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OPINION

The Divide: How the NYPD keeps its surveillance secret

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On February 6, 2018, the Court of Appeals of the State of New York heard arguments in the case of *Talib W. Abdur-Rashid and Samir Hashmi (petitioners-appellants) – against – New York City Police Department, et al. (respondents-respondents).* The case concerns the NYC Police Department's refusal to release documents sought under the New York State Freedom of Information Law (FOIL) and the United States' Freedom of Information Act (FOIA). The NYPD invoked the Glomar response, which means the NYPD "could neither confirm nor deny the existence of records relating to the surveillance or investigation of any individuals." The NYPD's use of Glomar creates an unhealthy divide between the public's right to information and governmental agencies' refusal to even admit such information exists.

The Glomar response derives its name from an event that happened in 1975. The *Los Angeles Times* wanted to print a story on the Central Intelligence Agency's (CIA) use of the salvage vessel USNS Hughes Glomar Explorer to try and salvage a sunken Soviet submarine ("Project Azorian"). The CIA wanted to stop the publication of the story. The reporter, Harriet Ann Phillippi, asked the CIA to disclose both the salvage project and that the CIA was trying to squash her report. The CIA's response to Phillippi was to "neither confirm nor deny" both actions, and Phillippi's FOIA request was rejected. The denial was based on that tired old government response, "in the interest of national security." The CIA's denial went on to state, "Acknowledgement of the existence or non-existence of the information you request could reasonably be expected to result in the compromise of important intelligence operations…" Thus, the terminology "Glomar" or "Glomar response" when a government agency does not want to confirm or deny the existence of records under FOIA. (NOTE: In 1977, the Carter administration reversed the original denial, and both of Phillippi's claims were confirmed.)

Over the past 40-plus years, Glomar has been used on the federal level to "protect national security" by denying to answer FOIA requests. Then, in 2012, the NYPD invoked Glomar in answer to Abdur-Rashid's and Samir Hashmi's FOILs of NYPD records relating to any investigation, surveillance, and associated memoranda of themselves and organizations they were members of. This was the first time the NYPD hid behind Glomar in order to "neither confirm nor deny" the existence of records. The reason that the petitioners filed the FOILs in the first place was because organizations they belonged to had been subjected to surveillance by the NYPD. The NYPD's mass surveillance of Muslim community groups was first reported in a series of Pulitzer Prize winning stories by the Associated Press (AP) in 2012. So, upon reading the AP articles, the petitioners sought to find out what information the NYPD may have collected on them. Seems like a reasonable request to me.

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Well, as reasonable as it seems to us, the public, to know what information a local police department may have on us, the NYPD felt it was necessary to Glomar-ize the FOILs "because doing so [responding to the FOIL] would undermine its work and law enforcement interests" (*Brief of Amicus Curiae of the New York Civil Liberties Union in support of the petitioners-appellants*). Both Abdur-Rashid and Hashmi took their FOIL cases to trial. In the Abdur-Rashid case, the trial court accepted the NYPD response, while in the Hashmi case, the court rejected the availability of a Glomar response under FOIL. The two cases were consolidated on appeal, and the First Department sided with the *Abdur-Rashid* court and held that agencies may use the Glomar doctrine under FOIL.

Even though the First Department ruled in favor of the NYPD, the court warned that the decision "do[es] not suggest that any FOIL request for NYPD records would justify a Glomar response." The court stated that agencies bear the burden of justifying a Glomar response, but gave little guidance for curbing Glomar in future cases. In fact, the First Department accepted the Glomar invocation, even though the petitioners had made several separate FOIL requests. In effect, the court didn't require the NYPD to meet the burden for each individual FOIL request that the court itself suggested had to be met in order to justify Glomar.

The outcome of this case is very important on many levels. The most basic one being that Glomar is the total antithesis of the spirit of FOIL. The purpose of FOIL is to "promote open government and accountability." Respondents have three options under FOIL: to produce the requested records; to deny the request under specific terms; or to not produce the records because they do not exist or cannot be found after a reasonable search. Nowhere under FOIL does it say a government agency can "neither confirm nor deny" the existence of the requested information. In fact, the trial court in *Hashmi* noted that in most Glomar cases "the invocation of the doctrine is tethered to FOIA exemptions…the National Security Act of 1947 and the Central Intelligence Agency Act of 1949…"

On another level, the NYPD states in its response to the appeal urging the court to affirm *Abdur-Rashid* that "there is no reason to think" that Glomar would undermine FOIL. Yet, the NYPD has again hid behind Glomar in the Millions March NYC (a protest against the killing of unarmed black people by police officers), when organizers requested copies of policies and practices related to surveillance of communications of protestors. This use of Glomar in a peaceful public protest by a police department is a direct assault on our constitutional rights to assemble (First Amendment) and to protect us from unreasonable searches (Fourth Amendment).

But perhaps the most important aspect of this case is the NYPD's "widespread suspicionless surveillance" of Muslims and Muslim organizations without any legal basis to do so, other than their religion. This action absolutely violates the "establishment of religion" clause of the First Amendment.

The NYPD's position to invoke Glomar and "neither confirm nor deny" their involvement in mass surveillance and information gathering on one particular religion, or one group of peaceful protestors, is an attack on all of us. For your religious denomination or political action group could be next. The next organization in the cross-hairs of a government agency could be the Jewish Voice for Peace, or the Unitarian Universalists, or even Grannies for Peace. If the petitioners fail to win their case, the court will essentially be giving local law enforcement carte blanche to do whatever it wants and our civil liberties be damned.

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