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NYPD Use of Noncommittal 'Glomar' Answer Questioned as Transparency Dodge

Andrew Denney, New York Law Journal

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Some in the legal community can neither confirm nor deny that the New York City Police Department's policy of using the so-called *Glomar* doctrine as an exemption to open records requests is a good thing.

But all can agree that the CIA-coined nonanswer to requests for information that was typically used in situations involving matters of national security has seen wider use in recent years.

Earlier this month, the New York Civil Liberties Union filed an amicus brief on behalf of the plaintiffs in two lawsuits against the NYPD regarding requests filed under the state's Freedom of Information Law (FOIL) to obtain records pertaining to the department's surveillance activities.

The NYPD is the first state or local governmental unit to invoke the *Glomar* doctrine in response to a state open records request.

The police denied the requests under the *Glomar* exception, providing a vague nonanswer to open records requests in which an entity replies that it can neither confirm nor deny that the requested records exist.

The cases are expected to go before the Court of Appeals, New York's highest court, for oral arguments later this year.

Glomar derives from a secret salvage operation conducted in the 1970s by a ship called Hughes Glomar Explorer to recover a sunken Soviet submarine and the doctrine was first used in response to a journalist's inquiries about the project and the CIA's efforts to block publication of a story about the project in the Los Angeles Times.

As for the New York cases, the Appellate Division, First Department, ruled last year that the NYPD properly used the *Glomar* response to deny requests for records related to the department's surveillance of a Muslim student and of a mosque in Harlem, settling a dispute between two state judges in Manhattan whose decisions as to whether the NYPD has the authority to invoke the doctrine.

In the decades since, the *Glomar* response has become a staple for government agencies seeking to sidestep open records requests, and courts have generally ruled on the government's side.

In another recent example, a New Jersey appellate court said the Bergen County Prosecutor's Office could claim that the NYPD properly used the *Glomar* response to deny requests for records related to the department's surveillance of a Muslim student and of a mosque in Harlem, settling a dispute between two state judges in Manhattan whose decisions as to whether the NYPD has the authority to invoke the doctrine.

The Manhattan-based appeals court said that it was not suggesting that any FOIL request would justify use of *Glomar*.

But granting the requests underlying *Abdur-Rashid v. New York City Police Department*, 101559/2013, and *Hashmi v. New York City Police Department*, 101560/2013, may have caused "harm cognizable," and thus would fall under the law enforcement and public safety exemptions of Public Officers Law §87(2).

Additionally, the court found, the department met its burden to "particularized and specific justification" for use of the doctrine.

Now before the Court of Appeals, attorneys for the plaintiffs say the First Department's ruling "creates more problems than it resolves" and amounted to creating a new exemption under FOIL.

The plaintiffs are represented by Omar Mohammedi, Clifford Mulqueen and Elizabeth Kimundi of the Law Firm of Omar T. Mohammedi.

But the NYPD argues that the plaintiffs are seeking to compel the department to reveal the identities of subjects of counterterrorism investigations and that it is beholden to safeguards established in the long-running litigation in *Handschu v. Special Serv. Div.*, 71-cv-2203, that govern surveillance of political and religious activities.

"That would arm individuals and organizations intent on committing acts of terrorism in New York City or elsewhere with highly valuable information enabling them to evade detection, develop intelligence countermeasures, refrain from contact with potential subjects of investigation, and discern the identities of undercover officers and confidential informants," the NYPD argues in a brief filed in May. The department is represented by Assistant Corporation Counsels Richard Dearing, Devin Slack and John Moore.

Lawrence Byrne, the NYPD's deputy commissioner for legal matters, said the department uses the doctrine sparingly—it has been used twice so far, he said—and that it generally has a high burden to meet to justify its use.

"It helps to keep the common, everyday New Yorker safe because we don't have to reveal the content of constitutional investigations," Byrne said.

The NYPD has also proposed safeguards for its use of *Glomar*, including charging the department with the burden of proof, ensuring that its justification is subject to adversarial testing" and allowing plaintiffs to prove that *Glomar* is being invoked in bad faith.

But in its amicus brief in the case, the NYCLU argues that, if the Court of Appeals does allow the use of *Glomar* to respond to FOIL requests, it should impose additional safeguards beyond those proposed by the NYPD, including a heightened presumption against the use of the doctrine and that the department should not be able to use the response in case where officials or public records acknowledge the existence of the records that are being requested.

"This response represents a sea change in FOIL practice and it cloaks the NYPD in an additional layer of secrecy not contemplated by FOIL's carefully calibrated legislative scheme," the NYCLU attorneys wrote. "Left unchecked, the *Glomar* doctrine can be and will be abused to strip FOIL of its effectiveness."

Michael Richter, a former intelligence official who spent time with the Defense Department and with the Office of the Director of National Intelligence who now works as an associate at Skadden, Arps, Slate, Meagher & Flom, said given his background he is sensitive to the NYPD's security needs in the post-9/11 world.

But he said that, while the department has invoked *Glomar* sparingly so far, he sees potential for it to "slip" in the future and use it in other contexts. He said it may be a good idea to boot the issue to the state Legislature to consider putting safeguards for the use of *Glomar* into statute.

"Let's not fashion this out of whole cloth," Richter said.

While the *Glomar* doctrine lives on—including in the CIA's official Twitter feed—the eponymous vessel was taken out of military service in the 1990s and sent to the scrap yard in 2015.

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