1          COURT OF APPEALS

2          STATE OF NEW YORK

3          ------------------------------------------
           TALIB W. ABDUR-RASHID,

4
                         Appellant,

5
                -against-

6                                             NO. 19
           NEW YORK CITY POLICE DEPARTMENT,

7          et al.,

8                         Respondents.

9          ------------------------------------------
                                            20 Eagle Street

10                                          Albany, New York
                                            February 6, 2018

11         Before:

12                      CHIEF JUDGE JANET DIFIORE
                        ASSOCIATE JUDGE JENNY RIVERA

13                    ASSOCIATE JUDGE LESLIE E. STEIN
                      ASSOCIATE JUDGE EUGENE M. FAHEY

14                 ASSOCIATE JUDGE MICHAEL J. GARCIA
                     ASSOCIATE JUDGE ROWAN D. WILSON

15                    ASSOCIATE JUDGE PAUL FEINMAN

16

           Appearances:

17
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25                                  Official Court Transcriber

1            CHIEF JUDGE DIFIORE:  Good afternoon.  The first

2    matter on this afternoon's calendar is appeal number 19,

3    matter of Abdur-Rashid v. the New York City Police

4    Department.

5            Counsel?

6            MR. MOHAMMEDI:  Good afternoon, Your Honor.

7            CHIEF JUDGE DIFIORE:  Good afternoon.

8            MR. MOHAMMEDI:  My name is Omar Mohammedi.  I'm

9    representing the appellant, Talib Abdur-Rashid and Samir

10   Hashmi.  May it please the court.

11           CHIEF JUDGE DIFIORE:  Mr. - - - counsel, would

12   you care to reserve any - - -

13           MR. MOHAMMEDI:  Omar Mohammedi.

14           CHIEF JUDGE DIFIORE:  Mr. Mohammedi, do you - - -

15   would you care to reserve any rebuttal time?

16           MR. MOHAMMEDI:  Yes.  Three minutes, please.

17   Thank you.

18           CHIEF JUDGE DIFIORE:  You're welcome.

19           MR. MOHAMMEDI:  The NYPD, by using Glomar theory,

20   we cannot confirm or deny the existence of document, assert

21   blanket objection in violation of the FOIL policy plain

22   language and legislative intent.  The NYPD cannot support

23   the Glomar theory under any New York State law precedent.

24   The NYPD argues that Glomar is only a form response.

25           JUDGE RIVERA:  But what - - - isn't it obvious

1  from the legislation, since the legislature has carved out

2  these exceptions, that the role of the court is to ensure

3  that those exceptions indeed have some meaning?  So if - -

4  - if the answer reveals the information that is indeed

5  excluded, don't they have an argument for us to say yes, we

6  have to allow them to be able not to tell you whether they

7  have it or not so that they protect the very exclusion that

8  the legislature has already adopted in the statute?

9         MR. MOHAMMEDI:  But Your Honor, you know that

10  there are exemptions under FOIL and those exemptions they

11  have to be narrowly construed.

12         JUDGE RIVERA:  Um-hum.

13         MR. MOHAMMEDI:  And - - - and in your case,

14  Friedman, the latest case in Friedman 2017, you

15  specifically mention that asserting exemption for the

16  requester of the court to understand and evaluate the

17  validity of the exemption is important to the principal of

18  particularized exemption.  We cannot confirm - - -

19         JUDGE RIVERA:  But if - - - yes, but I think the

20  point that they're trying to make is if their answer

21  actually reveals the information that the legislature

22  allows to be exempted, that they need a way to respond to

23  protect that very information that the legislature has

24  already identified can be exempted from FOIL.

25         MR. MOHAMMEDI:  But under FOIL the exemptions

1  require that the Agency will have to explain what is the

2  exemption, with particularity - - -

3          JUDGE RIVERA:  Okay.

4          MR. MOHAMMEDI:  - - - why do we want these

5  documents not to be produced.  We cannot confirm or deny

6  existence of documents, Your Honors, are blanket - - -

7  blanket exemptions.

8          JUDGE FAHEY:  Yeah, but doesn't - - -

9          MR. MOHAMMEDI:  They are not particularized

10 exemptions.

11         JUDGE FAHEY:  Doesn't it create a situation where

12 it would be impossible for a law enforcement agency to

13 conduct a confidential investigation if those being

14 investigated could always ask are we being investigated?

15         MR. MOHAMMEDI:  But isn't that the spirit of FOIL

16 that you have open government?

17         JUDGE FAHEY:  Let's - - - let's leave the spirit

18 of FOIL aside and - - - and focus on that question.  Would

19 it be possible to conduct a confidential investigation if -

20 - - if those being investigated can always ask are we being

21 investigated?

22         MR. MOHAMMEDI:  Your Honors, how many times the

23 NYPD was able to respond in response to FOIL requests with

24 exemption with this - - - those are confidential

25 information?  And Friedman itself talks about confidential

1    inform - - -

2             JUDGE GARCIA:  Friedman was a public prosecution,

3    so there was really no reason to keep files from - - -

4    reason to assert a Glomar response.  I mean, it wasn't

5    whether or not Friedman was under investigation.  But the

6    more particularized your inquiry is, the more difficult it

7    is to respond, in the ordinary way, to a FOIL request,

8    right?

9             MR. MOHAMMEDI:  But this is not - - -

10            JUDGE GARCIA:  Judge Fahey was saying, I mean, if

11   somebody comes in and says:  am I under investigation?  I

12   want all your files.  Or if somebody comes in and says I

13   want all of the payment records from NYPD to this

14   individual who they believe may be a confidential

15   informant.  The fact that you have to go in and say I have

16   these records, but they're exempt under one of the

17   exemptions, really proves to the person seeking the

18   information that it exists and violates the spirit of those

19   exemptions.

20            MR. MOHAMMEDI:  It does not - - - Your Honor, it

21   does not violate the spirit of those exemptions.  It's an

22   open - - - it's an open - - -

23            JUDGE GARCIA:  It kind of violates the actual

24   fact - - -

25            MR. MOHAMMEDI:  FOIL - - -

1        JUDGE GARCIA:  - - - of the exemption.

2        MR. MOHAMMEDI:  FOIL was established and then

3  open government policy was not established under secrecy.

4  And what the NYPD is trying to do is trying to foster

5  secrecy which is - - - which is actually detrimental to the

6  public.

7        JUDGE GARCIA:  Counsel, this case involves, as

8  you say, the NYPD and a particular program.  But the rule

9  we're going to make from this case, whether or not we adopt

10  this Glomar exemption or Glomar response, will apply to

11  everything.  So not to the NYPD but to any FOIL request.

12  So while you may point to allegations of what seem to me

13  amount to bad faith on the point - - - part of the NYPD,

14  isn't that something that's factored into the Glomar

15  procedure?

16        MR. MOHAMMEDI:  Glomar procedure are - - - are

17  federal procedures that were tethered in the Freedom of

18  Information Act that relate to specific exemptions, and

19  there are exemption one, which is executive order and

20  classification of documents, and exemption three, which is

21  act of Congress.  The NYPD does not have any of that to be

22  able to use it, and they tether it to - - - to FOIA and say

23  here we have a right to say we cannot confirm or deny the

24  existence of documents.

25        JUDGE FEINMAN:  I - - - I think what Judge Garcia

1    and - - - and the other judges are trying to get you to do

2    is - - - is sort of broaden your thinking about this beyond

3    the specifics of this set of facts, because whatever we

4    decide, in terms of this set of facts, is going to have a

5    broader implication.

6              MR. MOHAMMEDI:  And - - -

7              JUDGE FEINMAN:  And - - - and I don't think that

8    your response - - -

9              MR. MOHAMMEDI:  And I think this - - -

10             JUDGE FEINMAN:  - - - is really answering Judge

11   Garcia's question.

12             MR. MOHAMMEDI:  Okay.  The response should be I

13   think this issue should go to the legislature, not this

14   court, to decide on this issue because the legislature has

15   already promulgated harm under which the exemptions were

16   issued.

17             JUDGE WILSON:  Can I try the same - - -

18             MR. MOHAMMEDI:  And the exemptions are not we

19   cannot confirm or deny - - -

20             JUDGE WILSON:  Can I try the same thing - - -

21             MR. MOHAMMEDI:  - - - which is really a blanket

22   and carte blanche exemption that this court has already

23   said it's not applicable under FOIL.

24             JUDGE WILSON:  Let me try the same thing a

25   different way.  Is there any hypothetical situation you can

1    imagine in which a Glomar response would be appropriate, or

2    none, under FOIL?

3           MR. MOHAMMEDI:  We know under this case there's

4    no way this could be applied.

5           JUDGE WILSON:  I didn't ask you about this case.

6           MR. MOHAMMEDI:  But in a hypothetical situation,

7    I think it would be applied on a case-by-case basis.  And -

8    - - and I'm not here to argue - - - I'm going to argue on

9    behalf of our clients in this specific situation.  I think

10    case-by-case situation is very important in FOIL for any

11    request of what they offer what they're requesting.  In

12    this situation we know that the requester is asking

13    information on themselves, not a third party request, on

14    themselves.  So any - - - any - - -

15           JUDGE STEIN:  Are you saying there should be a

16    different rule on this between first-party and third-party

17    requests?

18           MR. MOHAMMEDI:  I mean, we - - - we - - - for a

19    public policy issue or for - - - for privacy issues, yes,

20    but not under Glomar.  I don't think Glomar should be

21    applied, even if it's a third-party request.  I think

22    should - - - the court will have to go with the legislature

23    finding which is the harm of revealing information, and - -

24    - and will have to interpret the - - - the legislature

25    intent rather than making decision instead of legislature.

1    It's very specific. The - - - the exemptions are really

2    narrowly construed. And the NYPD has already asked this

3    court not to apply the rigid per se exemption which is

4    meaning what? Meaning its - - - its exemption has to be

5    construed. And the - - - the NYPD said you should not be

6    doing that.

7            JUDGE STEIN: So just to clarify: you're

8    acknowledging that there may be situations - - - leave out

9    whether it's this situation or not - - - in which simply

10   answering the question of whether documents do or don't

11   exist may reveal exempted information. What you're saying

12   is that it's up to the legislature to correct that.

13           MR. MOHAMMEDI: Yes.

14           JUDGE STEIN: Is that your argument?

15           MR. MOHAMMEDI: Because we believe, Your Honors -

16   - - Your Honor, is the harm. This is - - - this is

17   question of harm that is going to cause for revealing

18   information. But harm has already been defined by the

19   legislature. The NYPD is trying to create this different

20   standard of harm by saying we cannot confirm or deny the

21   existence of document. This has never been used by the

22   NYPD, by any city or state agency, to say that we cannot

23   confirm or deny the existence of document based on harm.

24   This has already been legislated by - - - in - - - in the

25   statute. It has already - - - the intent is clearly you

1  need to answer.  You need to say we have documents; we

2  cannot produce them to you.

3            CHIEF JUDGE DIFIORE:  Thank you, counsel.

4            MR. MOHAMMEDI:  Yes.

5            CHIEF JUDGE DIFIORE:  Counsel?

6            MR. SLACK:  May it please the court.  Devin Slack

7  on behalf of the respondents.

8            JUDGE FAHEY:  Counselor?  See, I waited to get

9  your name out there.  I thought that was good.  But - - -

10           MR. SLACK:  Appreciate it.

11           JUDGE FAHEY:  But the - - - the problem I have

12  here is that the affidavit that you're required to put in

13  requires a - - - by statute, a particularized and specific

14  justification.  How is a Glomar response ever a

15  particularized and specific justification for not releasing

16  certain material?

17           MR. SLACK:  I think it's going to differ

18  depending on the request, but - - -

19           JUDGE FAHEY:  Well, it has to beat petitioner's

20  argument that - - - that we should take these cases one at

21  a time.

22           MR. SLACK:  Right, which - - -

23           JUDGE FAHEY:  It's not relevant here, but it may

24  - - -

25           MR. SLACK:  Which is a new argument that I - - -

1    that I've heard.

2            JUDGE FAHEY:  Go ahead.

3            MR. SLACK:  It has to be particularized and

4    specific to the information that would be revealed by

5    disclosing the - - - the existence or nonexistence of

6    responsive records.  Just like the - - -

7            JUDGE FAHEY:  So a response that says I can't

8    affirm or deny, you would say that's particularized and

9    specific?

10            MR. SLACK:  No, no, no.  So like in - - - let's

11    take a look at this case.

12            JUDGE FAHEY:  Well, if it's not, let me just

13    follow through on that thought then.  Then is legislative

14    action required to change that standard before we can

15    change that standard?

16            MR. SLACK:  No, because, I mean, what's

17    interesting about this case is when petitioners argue that

18    any agency has to do X, they haven't pointed to anything in

19    the statute that says that.  If you look at 89(3)(a), what

20    agencies can do, one of the options is to, quote, "deny a

21    request".  If that goes to an administrative appeal, then

22    they have to fully explain their reasons in writing.  No

23    time, nowhere anywhere in FOIL, has the legislature said

24    that agencies have to answer the question of whether or not

25    - - -

1          JUDGE RIVERA:  But - - -

2          MR. SLACK:  - - - there are respons - - -

3          JUDGE RIVERA:  But counsel, that - - - that's

4    very fine, but the reality is that, historically, this

5    court has said, and it's very clear from the legislation,

6    that this is a disclosure legislation.  The point of this

7    is transparency, to turn over documents.  The point of it

8    is not to say I don't know if we have it or I won't tell

9    you if we have it.

10          But I have a different question for you, or I

11    have a question for you.  It's a different provision of

12    FOIL, Section 89(5)(a)(1) and also (1-a).  Granted, this

13    provision deals with trade secrets, but nevertheless, it

14    contains the following language:  "Where the request itself

15    contains information which if disclosed would defeat the

16    purpose for which the exception is sought, such information

17    shall also be excepted from disclosure."

18          MR. SLACK:  Um-hum.

19          JUDGE RIVERA:  Doesn't that language suggest, at

20    a minimum, that the legislature, when it wants to do

21    exactly what you're requesting us to say you can do, it

22    puts that kind of language in the statute?  That is to say,

23    if the legislature really wanted the kind of response that

24    you're advocating for to be considered adequate under the

25    statute, it could have said so in the other sections that

1   we are talking about these - - - these narrow carve-outs.

2              MR. SLACK:  Right, I mean, I - - - I'm less

3   familiar with this procedure, but as the way I understand

4   its purpose - - -

5              JUDGE RIVERA:  Yes.

6              MR. SLACK:  - - - is not to answer the question

7   whether or not records do or do not exist but to give the -

8   - - the - - - the person who has a vested interest in the

9   trade secret - - -

10             JUDGE RIVERA:  Yes.

11             MR. SLACK:  - - - an opportunity to object.  So I

12  do think it's designed for a different purpose.

13             JUDGE RIVERA:  Well, it may, but that's not - - -

14  I don't disagree with you that it may, because obviously

15  it's in a different section.  My - - - my point is not that

16  one.  My - - - my point is that if - - -

17             MR. SLACK:  Yeah.

18             JUDGE RIVERA:  - - - the purpose - - -

19             MR. SLACK:  Sure.

20             JUDGE RIVERA:  - - - is to protect the underlying

21  information secrecy, along with information that leads to

22  that underlying secret information or information that - -

23  -

24             MR. SLACK:  Right.

25             JUDGE RIVERA:  - - - is seeking to be maintained

1    confidential, that the legislature full well knows how to

2    include such language.  And not having done so in the

3    statute should signal to us that, as your adversary says,

4    this is a question for the legislature.  And when it wants

5    to - - -

6              MR. SLACK:  Right.

7              JUDGE RIVERA:  - - - give you, and you can

8    obviously lobby for it - - - when it wants to give you the

9    opportunity to provide the kind of response that you think

10   is necessary, which may very well be - - - my question is

11   not about the underlying merits of that.  I'm just talking

12   about whether or not this is a legislative - - -

13             MR. SLACK:  Sure.

14             JUDGE RIVERA:  - - - or a judicial role.

15             MR. SLACK:  I think that actually probably cuts

16   in the other direction - - -

17             JUDGE RIVERA:  Okay.

18             MR. SLACK:  - - - because when the legislature

19   did carve out the general obligations of agencies, it

20   didn't specify that agencies have to answer the question of

21   whether or not responsive - - -

22             JUDGE STEIN:  But no, what it said was you either

23   have to grant it, you have to deny it, or you have to say

24   you can't find it - - -

25             MR. SLACK:  Correct.

 1      JUDGE STEIN:  - - - basically, right?

 2      MR. SLACK:  Correct.

 3      JUDGE STEIN:  None of those says you - - - you

 4  can - - - you can say I don't want to tell you whether I

 5  have it or not.

 6      MR. SLACK:  I actually - - - I think it's much

 7  more open ended.  Denying a request and tethering it to

 8  exemption is exactly what happened here, and then if it

 9  goes to the next level, 89(4)(a) says - - -

10      JUDGE RIVERA:  But my point is - - -

11      MR. SLACK:  - - - you have to fully explain it.

12      JUDGE RIVERA:  - - - there's no exception that

13  says because I can't tell you whether or not I have it.

14      MR. SLACK:  But it doesn't say tell me whether or

15  not you have it.  It says you can deny a request and

16  explain your reasons in writing.  That's a - - -

17      JUDGE RIVERA:  But this is the way it's always

18  been interpreted.  So let me ask you this.  It's a point

19  made by one of the courts below.  This seems to have

20  functioned very well for law enforcement with the way we've

21  interpreted this in the past.  What has changed?  Why is

22  this necessary now?

23      MR. SLACK:  Yeah.  I mean, I think there's - - -

24      JUDGE RIVERA:  I mean, Glomar's been in place for

25  a while also at the federal level.

1            MR. SLACK:  It has.  It's only been recognized by

2     - - - by some circuits recently, like 2009, so I don't know

3     how much to - - - to draw from the timing.  I think there's

4     a lot of things.

5            JUDGE RIVERA:  Perhaps more reason for us to step

6     very slowly and leave this to the legislature, yes?

7            MR. SLACK:  Well, I think one - - - one reason

8     why the world has changed is - - - I mean, simply the

9     internet and social media.  The harms of disclosure are

10    much different than they - - - they once were in 1970s when

11    FOIL was first described.

12           JUDGE STEIN:  Right, but that doesn't answer the

13    question as to who should make this determination.  I mean

14    the federal statute has - - - has certainly carved out

15    these - - - these exceptions under 552(c) - - -

16           MR. SLACK:  Um-hum.

17           JUDGE STEIN:  - - - right?  And - - - and it's -

18    - - and I haven't found any cases dealing with the criminal

19    investigation exception or exemption that doesn't - - -

20    that relies on Glomar, not on that statute.

21           MR. SLACK:  Right.

22           JUDGE STEIN:  And so - - -

23           MR. SLACK:  I can give you two.

24           JUDGE STEIN:  - - - it seems to me that the abs -

25    - - oh, you can give me two?  Good.

1           MR. SLACK:  They're - - - they're cited in our

2     briefs.  I don't have the cites, but - - -

3           JUDGE STEIN:  And they don't have anything to do

4     with privacy?

5           MR. SLACK:  - - - but Platsky v. NSA and Vazquez.

6     The first one's out of the Second Circuit; the other one's

7     out of D.C.  But there are a number of cases that are under

8     exemption 7(E) because - - -

9           JUDGE STEIN:  But - - -

10          MR. SLACK:  - - - the statutes you're

11    referencing, 552(c), isn't - - - isn't Glomar; it's

12    something on top of Glomar that was enacted in the '80s.

13    And that works differently.  It's not actually an

14    exemption; it's an exclusion.  So what it allows agencies

15    to do, in that context, in addition to Glomar, is when they

16    think even citing an exemption can cause a harm, like

17    identifying which one, then they can treat it as if it does

18    not fall under - - -

19          JUDGE STEIN:  But it seems - - -

20          MR. SLACK:  - - - under FOIA at all.

21          JUDGE STEIN:  It seems like the vast majority of

22    cases falling within the types that - - - that you're now

23    seeking to use Glomar for are - - - are really 552(c) - - -

24          MR. SLACK:  Yeah.

25          JUDGE STEIN:  - - - situations.

1           MR. SLACK:  I don't know empirically, but - - -

2     but certainly courts have been clear that Glomar is

3     available under any exemption and has applied under the law

4     enforce exemption - - -

5           JUDGE STEIN:  And - - -

6           MR. SLACK:  - - - under which FOIA is - - - FOIA

7     is - - -

8           JUDGE STEIN:  The other thing is that under

9     552(c), it's very specific and very narrow.  And - - - and

10    that's not usually - - -

11          MR. SLACK:  Right.

12          JUDGE STEIN:  - - - the kind of thing that courts

13    do.  That's usually the kind of thing that legislature - -

14    -

15          MR. SLACK:  Absolutely.  Just to be clear, we

16    don't - - - we don't believe that there is something

17    equivalent to 552(c) under FOIA because that carves it out

18    of FOIA entirely.  It allows NYCHA (sic) to say those

19    records do not exist.  They don't have to do a public

20    affidavit under 552(c).  What they do is, in every case,

21    the DOJ submits an in-camera affidavit.  It is a process

22    that is less public than Glomar.  What - - - what Glomar

23    traces from is the general structure of FOIA which is the

24    general obligation of disclosure, which is true.  FOIA and

25    FOIL and both open records, but there are also open-record

1    requirements that are coupled with specified exemptions

2    that the legislature made clear that they are the kind of

3    information that, if disclosed, are expected to cause harm.

4    That same structure - - -

5              JUDGE RIVERA:  And each one - - -

6              MR. SLACK:  - - - is exact - - -

7              JUDGE RIVERA:  And each one is a policy choice.

8    So let me ask you this.  It - - - it's in part what your

9    adversary has argued, both today and in - - - in the

10   briefing.  And it is mentioned in the decisions below.  I -

11   - - I don't understand, and you can help me here, please,

12   how Glomar works, unless it is a blanket statement that you

13   can make, that it applies, in a way, across an entire

14   classification of documents.

15             MR. SLACK:  Right.

16             JUDGE RIVERA:  Because otherwise, if you use it

17   so selectively, isn't that really telling a person who

18   requests it I guess they have it?

19             MR. SLACK:  Right.  Right.

20             JUDGE RIVERA:  Because otherwise they either say

21   they do have it or they don't have it.

22             MR. SLACK:  I totally agree.  I think there's

23   actually just kind of conflating what is - - -

24             JUDGE RIVERA:  Okay.

25             MR. SLACK:  - - - a specific and particularized

1    explanation as to the category of information which FOIA

2    requires and FOIL requires.  And then is the inquiry about

3    the information that would be disclosed on the - - - by

4    responding to a request interpreted from the face of the

5    request - - -

6              JUDGE RIVERA:  Um-hum.

7              MR. SLACK:  - - - is a more abstract kind of

8    inquiry.  You just look at the face of the request, you

9    determine what information would be disclosed if I respond

10   to whether there are or are not responsive records.  And

11   then from there you're just basically an ordinary FOIA

12   litigation trying to tackle that.

13             JUDGE WILSON:  But isn't the consequence of your

14   position that if I ask whether the police department has

15   records about me you must say - - - you must give a Glomar

16   response?

17             MR. SLACK:  You definitely should.

18             JUDGE WILSON:  No, must, because if you - - - if

19   you - - - if there's a slight chink then your rationale

20   falls apart.

21             MR. SLACK:  I think it - - - for it to be

22   effective it needs to be consistent.  I don't know if it

23   needs to be completely consistent.

24             JUDGE RIVERA:  Well, but if I ask and you give it

25   to me - - -

1          MR. SLACK:  No, absolutely.

2          JUDGE RIVERA:  - - - isn't it obvious, once you -

3    - -

4          MR. SLACK:  Absolutely.

5          JUDGE RIVERA:  Once you go down this road, you've

6    got to invoke that Glomar response every single time.

7          MR. SLACK:  No, absolutely.  I mean, it's - - -

8    to be effective, it needs to be consistent.  I don't know

9    if every - - -

10         JUDGE RIVERA:  And then - - -

11         MR. SLACK:  - - - single exception would - - -

12         JUDGE RIVERA:  And then - - -

13         MR. SLACK:  - - - would - - -

14         JUDGE RIVERA:  Now let's circle back to my

15   earlier point.  Isn't that a decision for the legislature

16   to make if what you're looking for is an additional carve-

17   out - - -

18         MR. SLACK:  No.

19         JUDGE RIVERA:  - - - from FOIL?

20         MR. SLACK:  I mean, just to be clear, we're - - -

21   we're not claiming that we're expanding any of the

22   exemptions one iota.  It's just a question of whether that

23   information falls within the law enforcement and public

24   safety exemptions.  And I have never heard an argument that

25   identifying the specific identities of who is - - - who is

1    or is not subject to surveillance or investigation, recent

2    or ongoing, isn't implicated by those exemptions.

3            JUDGE RIVERA:  I know your red light has gone on,

4    but if the Chief will permit me one question.  With respect

5    to the actual affidavit - - - let - - - let's say we agree

6    with you that - - - that Glomar, indeed, we should adopt it

7    with respect to FOIL, how does the affidavit that was

8    submitted, or anything else you submitted, satisfy the

9    requirements?

10           MR. SLACK:  I think it - - - it starts with Chief

11   Galati's affidavits explain that identifying the specific

12   identities of surveillance and investigation allows them to

13   evade detection.  It allow - - - even knowing when people

14   are not subjects of investigation is valuable information

15   to people.  I think you can stop there, pretty much, but

16   the affidavits go on in quite a lot of detail as to how

17   additional harms can flow from that.

18           JUDGE WILSON:  The affidavit is - - - it's all

19   phrased in sort of conditional language, though:  it may

20   let them do this, it might.  It's not - - - it's less than

21   an affirmative statement that this will happen, in his

22   experience.

23           MR. SLACK:  I would disagree about - - - about

24   that.  There are particular aspects where he does.  But I

25   think he does make clear that disclosing the identities of

1 surveillance and investigation is something that would

2 likely be causing harm. It just needs to be "would

3 likely", not a - - - not a certainty, under this court's -

4 - -

5 CHIEF JUDGE DIFIORE: Counsel, are these common

6 requests at the NYPD, these FOIL requests?

7 MR. SLACK: To - - -

8 CHIEF JUDGE DIFIORE: Am I under investigation -

9 - -

10 MR. SLACK: To my - - -

11 CHIEF JUDGE DIFIORE: - - - for a covert

12 investigation?

13 MR. SLACK: To my knowledge - - - and actually,

14 Chief Galati's affidavit mentions this. One of the things

15 that has changed in recent years is that people are more

16 often asking about events that are not known already. But

17 to my knowledge, it is not - - - the Glomar response is not

18 being used more than - - - to these kind of requests on two

19 occasions. But we do know that there was a coordinated

20 campaign to solicit this kind of information. But I - - -

21 to my knowledge, there weren't actually responses to that.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MR. SLACK: Thank you.

24 CHIEF JUDGE DIFIORE: Counsel?

25 MR. MOHAMMEDI: Your Honors, I'd just like to

1    mention that the NYPD has said that under the federal rule

2    and Glomar was applied to, for instance here he mentioned

3    Platsky case.  Platsky case, even though it was a law

4    enforcement exemption, it really relates back to the

5    national defense and their exemption one and three because

6    all of those were CIA, NSA, and FBI.  So everything was

7    relating back to exemption one and three.  And even - - -

8    even - - - even at the - - - Catledge where requester was

9    the FBI, but since the requested documents were documents

10   of national security, Glomar was - - - was asserted.  And

11   this goes also to a classification of documents that the

12   NYPD does not have.

13        In addition, even under federal rule, in for

14   instance, in Shapiro case in district court 2016, the court

15   here states specifically, "although the Glomar doctrine may

16   constitute a gloss on FOIA's text, it does not lead to

17   results fundamentally at odds with the statute."

18        So even if you apply Glomar, if it's at odds with

19   the statute, it's not going to be granted.  And that's

20   exactly what the NYPD is doing.  At the federal level it

21   says specifically that.  And - - - and also - - -

22        JUDGE RIVERA:  Well, if we were to recognize

23   something akin to what Glomar is in the federal system with

24   more stringent requirements that require an in-camera

25   review, would that address your concerns?

1            MR. MOHAMMEDI:  Actually, yes.  Actually that's

2      what you said in Friedman, that - - - that we need - - - we

3      need that the court will have an ability to review the

4      validity of the objection.  That's what Judge Moulton said

5      specifically.  The NYPD, by claiming Glomar, which is a

6      blanket carte blanche - - - carte blanche objection, which

7      you already state is not applicable under FOIL, right, is

8      not even allowing this court to have in-camera review.

9      There's not even - - -

10            JUDGE STEIN:  But can you explain to me how would

11      you have in-camera review without them answering the

12      question as to whether the documents exist?

13            MR. MOHAMMEDI:  I mean, you - - - in-camera

14      review allows the court, even if the party is not allowed

15      to see, the court would be able to see it.  Responding to

16      it is not harm in itself.

17            JUDGE STEIN:  No, no, no.  What I'm asking is is

18      if you're - - - if you're asking the judge to review the

19      documents to see whether - - - doesn't that assume that

20      there are documents, and doesn't that then answer the

21      question that Glomar is intended - - -

22            MR. MOHAMMEDI:  And that's the reason why the

23      NYPD should not claim we cannot confirm or deny the

24      existence of document that has no - - - nothing in the

25      statute that says that.

1          JUDGE STEIN:  But my point is - - -

2          MR. MOHAMMEDI:  By the way, the three answers - -

3    -

4          JUDGE STEIN:  - - - how do you - - - how do you -

5    - - how would you - - - you said that'd be okay if there

6    was in-camera review, but I just don't see how the two - -

7    -

8          MR. MOHAMMEDI:  Because - - -

9          JUDGE STEIN:  - - - can go together.

10         MR. MOHAMMEDI:  Because Glomar does allow camera

11   review, therefore Glomar should not apply to the statute

12   under New York State's Freedom of Information Law.  Period.

13         JUDGE FEINMAN:  Let me ask you a very

14   specific-to-this-case question which is what is it that you

15   feel is insufficient in Chief Galati's affidavit?  So in

16   other words, if we were to disagree with you and - - - and

17   adopt some version of a Glomar except - - - exception, and

18   then we would have to turn to looking at the - - - the

19   Chief's affidavit, what's insufficient about it?

20         MR. MOHAMMEDI:  I think I'd like to make one

21   comment about the Galati affidavit.  It goes back to Judge

22   Moulton's decision, right, when it says that before the

23   NYPD was able to protect information without having to

24   assert Glomar.  The Galati affidavit listed many plots that

25   were able to stop, right, even though some of those were,

1    you know, we - - - we objected to, still it shows that NYPD

2    was able to do it without asserting Glomar, and AALDEF is

3    case in point.  Glomar - - - Glomar was not asserted in

4    AALDEF when - - - when it was filed request where - - -

5          JUDGE STEIN:  That was for broad information;

6    isn't that really - - -

7          MR. MOHAMMEDI:  But it doesn't matter.  In

8    principal, it's a legislature theory - - - I mean, Glomar

9    it's not inherent in FOIL, so it's for the legislature to

10   say we need to really install this for us to be able to use

11   it.  This court cannot do that.  Harm has already - - -

12   like again, I would say again and again, harm has been

13   really already established and has been already studied by

14   the legislature.  Therefore, exemptions were issued.

15   Exemptions do not allow we cannot confirm or deny the

16   existence of documents, which is we mention in Section 89

17   that there are three ways of answering.  We can - - -

18   cannot deny - - - we cannot deny - - - we can neither deny

19   or confirm is not denying.

20          CHIEF JUDGE DIFIORE:  Thank you, counsel.

21          MR. MOHAMMEDI:  Thank you.

22          (Court is adjourned)

23

24

25

C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Talib W. Abdur-Rashid v. New York City Police Department, et al., No. 19, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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