Index No. 13/101559

# Court of Appeals
# *of the*
# State of New York

TALIB W. ABDUR-RASHID

*Plaintiff-Appellant,*

– against –

NEW YORK CITY POLICE DEPARTMENT AND RAYMOND KELLY, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE NEW YORK CITY POLICE DEPARTMENT

*Defendants-Respondents.*

**BRIEF OF *AMICI CURIAE***
**(List of *Amici* on next page)**


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## LIST OF *AMICI CURIAE*

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## INTEREST OF THE AMICI

*Amici curiae* are the Reporters Committee for Freedom of the Press, and XX. *Amici* are described in more detail in Appendix A.

This case presents issues of significant importance to *amici* who, as members and representatives of the news media, frequently utilize state and federal freedom of information laws, including New York's Freedom of Information Law ("FOIL"), to gather news and keep the public informed about the activities and operations of government. *Amici* have a strong interest in ensuring that such laws remain powerful tools to facilitate public access to government records and assure government accountability. The Appellate Division's decision below, affirming a municipal agency's issuance of a so-called "Glomar" response to a FOIL request—that is, a refusal to either confirm or deny the existence of public records responsive to a request—will harm FOIL's ability to serve as an effective means for public oversight of state and local government. Because application of this judicially crafted federal doctrine will work a drastic change to FOIL, and will hinder the news media's ability to keep the citizens of New York informed about their government, *amici* write separately to urge this Court to reverse.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns whether a municipal government agency may refuse to either confirm or deny whether it has records requested by a member of the public under New York's Freedom of Information Law, N.Y. Pub. Off. Law §§ 84–90 ("FOIL"). The Appellate Division, First Department, concluded that such a response is permissible under FOIL. For the reasons set forth in Appellant's brief and herein, this Court should reverse.

Freedom of information laws like FOIL have been enacted at the federal level, as well as in every state and the District of Columbia. They exist to facilitate public access to government information and to enable meaningful public oversight of government agencies and officials. *See*, *e.g.*, FOIL § 84 ("a free society is maintained . . . when the public is aware of governmental actions"). Such laws generally require a government agency in receipt of a request for public records to respond in one of three ways: (1) to produce the requested records, (2) if a specific exemption applies, to withhold the requested records or the portions thereof that are exempt from disclosure under applicable law, or (3) to inform the requester that there are no records responsive to the request. In this case, the New York City Police Department ("NYPD") adopted a fourth approach not found in any provision of FOIL. It issued what is known at the federal level as a "Glomar" response, refusing to either confirm or deny the existence of requested records.

The Appellate Division, below, relying on federal caselaw, erroneously concluded that such a response is permissible under FOIL and is consistent with the law's legislative intent, purpose, and the policy underlying it. *See Abdur-Rashid v. N.Y. City Police Dep't*, 140 A.D.3d 419, 420 (N.Y. App. Div.)

The Glomar doctrine, a creature of federal decisional law, was developed to address uniquely federal concerns. It was developed by courts at the height of the Cold War to protect the most sensitive of national security activities from being revealed through requests for records made under the federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). Since then, use of the Glomar response has broadly expanded, including into areas that could not have been imagined by the federal court that first authorized it.

Judicial incorporation of the Glomar doctrine into New York's FOIL will work a profound change to this State's statutory open records regime that was not contemplated—let alone adopted—by the Legislature. And, if the federal experience is any example, judicial adoption of that doctrine here will have a significant practical effect on the public's statutory rights of access to state and local government information. An explosion in the use of the Glomar doctrine at the federal level has had a marked negative effect on the ability of the news media and the public to monitor federal government activity. If New York courts open the door to the issuance of Glomar responses by state and local government

agencies in this case, over time, use of the Glomar doctrine by such agencies will almost certainly spread far beyond the facts presented here.

The Glomar doctrine has significantly altered the nature of FOIA litigation in federal courts, inhibiting the ability of requesters and judges alike to evaluate government exemption claims in a true adversarial process. Among other things, the Glomar doctrine countenances the assertion of broad, sweeping, and generalized exemptions for categories of records and effectively shifts the burden of proof from the government entity to the requester—two striking departures from this Court's long-standing line of decisions interpreting FOIL.

The Appellate Division's decision grafting the federal Glomar doctrine onto New York's FOIL is particularly worrisome for members of the news media, who routinely rely on FOIL as a means to gather news and information about the government, including law enforcement agencies like the NYPD, for the benefit of the public. Indeed, the NYPD—the largest municipal police force in the United States—is already a notoriously opaque agency with a history of failing to comply with its obligations under FOIL. *See*, *e.g.*, CJ Ciarmella, *Secrets of the NYPD*, Salon.com (May 8, 2013), *archived at* https://perma.cc/27KH-9TPN (reporting that the NYPD routinely ignores a third of all FOIL requests it receives). As one of the trial court decisions in this case correctly recognized, to permit state and local agencies like the NYPD to issue Glomar responses would only make it more

difficult for the press to use FOIL as a tool to keep citizens informed about the activities of their government, including local law enforcement. *See Hashmi v. N.Y.C. Police Dept*, 998 N.Y.S.2d 596, 603 (N.Y. Sup. Ct. 2014) ("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.").

Because Glomar is a judicial doctrine, this Court has both the authority and obligation to consider its likely effects and whether those effects are compatible with FOIL's unequivocal declaration that access to government records "should not be thwarted by shrouding [them] with the cloak of secrecy or confidentiality." FOIL § 84; *see also Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979) (FOIL "proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government."). *Amici* submit that the unbridled and unintended use of the Glomar doctrine at the federal level, and the corresponding decrease in public awareness of activities of government as a result, provide ample reason for this Court to reject its adoption in this state. *Amici* urge this Court to ensure that FOIL continues to fulfill its role as foundational to the democratic nature of New York's government and, for the reasons set forth herein and in Appellant's brief, reverse the decision of the Appellate Division.

## ARGUMENT

### I. Use of the Glomar response, which was developed to protect the most sensitive national security secrets, has exploded across federal agencies.

The Glomar doctrine emerged during the Cold War in response to requests made under FOIA for federal agency records related to covert actions of the United States government. *See Phillippi v. Central Intelligence Agency*, 546 F.2d 1009 (D.C. Cir. 1976) ("*Phillippi I*"). In *Phillippi I*, the D.C. Circuit implicitly upheld a refusal by the Central Intelligence Agency ("CIA") to "neither confirm nor deny" the existence of records concerning its efforts to suppress reporting about the Hughes Glomar Explorer, a ship that was part of a U.S. government operation to recover a Soviet nuclear submarine that had sank in the Pacific Ocean in 1968. *See id; Phillippi v. CIA*, 655 F.2d 1325, 1326 (D.C. Cir. 1981) ("*Philippi II*"); *Military Audit Project v. Casey*, 656 F.2d 724 (D.C. Cir. 1981); *see also* Norman Polmar & Michael White, *Project Azoran: the CIA and the Raising of the K-129* (2012). The "classified CIA program" of which the Hughes Glomar Explorer was a part aimed to "recover the missiles, codes, and communications equipment onboard [the Soviet submarine] for analysis by United States military and intelligence experts." *Philippi II*, 655 F.2d at 1327. In both *Phillippi I* and *Military Audit Project*, the government argued that "(o)fficial acknowledgment of the involvement of specific" U.S. government agencies in that operation "would disclose the nature and purpose of the Program and could . . . severely damage the foreign relations

and the national defense of the United States." *Phillippi I*, 546 F.2d at 1013–14. The D.C. Circuit's opinion, while implicitly approving the CIA's response, also made clear that the case before it presented unique and sensitive circumstances. *See id.* at 1010–15. There is no indication that the court anticipated that what is now referred to as a "Glomar" response would become commonplace under FOIA. *See id.*

Yet since *Phillippi I* invocation of the Glomar doctrine has become "a staple of evasion" for federal agencies who wish to avoid public scrutiny. Paul H.B. Shin, *The CIA's Secret History of the Phrase 'Can Neither Confirm Nor Deny'*, ABC News (Jun. 6, 2014), http://perma.cc/7Z65-HMNE; *see also* Michael D. Becker, *Piercing Glomar: Using the Freedom of Information Act and the Official Acknowledgment Doctrine to Keep Government Secrecy in Check*, 64 Admin. L. Rev. 673, 688 (2012) ("[I]t was not the intent of the D.C. Circuit—nor Congress, for that matter—for the Glomar response to explode as it has."). Federal agencies far removed from the national security considerations that gave rise to the Glomar doctrine in the first instance have seized upon the opportunity to "neither confirm nor deny" the existence of records requested under FOIA.

For example, in 2002 the Securities and Exchange Commission ("SEC") issued almost 100 Glomar responses to FOIA requests. *Securities and Exchange Commission Freedom of Information Act Annual Report for the Fiscal Year*

*Ending September 30, 2003*, https://perma.cc/7WEZ-JN33.[1] The SEC is not alone; the Internal Revenue Service ("IRS") and even the U.S. Postal Service have taken to issuing Glomar responses. Alex Richardson & Joshua Eaton, *Postal Service and the IRS join the CIA in handing out GLOMAR denials*, MuckRock (Mar. 17, 2015), https://perma.cc/4RBN-B26K. One recent Glomar response from the U.S. Postal Service was issued in response to a reporter's request for records that had already been released to another reporter and that had formed the basis of a story that ran in *The New York Times*. Alex Richardson & Joshua Eaton, *supra*. The Postal Service argued that either confirming or denying the existence of such records would violate the reporter's privacy. *Id*.

The Postal Service is not the only federal agency to take this expansive view of what might justify issuing a Glomar response. Other federal agencies have similarly cited purported privacy interests under Exemptions 6 and 7(C) of FOIA as a basis for refusing to confirm or deny the existence of requested records. Nathan Freed Wessler, *"[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, 1389 (2010). This same "privacy" rationale has also been asserted in cases where agencies "respond to a

[1] That the SEC published the number of Glomar responses it issued that year is unusual; agencies do not generally divulge such numbers to the public.

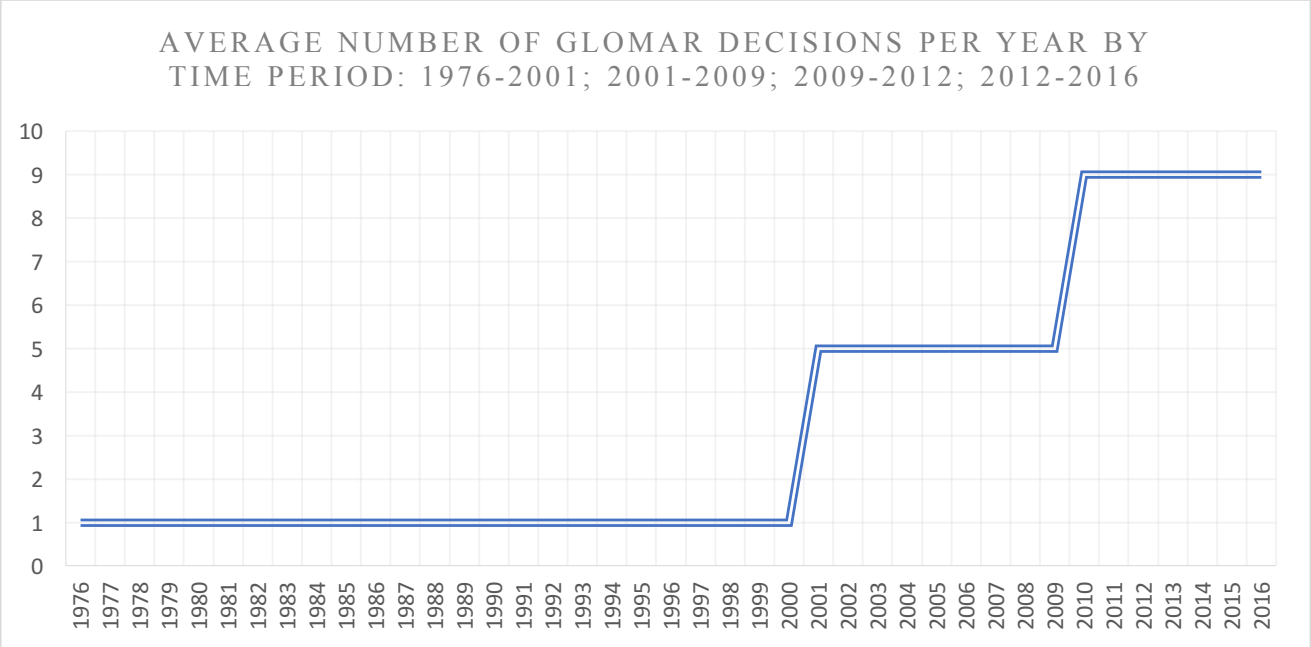
FOIA request for information concerning wrongdoing by government employees" with a Glomar response. John Y. Gotanda, *Glomar Denials Under FOIA: A Problematic Privilege and A Proposed Alternative Procedure of Review*, 56 U. Pitt. L. Rev. 165, 166 (1994). In short, even though the Glomar doctrine was created by federal courts to address the most secret of national security operations, it is now being used to impede public access to government records for reasons that go far beyond the rationale underlying those early cases.

This expansion of the Glomar doctrine has led to some bizarre results. Take the case of a former CIA employee, Eduardo Frugone, who requested his personnel file from the agency in an effort to prove that he was entitled to retirement benefits. *See Frugone v. CIA*, 169 F.3d 772 (D.C. Cir. 1999). The Office of Management and Budget ("OMB") had acknowledged Mr. Frugone's former employment status, and indicated that the CIA would have his personnel file. *Id.* at 773. The CIA, however, issued a Glomar response to his request for that file, refusing to confirm or deny the existence of any personnel records concerning its former employee, Mr. Frugone. *Id.* The D.C. Circuit upheld the CIA's response, concluding that OMB's confirmation of the existence of records held by the CIA did not deprive the agency of its ability to issue a Glomar response. *See id.* at 774–75.

The sheer increase in the use of Glomar responses by federal agencies can be seen in the number of FOIA opinions issued by federal courts. According to the

National Security Archive,[2] there were approximately 20 opinions involving a Glomar response between 1976 and 2001, an average of less than one a year. *See Amicus Curiae* Brief of Nat'l Sec. Archive in Support of Appellants to Vacate and Remand at 9, *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60 (2d Cir. 2009), *archived at* https://perma.cc/U2Q9-3VXQ. Between September 11, 2001 and 2009, however, there were approximately 60 decisions involving a Glomar response, an average of five per year. *See id*. From 2010 to 2012 there were at least 28 judicial decisions involving the issuance of a Glomar response, an average of nine per year, *see Court Decisions*, United States Department of Justice, *archived at* https://perma.cc/KKH9-7M3V, and from 2013 to the end of 2016 there were at least 35 more Glomar-related decisions. *See Court Decisions*, United States Department of Justice, *archived at* https://perma.cc/VHQ8-H3H9.

[2] The National Security Archive is a non-profit research and journalism center based at The George Washington University.




It is difficult to imagine that the D.C. Circuit, when it decided *Phillippi I*, could have foreseen such a massive spike in Glomar litigation given the unique circumstances of that case. Yet several decades later, the Glomar doctrine is now a regular feature of FOIA litigation.

Adoption of the Glomar doctrine can increase government secrecy in more subtle ways. At the federal level, for example, the Glomar doctrine frequently works hand-in-hand with the widespread problem of over-classification of government information to keep the public in the dark about government activities. As one federal district court put it:

> 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 knows, or that which is more embarrassing than revelatory of intelligence sources or methods. [ . . . ] The practice of secrecy, to compartmentalize

> knowledge to those having a clear need to know, makes it difficult to hold executives accountable and compromises the basics of a free and open democratic society.

*ACLU v. Dept. of Defense*, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005).

Classification of records and information at the federal level has become "rampant" in the last few decades. *See* Elizabeth Goitein and David M. Shapiro, *Reducing Overclassification Through Accountability*, Brennan Center for Justice (2011), *archived at* https://perma.cc/43J6-JSRM. This drive toward keeping ever-increasing amounts of government information secret, according to commenters, threatens to overtake the "singularly American" commitment to open government. *See* Daniel Patrick Moynihan, *Secrecy* 227 (1998) (quoted in *ACLU v. Dept. of Defense*, 389 F. Supp. 2d 547, 562 (S.D.N.Y. 2005)).

There is no reason to think that New York state and local agencies would avoid falling into a similar secrecy trap if use of the Glomar doctrine is judicially approved by courts in this state. This is particularly concerning with respect to agencies like the NYPD that have already demonstrated a penchant for excessive secrecy. For example, despite the fact that New York's municipal governments do not have the authority to classify documents, *see Hashmi v. New York City Police Department*, 998 N.Y.S.2d 596, 604 (N.Y. Sup. Ct., 2016), the NYPD maintains an extensive system whereby it labels some internal documents "Secret." Matt Sledge, *NYPD 'Secret' Classification For Documents 'Means Diddly' In Eyes of*

*Legal Experts*, The Huffington Post (Sep. 16, 2013), https://perma.cc/TE4V-HVGE. By doing so, the NYPD's "Intelligence Division appears to be operating its own in-house classification system, similar to those used at federal agencies like the CIA," where the Intelligence Division's former chief, David Cohen, "previously worked for 35 years." *Id*.

The NYPD has also adopted another feature of the trend toward increasing secrecy at the federal level: the so-called "mosaic theory," which "posits that '[e]ven disclosure of what appears to be the most innocuous information" may pose "a threat to national security . . . because it might permit our adversaries to piece together sensitive information.'" Wessler, 85 N.Y.U. L. Rev. at 1397. The NYPD has cited the "mosaic theory" as a basis for denying FOIL requests for financial information relating to its Zone Assessment Unit, which until recently surveilled local Muslim communities. *See* Matt Sledge, *NYPD Cites Mosaic Theory, Favored by FBI and NSA, To Deny Access to Budget Records*, The Huffington Post (Dec. 30, 2013), http://perma.cc/LCF3-PJRU; Matt Apuzzo & Joseph Goldstein, *New York Drops Unit That Spied on Muslims*, N.Y. Times (Apr. 15, 2014), http://nyti.ms/1evdnCO.[3] Permitting the NYPD and other state and

[3] The NYPD's development of a surveillance program secretly targeting American Muslims has been widely reported. *See* Matt Apuzzo & Adam Goldman, *With CIA help, NYPD moves covertly in Muslim areas*, The Associated Press (Aug. 23, 2011), http://perma.cc/TQP9-QWBW. *See also* Charlie Savage, *C.I.A. Report Finds Concern With Ties to New York Police*, N.Y. Times (Jun. 26, 2013), http://nyti.ms/10WOAAB. According to the Associated Press, NYPD officials have defended the surveillance, but admit that they have been "careful to keep information about

local agencies in New York to issue Glomar responses to FOIL requests will only intensify what is already a growing and problematic trend toward secrecy at all levels of government.

The evolution of the federal Glomar doctrine is a cautionary tale with profound implications that were not addressed in any way by the Appellate Division's decision below. *See Abdur-Rashid v. N.Y. City Police Dep't*, 37 N.Y.S.3d 64 (N.Y. App. Div.). The appellate court merely concluded that because FOIL is somewhat similar to FOIA, the 40-year history of the federal Glomar doctrine should be grafted wholesale onto New York law. *See id.*

There can be little doubt that there are many state and local government entities in New York that would prefer to operate in secrecy, avoiding public records requests entirely and answering only to their superiors. But that is not the type of government that exists in New York. The Legislature in enacting FOIL made expressly clear that

> a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. . . . The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society.

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some programs out of court, where a judge might take a different view. The NYPD considers even basic details, such as the intelligence division's organization chart, to be too sensitive to reveal in court." Apuzzo & Goldman, *supra*.

FOIL § 84. This declaration cannot and should not be dismissed as ornamental language; it represents a democratic commitment that will be threatened by judicial adoption of the Glomar doctrine—a doctrine not provided for by the Legislature.

The federal experience demonstrates why this Court should refuse to incorporate the Glomar doctrine into FOIL. If the door to Glomar responses is opened in this case, it will serve as an invitation to the NYPD and other state and local government entities to routinely refuse to confirm or deny the existence of records. A school district may wish to conceal the existence of records about an abusive teacher. An agency may find it convenient to neither confirm nor deny that it was warned about a health risk to the public. A police department may refuse to disclose whether it has bodyworn camera or other video of a use-of-force incident that results in the death of a member of the public. Such outcomes were not contemplated nor sanctioned by the Legislature when it enacted FOIL.

## II. Glomar responses will inhibit the ability of plaintiffs and courts to evaluate withholdings in FOIL cases and constitute a radical change to FOIL; such a change, if made at all, should be made by the Legislature.

Incorporating the federal Glomar doctrine wholesale into New York law, as the Appellate Division did below, will complicate matters for plaintiffs and judges seeking to evaluate the propriety of government refusals to provide information under FOIL. Glomar proceedings are unique in public records law because they both (1) dramatically expand the already-existing "asymmetrical access to

information between the requesting party and the responding agency[,]" Wessler, *supra* at 1391, and (2) shift power from the judiciary to the executive, inhibiting the former's ability to function as an independent arbiter informed by the arguments of adversarial parties. As explained in more detail below, in the context of FOIL, these changes would be so profound that they would undermine long-standing decisions of this Court. Such a departure from the long-standing commitment to open government in this state, if it is to happen at all, is a decision best left to the Legislature.

At the federal level, the issuance of a Glomar response is usually a death knell for the public's right to know. Generally, FOIA requesters have several options for redress if their request is denied, all of which require the agency to provide specific and particularized information to justify the denial. For example, in most FOIA litigation the agency is required to give a detailed accounting of the records being withheld and the reasons therefore (usually in the form of a so-called *Vaughn* index[4]). But that is not the case when it comes to a Glomar response. Instead, after a lawsuit is brought the agency will simply submit an affidavit to the court saying that the broad category of records sought "logically falls within the claimed exemptions." *Wilner*, 592 F.3d at 68. The plaintiff and the court are then left trying to evaluate hypotheticals, namely, whether the category of records the

[4] *Vaughn v. Rosen (II)*, 523 F.2d 1136 (D.C. Cir. 1975).

plaintiff requested might theoretically fall within the scope of an exemption, but without any concrete information to inform their deliberations. In sum, as the trial court in this case stated below: "A Glomar response virtually stifles an adversary proceeding." *Hashmi*, 998 N.Y.S.2d at 603.

This is antithetical to this Court's long-established FOIL precedent holding that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government[.]" *Gould v. N.Y. City Police Dep't*, 89 N.Y.2d 267, 275, (1996) (citations and quotations omitted). So too is it contrary to this Court's precedent holding that agencies must articulate "particularized and specific justification" for withholding requested documents. *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979); *cf. Hashmi*, 998 N.Y.S.2d at 601 ("When an agency asserts a Glomar response, the discussion of exemption is more abstract, and not anchored to any particular document.").

Since *Phillippi I*, federal agencies asserting Glomar responses have submitted "increasingly boilerplate" public declarations to justify invoking the Glomar doctrine. Becker, 64 Admin. L. Rev. at 689. Courts may review more detailed reasoning in support of a Glomar response *in camera*, but even that is atypical. Generally, "[c]ourts give tremendous deference to agency arguments, accepting them if they are 'logical or plausible.'" Wessler, 85 N.Y.U. L. Rev. at 1393. In fact, judicial review of Glomar responses have typically been so cursory

that commentators have called on courts to conduct more *in camera* review, despite the fact that such closed-door deliberations are themselves contrary to the goals of openness and government transparency. *See*, *e.g.*, *id.* at 1409 ("Courts could also take advantage of their *in camera* review power to demand that agencies produce more evidence to justify their invocation of the Glomar response, including any underlying records (if they exist) or an admission that records do not exist if that is the case.").

Glomar responses also effectively reverse the burden placed on the agency to justify its withholding of responsive records. *See*, *e.g.*, *Gould*, 89 N.Y.2d at 275 ("the burden rest[s] on the agency to demonstrate that the requested material indeed qualifies for exemption[.]" (citation omitted)). If a court decides that a federal agency used a Glomar response properly—*i.e.*, that the agency cleared the low bar of demonstrating that the response is "logical or plausible"—the burden shifts to the requester, who has only two ways to try to force an agency to confirm or deny the existence of a record. The requestor must either (1) show that the same agency has already officially acknowledged the existence of the record, or (2) that the agency is acting in bad faith, Wessler, 85 N.Y.U. L. Rev. at 1393—extremely demanding hurdles that and requesters often cannot satisfy. Thus, if an agency wishes to evade a records request for any reason, and escape meaningful judicial

review of that conduct, a Glomar response is the first—and often final—weapon of choice.

The Appellate Division gave short-shrift to these concerns, dispensing with the complex procedural questions raised over 40 years of federal caselaw in a mere three paragraphs. *See Abdur-Rashid*, 37 N.Y.S.3d. at 66. Indeed, the Appellate Division seemed far less concerned with the damage to the adversarial process wrought by Glomar than the D.C. Circuit in *Phillippi I*, which took great pains to explain the necessity of detailed public affidavits and the use of discovery "to clarify the Agency's position or to identify the procedures by which that position was established." *Phillippi I*, 546 F.2d at 1013. Given the radical ways in which the Glomar doctrine would alter FOIL, the question of whether it should be incorporated into state law and, if so, to what extent, is a decision best left to the Legislature. Indeed, if this Court sanctions the Glomar doctrine, it would be the first high court of any state or the District of Columbia to do so. *Amici* are aware of only one other state intermediate appellate court that has sanctioned a Glomar-like response, doing so, in part, by citing the Appellate Division's decision in this case. *See North Jersey Media Grp. Inc. v. Bergen Cty. Prosecutor's Office*, 146 A.3d 656, 666 (N.J. App. Div. 2016). If the Glomar doctrine is permitted here, New York will be leading the way into a new era of secrecy for state and local government agencies.

That the New York Legislature has not amended FOIL in the 40 years since the Glomar doctrine came into existence at the federal level should not be discounted. Many of FOIL's provisions were modeled after FOIA, and the Legislature has, in the past, amended FOIL to mirror changes in federal law. *See Lesher v. Hynes*, 19 N.Y.3d 57, 64 (2012) (noting FOIL's law enforcement exemption was amended in 1977 following a similar change to FOIA in 1974). That is not the case here. The Legislature has not taken steps to incorporate the Glomar doctrine into FOIL, despite the fact that it has existed for decades in federal courts and that Congress approved of a Glomar-like response in certain circumstances in its 1986 amendments to FOIA. *See* 132 Cong. Rec. 9467-68 (daily ed. Oct. 8, 1986) (statement of Rep. English). The absence of any such legislation counsels in favor of restraint by the judiciary.

Were the Legislature to choose to amend FOIL to permit a Glomar-like response, it is quite possible that it would *not* adopt the federal doctrine wholesale. That is precisely what the Indiana General Assembly did in 2013 when it amended its freedom of information law to permit agencies to "[r]efuse to confirm or deny the existence of [a] record[.]" 2013 Ind. Acts 3413–14, *available at* https://iga.in.gov/static-documents/8/4/0/7/8407e19c/acts_2013.pdf. Indiana did not adopt the entirety of the federal Glomar doctrine, but instead limited its scope to certain types of records where disclosure of their existence or non-existence

would cause certain types of specified harm, such as compromising an ongoing law enforcement investigation or threatening public safety. *See* Ind. Code Ann. § 5-14-3-4.4(a)–(b). The General Assembly also set forth detailed procedures for such responses at both the administrative and judicial review stages. *See id.* at § 5-14-3-4.4(c)–(j). If the New York Legislature decided to authorize a Glomar-like response under FOIL it too might make changes that depart from the federal doctrine. *See*, *e.g.*, *Encore Coll. Bookstores, Inc. v. Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 N.Y.2d 410, 417 (1995) (noting that unlike FOIA, FOIL contains a detailed definition of "records" that are subject to the law). Ultimately, as the Supreme Court in *Hashmi* noted below, "the decision to adopt the Glomar doctrine is one better left to the State Legislature, not to the Judiciary. 998 N.Y.S.2d at 603.

## III. Adoption of the Glomar doctrine will hinder FOIL's effectiveness as a tool for keeping the public informed, especially about the activities of New York law enforcement agencies.

Freedom of information laws are powerful and vital tools for government accountability. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Journalists across New York frequently use FOIL to help them gather news and keep the public informed about the activities of government. The importance of this constitutionally-recognized role of the press cannot and should not be understated:

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his

> government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.

*Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975). *See also* FOIL § 84 (acknowledging that "government is the public's business and [] the public, individually and collectively and *represented by a free press*, should have access to the records of government in accordance with the provisions of this article") (emphasis added). Adopting the Glomar doctrine as a matter of state law would significantly hamper the ability of the press to perform this vital function; permitting state and local agencies like the NYPD to issue Glomar responses would only make it more difficult for the press to utilize FOIL as a tool to keep citizens informed about the activities of their government, including their law enforcement agencies. *See Hashmi*, 998 N.Y.S.2d at 603.

Time and time again, FOIL has proven itself to be an invaluable tool for ensuring that the citizens of New York are informed, through the news media, about their government, including the actions of law enforcement agencies and their officers. Recently, records obtained through FOIL revealed that the NYPD has deployed video teams to over 400 Black Lives Matter and Occupy Wall Street protests from 2011–2013 and 2016. George Joseph, *NYPD sent video teams to*

*record Occupy and BLM protests over 400 times, documents reveal*, The Verge (Mar. 22, 2016), *archived at* https://perma.cc/P8WN-LTGT. Those protests arose, in part, over the death of Eric Garner, who died after being placed in a banned chokehold by an NYPD officer. *See* Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for the Police*, N.Y. Times (Jul. 18, 2014), https://nyti.ms/2lqV1uE. In response to the FOIL request the NYPD also said there were no records showing approval of such filming of public activities, as is required by its internal rules. *See* George Joseph, *supra*. According to a retired NYPD detective sergeant, the failure to produce those authorized request records "suggests top department officials are deciding either to not follow departmental rules or to not hand over sensitive records[.]" *Id*. The disclosures and response of the NYPD is already sparking widespread debate, including about the effect of the surveillance on individuals' First Amendment rights. *See id*.

In recent years FOIL has consistently provided the public with information about policing practices that are of the utmost public concern. For example, in 2014 a reporter used FOIL requests to gain access to information about a disciplinary trial of a NYPD officer that shed light on the use of chokeholds, and the role of the Civilian Complaint Review Board. Jon Campbell, *'I was choked by the NYPD': New York's Chokehold Problem Isn't Going Away*, The Village Voice (Sep. 23, 2014), *archived at* https://perma.cc/JZ53-7FYH. FOIL was also used to

obtain records showing that New York City paid more than $428,000,000 to settle more than 10,000 civil rights lawsuits brought against the NYPD since 2009. Caroline Bankoff, *The City Has Paid Almost Half a Billion Dollars in NYPD-Related Settlements Over the Past 5 years*, N.Y. Magazine (Oct. 12, 2014), *archived at* http://perma.cc/B65G-G2NM. And records released under FOIL showed that seven of the top ten most-sued officers were assigned to a Staten Island narcotics unit that covers the same area where Eric Garner died. Barry Baddock, Rocco Parascandola, Sarah Ryley, & Dareh Gregorian, *Staten Island, borough where Eric Garner died, has highest number of most-sued NYPD officers*, N.Y. Daily News (Jul. 28, 2014), *archived at* http://perma.cc/223K-PURV. Such information is invaluable for the citizens of New York, who can use it to knowledgeably participate in the democratic process. *See*, *e.g.*, Marc Santora, *Mayor de Blasio Announces Retraining of New York Police*, N.Y. Times (Dec. 4, 2014), http://nyti.ms/1FUsvDa (noting that "[w]hen Mr. de Blasio was running for mayor, he promised sweeping reforms of the Police Department . . . .").

FOIL is also an important tool for obtaining information that allows the public to understand how the NYPD trains its officers and interacts with the public. For example, a FOIL request submitted by a reporter in 2012 revealed that the NYPD showed an anti-Muslim film to almost 1,500 police officers as part of their training. Michael Powell, *In Police Training, a Dark Film on U.S. Muslims*, N.Y.

Times (Jan. 23, 2012), http://nyti.ms/1mOC8IV. When news first broke that the NYPD had been screening that film for trainees, a top official said it had been "mistakenly screened 'a couple of times'." *Id*. But documents obtained under FOIL told a different story: The NYPD had run the film "on a continuous loop" for between three months and one year of training. *Id*.

Reporters have also used FOIL to report valuable information about the shift of military equipment from federal agencies to state and local police forces. FOIL requests revealed, for example, that New York law enforcement agencies have received nearly 300 assault rifles though the Pentagon's 1033 program, as well as three tracked armored vehicles, two cargo planes, six helicopters, and more than 150 military trucks and Humvees. Shawn Musgrave, *New data provides first detailed look at military gear held by New York law enforcement agencies,* The N.Y. World (Oct. 14, 2014), *archived at* http://perma.cc/2L97-6FHR. The NYPD in particular obtained four armored trucks valued at $65,000 each, and two "armored mortar carriers" valued at more than $200,000 each. *Id*. As a result of public scrutiny of these kinds of military equipment transfers to local law enforcement agencies, then-President Obama announced that the Pentagon would limit the types of military equipment that can be obtained by local law enforcement. Radley Balko, *Obama moves to demilitarize America's police*, The Wash. Post (May 18, 2015), *archived at* http://perma.cc/9NJL-6BLS.

These stories represent only a handful of examples from the countless pieces of important journalism about law enforcement and the criminal justice system in New York that FOIL has made possible. From raising questions about the accuracy of criminal convictions,[5] to showing the inefficiency of Cooper's Law,[6] to revealing information about the NYPD's massive video surveillance network,[7] to forcing the NYPD to release information about civilian shootings,[8] the list of what FOIL has brought to light goes on[9] and on.[10] *Amici* and the citizens of New York have a compelling interest in ensuring that this law is not amended by the judiciary to allow agencies like the NYPD to refuse to either confirm or deny whether they have public records responsive to a FOIL request.

## CONCLUSION

For all the reasons stated herein and in Appellant's brief, this Court should reverse.

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[5] Jeff Morganteen, *The NYPD's secrecy weapon*, The N.Y. World (Aug. 2, 2013), http://perma.cc/R79B-BR3S.
[6] Daniel Fitzsimmons, *The Flaws in Cooper's Law*, StrausMedia (Jun. 10, 2015), http://perma.cc/WC76-6WBL.
[7] Ali Winston, *Secrecy Shrouds NYPD's Anti-Terror Camera System*, CityLimits.org (Apr. 26, 2010), http://perma.cc/SW5D-G4MK.
[8] Al Baker, *Judge Orders City to Release Reports on Shots Fired by Police at Civilians Since 1997*, N.Y. Times (Feb. 22, 2011), http://www.nytimes.com/2011/02/23/nyregion/23shootings.html.
[9] Shawn Musgrave, *NYPD Social Media Policy Allows Catfishing—With the Proper Paperwork*, The Daily Beast (Feb. 5, 2015), http://perma.cc/YVL6-PC7A.
[10] Patience Haggin, *Law School Study Alleges NYPD Overstepped its Power during Occupy Protests*, Time (Jul. 30, 2012), http://perma.cc/9B3Z-Z93T.

SIGNATURE BLOCK

# APPENDIX A

# CORPORATE DISCLOSURE STATEMENTS

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