 133 (1985).[7] There is a procedural process in place that ensures judicial oversight which the NYPD is attempting to evade without a legal basis. In addition, the NYPD refusal to allow state court to conduct *in camera* inspection under FOIL[8] to ascertain the validity of the NYPD's concerns raises lot of questions. As courts have held, an unchecked Glomar doctrine is 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), see also *Hashmi* at 724 (secrecy is a necessary tool that can be used legitimately by government or law enforcement … but also illegitimately to shield illegal or embarrassing activity from public view).

If this Court allows state and local agencies to use the Glomar Doctrine in response to FOIL requests, it will have a profoundly negative effect on the intent and purpose of the statute. What happens to the presumption of openness? Where is the burden to show that the records are exempt? What happens to the obligation

[7] Petitioner-Respondent consented to an *in camera* review of the documents in the NYPD's possession in his July 19, 2013 letter requesting an administrative appeal.

[8] *See Xerox* regarding procedures for evaluating exemption claims under FOIL.

to turn over portions of the records that do not fall within an exemption? Most importantly, where is the judicial over-sight? Lastly, what will the Court replace almost 40 years of precedent with if it grants this appeal? These are questions properly left to the legislature, not the courts.

POINT III

RESPONDENTS-APPELLANTS WILL HAVE TO EMPLOY THE GLOMAR RESPONSE EXTENSIVELY IN ORDER FOR IT TO BE EFFECTIVE, FURTHER CLOUDING THE INTENDED TRANSPARENCY, AND RESULTING IN ADDITIONAL LITIGATION.

> Justice Moulton pointed out that "…the doctrine is not effective if it is only invoked where there has been surveillance…" (*Hashmi* at 721).

The NYPD admitted that in order for the Glomar Doctrine to be effective, Respondents-Appellants will need to avail themselves of the Glomar response in many cases. Despite this admission, Respondents-Appellants then attempt to argue (brief at page 29) that the adoption of the Glomar Doctrine will have a minimal impact on FOIL. It is clear that the NYPD intends to use the Glomar response extensively, both where records exist (whether or not statutory exemptions apply) and where they do not. A decision to allow the NYPD to invoke Glomar will impact a large volume of requests; denying those individuals the open government that FOIL demands; even when the NYPD has nothing to protect and/or the records do not fit within a statutory exemption. In other words, many members of the public will be denied an open government for no reason at all. Such a

proposition is dangerous and will lead to large scale abuse as Judge Moulton predicts (*Hashmi* at 724-725). It will jeopardize the existence of FOIL. On October 13, 2015, just one day before the filing of this brief, the United States Court of Appeals for the Third Circuit issued an opinion in *Hassan v. The City of New York*, 14-1688 (3rd Cir. October 13, 2015 unpublished). The Court held that the Plaintiffs; a group of Muslim individuals, businesses and places of worship, stated Constitutional causes of action as a result of the NYPD's illegal surveillance of them based merely on their religious beliefs and affiliations. One of the Muslim Student Associations mentioned in the decision was the Rutgers MSA; Mr. Hashmi was an officer of the same organization that is the subject of one of the record requests at issue in this matter. This is just one of many examples of the abuses Justice Moulton warned against in his decision that the Respondents-Appellants are attempting to hide through the improper use of the Glomar Doctrine in response to a FOIL request. This Court should not permit the NYPD to use Glomar "illegitimately to shield illegal or embarrassing activity from public view." (*Hashmi* at 724-725).

Once again, the scenario the Respondents-Appellants are proposing is the opposite of the stated legislative intent of FOIL. This Court should not usurp the authority of the legislature. If Respondents-Appellants wish that FOIL be amended, they should make their arguments to the legislature, not the court. Unless

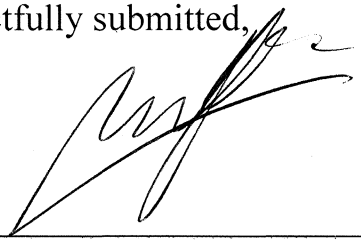
or until the legislature takes action, state and local agencies must comply with FOIL.

CONCLUSION

Petitioner-Respondent is not asking that the NYPD be required to reveal exempt information to criminal suspects; he merely requests that this Court send a clear message that the NYPD needs to comply with FOIL and abundant case law related to it. This is not a "common sense" matter as Respondents-Appellants attempt to argue. It is a matter of law that should be based on the New York State FOIL statute and state precedent. Judge Moulton based his opinion on both. Petitioner-Respondent respectfully requests that this Court affirms Judge Moulton's decision.

Dated: New York, NY
October 14, 2015

Respectfully submitted,



Omar T. Mohammedi
Clifford S. Mulqueen
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-Respondent Samir Hashmi

CERTIFICATE OF COMPLIANCE

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

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 5,671.

DB