46 Misc.3d 712
Supreme Court, New York County, New York.

Samir HASHMI, Petitioner,
v.
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.

Nov. 17, 2014.

Synopsis
Background: Requester filed article 78 proceeding challenging decision of New York City Police Department denying his request for surveillance and investigation records under New York's Freedom of Information Law (FOIL). The Department moved to dismiss.

[Holding:] The Supreme Court, New York County, Peter H. Moulton, J., held that Glomar response, neither admitting nor denying the existence of records requested under the federal Freedom of Information Act (FOIA), was not available as response to plaintiff's request.

Motion denied.

West Headnotes (9)

[1] Records
In general; freedom of information laws in general

The purpose of the New York Freedom of Information Law (FOIL) is to further governmental transparency and protect the public's right to know. McKinney's Public Officers Law § 84 et seq.

Cases that cite this headnote

[2] Records
Matters Subject to Disclosure; Exemptions

Any New York Freedom of Information Law (FOIL) exemptions are interpreted narrowly. McKinney's Public Officers Law §§ 87(2), 89(2).

Cases that cite this headnote

[3] Records
Matters Subject to Disclosure; Exemptions
Records
Evidence and burden of proof

Government records are presumptively open to the public, under the New York Freedom of Information Law (FOIL), and statutory exemptions to disclosure are narrowly construed, and the agency must articulate a particularized and specific justification for nondisclosure. McKinney's Public Officers Law §§ 87(2), 89(2).

Cases that cite this headnote

[4] Records
Evidence and burden of proof

The burden on proving any exemption under the New York Freedom of Information Law (FOIL) rests with the respondent agency. McKinney's Public Officers Law §§ 87(2), 89(2).

Cases that cite this headnote

[5] Records
In camera inspection; excision or deletion

If a court is unable to determine from the parties' papers whether withheld documents fall within the claimed exemptions, under the New York Freedom of Information Law (FOIL), it must conduct its own inspection of the withheld documents in camera and order disclosure of any non exempt, appropriately redacted material. McKinney's Public Officers Law §§ 87(2), 89(2).

Cases that cite this headnote

[6] Records
In general; request and compliance

In litigation, the defendant agency claiming an exemption under the federal Freedom of

Information Act (FOIA) is typically required to provide the plaintiff requester with a detailed affidavit, called a Vaughn Index, which describes the contents of each withheld document, while shielding exempt information, and explaining the statutory basis for its exemption. 5 U.S.C.A. § 552.

Cases that cite this headnote

[7] Records

In general; request and compliance

A federal agency may issue a Glomar response, which neither admits nor denies the existence of information requested under the federal Freedom of Information Act (FOIA), if an answer to the inquiry confirming or denying the existence of responsive documents would cause the harm cognizable under an FOIA exemption. 5 U.S.C.A. § 552.

Cases that cite this headnote

[8] Records

In general; request and compliance

A Glomar response, neither admitting or denying the existence of records requested pursuant to the federal Freedom of Information Act (FOIA), must be tethered to one of the nine FOIA exemptions. 5 U.S.C.A. § 552(b).

Cases that cite this headnote

[9] Records

In general; request and compliance

Glomar response, neither admitting nor denying the existence of records requested under the federal Freedom of Information Act (FOIA), was not available as a response to request for surveillance and investigation records from the New York Police Department pursuant to the New York Freedom of Information Law (FOIL). 5 U.S.C.A. § 552; McKinney's Public Officers Law § 84 et seq.

Cases that cite this headnote

Attorneys and Law Firms

****597** Jeffrey S. Dantowitz, Esq., Assistant Corporation Counsel, for respondent NYPD.

Omar T. Mohammedi, Esq., Law Firm of Omar T. Mohammedi, petitioner Samir Hashmi.

Opinion

PETER H. MOULTON, J.

***713** In this Article 78 proceeding petitioner Samir Hashmi seeks to obtain records from the New York City Police Department ("NYPD") pursuant to the state's Freedom of Information Law (Public Officers Law § 84 et seq., commonly referred to as "FOIL"). The records sought in Hashmi's October 2012 FOIL request pertain to alleged surveillance and investigation by the NYPD of Hashmi, and of the Rutgers University Muslim Student Association where he served as treasurer while enrolled as a student at Rutgers. The request was prompted by a series of newspaper articles by the Associated Press that concerned NYPD surveillance of various Muslim individuals, groups and Mosques in New York, New Jersey and Connecticut.

The NYPD responded to Hashmi's FOIL request by refusing to state whether or not it had records in its possession responsive to the request. According to the NYPD, the mere disclosure of the existence of such documents would "cause substantial harm to the integrity and efficacy of NYPD's investigations of terrorist activities and could endanger the safety of people working undercover, or who otherwise provide information to the NYPD." [1]

Information that might disclose non-routine law enforcement techniques, or reveal the identities of undercover operatives or others providing confidential information to the police, are types of documents that are specifically exempt from FOIL disclosure. (*See* POL §§ 87[2][e][iii], [iv].) However, in order to invoke these and other exemptions, FOIL provides that a law enforcement agency must first acknowledge the existence of responsive documents. Frequently, it is necessary for a court to conduct an *in camera* inspection of responsive documents for which an exemption is claimed in order to determine whether the agency has properly invoked that exemption.

****598** Here the NYPD seeks to avoid that process on the ground that its mere acknowledgment of the *existence* of

the documents sought by Hashmi would impair its ability to combat terrorism, even if the *content* of the documents would be exempt from disclosure under exceptions set forth in FOIL.

***714** In making this argument the NYPD asks this court to adopt the Glomar doctrine, a common law exception to disclosure that federal courts have engrafted onto the federal Freedom of Information Act (5 U.S.C. § 552, commonly referred to as "FOIA"). 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.

Before the court is respondents' motion to dismiss the petition. As discussed at greater length below, respondents argue that this court should adopt the federal Glomar doctrine in evaluating Hashmi's FOIL request and let stand the NYPD's denial of petitioner's request.

BACKGROUND

In a series of articles in 2011–12, the Associated Press revealed that the NYPD had engaged in extensive surveillance of Muslims, including Muslim university and college students, in New York, New Jersey, and Connecticut. The articles stated that Rutgers University was one of the schools where Muslim students were subject to NYPD surveillance. [2]

Hashmi alleges that he was a student at Rutgers University from 2006 to 2011. He alleges that as a member of the Rutgers Muslim Students Association, he condemned terrorism while raising awareness about Islam. He contends that he has never been charged with a crime, and has done nothing to warrant surveillance by the NYPD. There is nothing in the record before the court that contradicts those statements. Hashmi asserts in ***715** his affidavit that the NYPD "spied" on him "for no basis except that I am a Muslim." [3]

Hashmi submitted his FOIL request to the NYPD on October 23, 2012. He sought seven overlapping categories of documents:

> 1. All records related to any investigation of Samir Hashmi, between 2006–2012, including the results of those investigations.
>
> 2. All records related to Samir Hashmi relied upon by the NYPD that led to any report being filed.
>
> 3. All records related to the surveillance of Samir Hashmi by the NYPD.
>
> 4. All records related and relied upon on the surveillance [sic] of Samir Hashmi used by the NYPD.
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> 5. All directives and/or memoranda sent or received by the NYPD related to surveillance of Samir Hashmi from 2006–2012.
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> 6. All directives and/or memoranda sent or received by the NYPD related to ****599** surveillance of the Rutgers Muslim Student Associations from 2006–2012.
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> 7. All directives and/or memoranda sent or received by the NYPD related to the surveillance of Samir Hashmi, as Treasurer for Rutgers Muslim Student Association from 2006–2009.

In a letter dated November 13, 2012, a NYPD Records Access Officer acknowledged receipt of Hashmi's request, and estimated that the department would respond in twenty business days.

More than six months later the NYPD denied Hashmi's request in a letter dated June 28, 2013. The letter stated that Hashmi's request did not include a certification of Hashmi's identity. The NYPD also noted that Hashmi had not consented to the release of his records to his attorney.

The NYPD's denial went on to state that even if Hashmi's request had been accompanied by a certification of identity, the information sought was "on its face, information that is exempt from FOIL disclosure." The denial explicitly did not admit that records responsive to Hashmi's request were in the NYPD's possession. Instead, the denial stated conditionally that if such records were in the NYPD's possession they would be protected by several FOIL exemptions set forth in the denial:

> ***716** 1. Disclosure of the records would interfere with law enforcement investigations or pending judicial proceedings. POL § 87(2)(e)(i).

2. Disclosure of the records would identify a confidential source or confidential information relating to a criminal investigation. POL § 87(2)(e)(iii).

3. Disclosure of the records would reveal non-routine criminal investigative techniques or procedures. POL § 87(2)(e)(iv).

4. Disclosure of the records would endanger the life or safety of any person. POL § 87(2)(f).

5. Disclosure of the records would constitute an unwarranted invasion of privacy. POL §§ 87(2)(b), 89(2)(b).

6. Disclosure of the records would reveal protected pre-decisional inter-agency or intra-agency materials. POL § 87(2)(g).

7. Disclosure of the records would violate state or federal statutes that specifically exempt such documents from disclosure. POL § 87(2)(a).

Hashmi took an administrative appeal of the NYPD's denial. In a letter dated August 7, 2013, the Records Access Appeals Officer denied the appeal. The August 7th letter reiterated the objection that Hashmi's identity had not been properly certified in the request. It also stated that the records requested had not been properly identified "in a matter that would evoke a path that could lead to the retrieval of responsive records with reasonable efforts." The denial letter faulted, *inter alia*, the breadth of the records sought, and Hashmi's failure to identify the NYPD unit that may have been involved in the alleged surveillance.

The NYPD's primary reason for the denial was that the records sought, if they existed, would be exempt from disclosure under the FOIL provisions cited by the Records Access Officer that are set forth above. Consistent with its position in the instant motion to dismiss, the NYPD did not state whether or not it had any documents responsive to the request.

As these administrative challenges progressed, the NYPD's Muslim Surveillance program became an issue in the 2013 mayoral race and media outlets carried stories concerning the ***717** candidates' positions with respect to the program.[4] After his election, ****600** Mayor Bill De Blasio disbanded the NYPD unit that conducted the surveillance.[5]

Hashmi brought this Article 78 proceeding to challenge the NYPD's denial of the his FOIL request. Respondents moved to dismiss the petition. That motion is now before the court.

DISCUSSION

A. *New York State's Freedom of Information Law*

[1] **[2]** **[3]** 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, 862 N.Y.S.2d 833, 893 N.E.2d 110 [2008].) 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. (*Matter of New York Civil Liberties Union v. City of Schenectady,* 2 N.Y.3d 657, 661, 781 N.Y.S.2d 267, 814 N.E.2d 437 [2004] *citing Matter of Gould v. New York City Police Dep't,* 89 N.Y.2d 267, 274–275, 653 N.Y.S.2d 54, 675 N.E.2d 808 [1996] [internal quotations omitted].)

[4] **[5]** The "narrowly constructed" categories of FOIL exemptions are collected at POL §§ 87(2), 89(2). (*Matter of Fink v. Lefkowitz,* 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463 [1979].) The burden on proving any exemption rests with the respondent agency. (*Markowitz, supra,* at 50–51, 862 N.Y.S.2d 833, 893 N.E.2d 110.) 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. (*Matter of Xerox Corp. v. Town of Webster,* 65 N.Y.2d 131, 133, 490 N.Y.S.2d 488, 480 N.E.2d 74 [1985].)

B. *The Federal Freedom of Information Act and the Glomar Doctrine*

[6] In general, FOIA's procedures are similar to FOIL's: an individual or entity submits requests to a government agency and ***718** receives one of three responses. First, the agency may identify responsive records and release them. Second, it may determine that there are no responsive records and inform the requester of that fact. Third, it may identify responsive records but determine that all or part of the records are exempt from disclosure under one of

FOIA's nine statutory exemptions, which are listed below. If an agency denies a FOIA request, there is the opportunity for administrative and then judicial review of the denial. In litigation, the defendant agency is typically required to provide the plaintiff requester with a detailed affidavit, called a Vaughn Index,[6] which describes the contents of each withheld document (while shielding exempt information) and explaining the statutory basis for its exemption. The Vaughn Index thus provides the plaintiff requester with some information to contest the agency's basis for withholding documents or portions of documents, and allows the agency to carry its burden of proof. *In camera* inspection of the documents in question is ****601** often necessary to determine the validity of the claimed exemptions.

[7] The Glomar doctrine allows an agency to depart from this usual procedure. As noted above, the Glomar doctrine has as its premise that the existence or non-existence of documents is itself a fact protected by the exemptions to disclosure stated in FOIA, the federal analog of FOIL. A federal agency may issue a Glomar response if an answer to a FOIA inquiry confirming or denying the existence of responsive documents would cause the harm cognizable under a FOIA exemption. (*See Center for Constitutional Rights v. CIA*, 765 F.3d 161, 164 n. 5 [2d Cir.2014].)

Because the agency does not wish to acknowledge the existence of the requested documents, it does not prepare a Vaughn Index. For the same reason there is no *in camera* inspection of documents by the court—since the agency's position is that the documents may or may not exist. Instead the agency meets its burden by submitting an affidavit showing that the requested material, if it exists, logically would fall within the claimed exemptions. The affidavit must also set forth the harm that would ensue from merely acknowledging the existence of the requested records. (*Wilner v. National Security Agency*, 592 F.3d 60, 68 [2d Cir.2009].) When an agency asserts a Glomar response, the discussion of exemption is more abstract, and not anchored ***719** to any particular document. Because of the alleged sensitivity of the request, sometimes the agency's affidavits are submitted to the court *in camera*, which of course gives the plaintiff no chance to respond. (Note, "[W]e Can Neither Confirm Nor Deny the Existence or Nonexistence of Your Request": Reforming the Glomar Response Under FOIA" "85 NYULR 1381, 1391.) The reviewing court must accord "substantial weight" to the agency's affidavit(s). (*Wilner, supra*, at 68.)

[8] A Glomar response must be "tether[ed]" to one of the nine FOIA exemptions. (*Id.*) Those exemptions are set forth at 5 U.S.C. § 552(b):

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

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

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

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

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

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

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

***720** (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, ****602** (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E)

would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

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

(9) geological and geophysical information and data, including maps, concerning wells.

Section 552(b) goes on to state that an agency should redact exempt information if it is "reasonably segregable" and produce the redacted document(s).

C. *The NYPD's Proposal to Engraft the Glomar Doctrine into FOIL*

The NYPD argues that it must have the option of submitting a Glomar response to certain types of requests. Otherwise, the existence of its surveillance and other anti-terrorist strategies will be revealed and therefore undermined. While it would appear that details concerning surveillance techniques and strategies would almost certainly fall under one of FOIL's law enforcement exemptions, and that therefore the content of those ***721** techniques and strategies—and the identities of undercover agents—would not be revealed, the NYPD asserts that it would be harmful to go through the usual FOIL procedure of vetting the claimed exemption. According to the NYPD the mere acknowledgment of documents concerning surveillance would reveal the targets and scope of its anti-terrorism surveillance operations. Individuals and entities could know whether or not they are the subject of surveillance and adjust their activities accordingly.

The NYPD also correctly points out that the Glomar doctrine is effective only where whole categories of requests receive Glomar responses, whether or not there are actually documents responsive to those categories of requests. For example, the doctrine is not effective if it is only invoked where there *has* been surveillance of the person or entity requesting information. Were the NYPD to invoke the Glomar doctrine only when it had responsive records that it wanted to conceal, and give a "no record" response when it had no such records (or a Vaughn Index when it was willing to at least acknowledge exempt records), then requesters would see a Glomar response as nothing more than a governmental admission that records exist which the government wants to cover up.

The NYPD emphasizes the urgency of its anti-terrorism initiatives by stating the undeniable fact that New York City is a terrorist target. Two lethal attacks on the World Trade Center, and other, thwarted acts of terrorism have confirmed that grim reality. The NYPD submits the affidavit of Thomas Galati, who is the Chief of ****603** Intelligence of the NYPD's Intelligence Bureau. Chief Galati points to twenty-seven terrorist plots that law enforcement has disrupted since September 11, 2001. The NYPD argues that the individuals engaged in those plots could have found out if they were under surveillance by submitting a FOIL request. A response, even one that asserted an exemption that would suppress any detail about the surveillance, would still notify the individuals that they were being watched, and then cause them to alter their behavior to evade detection. The NYPD does not state whether it is aware of any instance of this use of FOIL by terrorists.

Of course, the surveillance of Muslims by law enforcement in the United States has long been acknowledged in the press, which would appear to provide ample notice to potential terrorists. The specific program that gave rise to Hamshi's FOIL ***722** request has been a particular focus of press attention. [7] TO MEET THAT ARGUMent, the nypd argues that AGENcy acknowledgment of exempt materials can still inflict harm, and points out that federal courts have held that there is no waiver of a Glomar response when the press, or even another federal agency or branch of government, reveals information that a defendant agency holds as too sensitive to reveal. (*E.g. Wilner, supra,* 592 F.3d at 70; *Frugone v. CIA,* 169 F.3d 772 [DC Cir.1999]; *Hunt v. CIA,* 981 F.2d 1116 [9th Cir.1992].) Only where senior executive branch officials, or an agency itself, publicly acknowledge the existence of requested documents can a Glomar response be defeated. (*See The New York Times Co. v. U.S. Dep't of Justice,* 762 F.3d 233 [2d Cir.2014].) However this "public acknowledgment" attack on a Glomar response has historically seen little success in federal court. (*See* Becker, *Piercing Glomar: Using the Freedom of Information Act and the Official Acknowledgment Doctrine to Keep Government Secrecy in Check,* 64 Administrative Law Review 673 [2012].)

The NYPD urges this court to adopt Glomar—just as federal courts have—essentially as a common law amendment to a

statutory scheme. It argues that just as Congress has never deemed it necessary to codify Glomar in FOIA, there is no prerequisite that the State Legislature do so in FOIL.

[9] For the reasons stated below, the court disagrees and declines to adopt Glomar. The adoption would effect a profound change to a statutory scheme that has been finely calibrated by the legislature. Therefore, the decision to adopt the Glomar doctrine is one better left to the State Legislature, not to the Judiciary.

The insertion of the Glomar doctrine into FOIL would build an impregnable wall against disclosure of any information concerning the NYPD's anti-terrorism activities. The wall would be created by the procedures used to vet a Glomar response, outlined above, which ensure that the decision to approve or deny a Glomar response is made with very little information, ***723** and with almost no useful input from the person or entity seeking the documents. A Glomar response virtually stifles an adversary proceeding.

Additionally, the Glomar doctrine has been shaped by more than thirty years of judicial precedent. It may be that the State Legislature would not choose to adopt wholesale that body of law. For example, the NYPD has indicated in its papers and at oral argument that it seeks ****604** a Glomar doctrine in state law that mimics the federal court's very limited view of "public acknowledgment" waiver. As noted above under FOIA, an agency, or the executive, must publicly acknowledge the existence of responsive documents before a Glomar response can be defeated. Under this very narrow "public acknowledgment" doctrine, press reports and even governmental statements acknowledging the existence of a given program, are not sufficient to effect waiver of a Glomar response. Therefore, the extensive press reports—and book—about the Muslim surveillance program, the mayoral candidates' reactions to the program, and Mayor De Blasio's well-publicized decision to disband the NYPD unit that had conducted the surveillance, all would be no impediment to the NYPD stating that it cannot confirm nor deny the existence of documents concerning the program. The legislature might strike a different balance on the question of waiver. Unlike a court, the legislature is not limited to the record presented by parties to a lawsuit.

Differences in the statutory exemptions listed in FOIA and FOIL also raise questions as to whether a judge should engraft the federal doctrine onto the state statute. In the vast majority of Glomar cases, the invocation of the doctrine is tethered to FOIA exemptions 1 and 3. FOIA exemption 1 protects "classified documents" designated by "Executive order." Municipal governance does not include an analogous category of documents. FOIA exemption 3 relates to documents "specifically exempted from disclosure by statute." FOIA exemption 3 is most often used in Glomar responses in conjunction with legislation that created the federal government's national security apparatus. For example, two statutes frequently invoked in conjunction with exemption 3 in Glomar responses are the National Security Act of 1947, which exempts from disclosure "intelligence sources and methods," (50 U.S.C. § 3024–1(i)(1)) and the Central Intelligence Agency Act of 1949, which requires the CIA director to protect intelligence sources or methods. These types of documents have no analogs in the NYPD's own records.

***724** Federal decisions exist that tether a Glomar response to FOIA exemption 7, which does have an analog in FOIL's law enforcement exemptions. (*see, e.g., people for the ethical treatment of animals v. national Institutes of Health,* 745 F.3d 535; *Platsky v. FBI,* 547 Fed.Appx. 81.) However, the fact that the Glomar doctrine has arisen, and has been shaped, by the federal government's preeminent role in "national defense [and] foreign policy" (5 U.S.C. § 552(b)(1)) casts doubt on whether a judge should apply the doctrine to the NYPD.

Finally, there is nothing in the record before the court that 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 that 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 ****605** view responsive documents to ensure they fall within an exemption. [8]

Since the September 11 attacks the NYPD has worked tirelessly in protecting New York City. This court's decision does not reflect any judgment of the NYPD's work. The

court is instead concerned with oversight of governmental functions as embodied by FOIL. 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 the disclosure of documents that could interfere with the proper operation of law enforcement. Engrafting the Glomar doctrine onto FOIL would change this balance between the need for disclosure and the need for secrecy. Secrecy is a necessary tool that can be used legitimately by government for law enforcement and national security, but also illegitimately to shield illegal ***725** or embarrassing activity from public view. It is a legislative function to write a statute that strikes a balance embodying society's values.

CONCLUSION

For the reasons stated, respondents' motion to dismiss is denied. Respondents shall answer the petition pursuant to CPLR 7804(f). This constitutes the decision and order of the court.

Parallel Citations

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Footnotes

1 Respondents' Memorandum of Law in Support of Motion to Dismiss at 6.

2 *E.g.* "NYPD Monitored Muslim Students All Over Northeast," Associated Press, February 18, 2012. The AP reporters expanded their work into a book. (Matt Apuzzo and Adam Goldman, *Enemies Within,* Simon & Schuster 2013.)

3 Affidavit of Samir Hashmi dated March 25, 2014, ¶ 19.

4 *E.g.* "Would a Democratic Mayor End the NYPD's Muslim Surveillance Program?", New York Magazine September 9, 2013.

5 *E.g.* "New York Drops Unit That Spied on Muslims," New York Times April 15, 2014.

6 Named for *Vaughn v. Rosen,* 484 F.2d 820 (D.C.Cir.1973).

7 *E.g.* "With CIA Help, NYPD Moves Covertly in Muslim Areas" Associated Press, August 23, 2011; "Informant: NYPD Paid Me to "Bait" Muslims" Associated Press, October 23, 2012.

8 For the reasons stated in this opinion, this court is not persuaded by *Abdur–Rashid v. New York City Police Dep't,* 45 Misc.3d 888, 992 N.Y.S.2d 870, which was recently decided in New York State Supreme Court.