State of New York
Court of Appeals

OPINION

No. 19
In the Matter of Talib W.
Abdur-Rashid,
Appellant,
v.
New York City Police Department,
et al.,
Respondents.

In the Matter of Samir Hashmi,
Appellant,
v.
New York City Police Department,
et al.,
Respondents.

Omar T. Mohammedi, for appellants.
Devin Slack, for respondents.
Reporters Committee for Freedom of the Press, et al.; New York Civil Liberties Union; District Attorneys Association of the State of New York; New York City Council's Black, Latino and Asian Caucus, amici curiae.

DiFIORE, Chief Judge:

The issue presented is whether an agency may decline to acknowledge that requested records exist in response to a Freedom of Information Law request (Public Officers Law § 84 *et seq.* [FOIL]) when necessary to safeguard statutorily exempted

information. Under these circumstances, we hold that it may and therefore affirm the Appellate Division order, which reached the same conclusion.

The federal courts have long permitted federal agencies responding to Freedom of Information Act (FOIA) requests to neither confirm nor deny the existence of responsive documents – a so-called Glomar response -- when the agency's acknowledgement that it possesses responsive documents would itself reveal information protected from disclosure under a FOIA exemption. In the context presented here, where a law enforcement agency was asked to disclose records relating to a police investigation and surveillance activities involving two specific individuals and associated organizations -- information protected under the law enforcement and public safety exemptions of Public Officers Law § 87 -- such a response is compatible with the FOIL statute and our precedent interpreting it.

In October 2012, petitioners Talib Abdur-Rashid and Samir Hashmi separately submitted targeted FOIL requests seeking any records possessed by the New York City Police Department (NYPD) related to any "surveillance" and "investigation" of them as individuals and of certain specified entities with which they were associated (including a mosque and a university student association, respectively) for the six-year period immediately preceding the request. The agency denied the requests, stating in each case that the information, "if possessed by the NYPD", would be protected from disclosure under various statutory exemptions, including the law enforcement, public safety and personal privacy provisions. After the NYPD adhered to those decisions on administrative appeal, petitioners commenced separate CPLR article 78 proceedings challenging the

determinations. Petitioners asserted that the NYPD was engaged in an ongoing domestic surveillance program in which, as alleged in press articles, it had targeted Muslim individuals, places of worship, businesses, schools, student groups and the like. It was in this context that petitioners attempted to ascertain whether they were subjects of surveillance or investigation, noting that they had supplied certifications of identity waiving their personal privacy interests and authorizing the NYPD to release responsive records to their attorneys.[1]

The NYPD's response, although styled as a motion to dismiss the petition in each case, did not assert a procedural objection but defended the FOIL responses on the merits. The agency explained the basis for its denial of the FOIL requests and its refusal to disclose whether it possessed responsive documents in a 22-page affidavit of its Chief of Intelligence, Thomas Galati. Without offering any specific information relating to petitioners, Chief Galati described the NYPD's ongoing and wide-ranging counterterrorism efforts, acknowledging that the agency was actively engaged in covert surveillance and other intelligence gathering in its effort to preempt acts of terrorism in New York City, which remains a prime target in the wake of the World Trade Center attacks. The Galati affidavit averred that disclosure of whether the NYPD possesses records responsive to the FOIL requests would necessarily reveal whether petitioners had been the subjects of its investigation, information which – particularly if aggregated –

[1] While petitioners waived their own privacy interests, they did not claim to have the authority to waive the privacy interests of other members of the associated entities with respect to which they also sought information.

would provide unprecedented and invaluable information concerning NYPD counterterrorism strategies, operations, tactics and techniques to those planning future terrorist attacks. The Galati affidavit also averred that the NYPD intelligence strategies are monitored by individuals and organizations with the goal of developing counterintelligence measures, and the greatest vulnerability to the NYPD Intelligence Bureau is the release of even "seemingly innocuous information" which would inexorably reveal sources from which information is gathered by the NYPD.

The proceedings were assigned to different justices for resolution. In Abdur-Rashid, Supreme Court granted the NYPD's motion to dismiss and denied the petition, reasoning that the NYPD demonstrated that its response – including its refusal to acknowledge whether responsive records existed – was not prohibited by FOIL as the records sought were exempt from disclosure under the statute and the cases interpreting it. In Hashmi, although not disputing that the content of responsive records may be exempt, Supreme Court, among other things, denied the motion to dismiss on the rationale that the NYPD's failure to acknowledge whether or not responsive records existed was impermissible under FOIL. Hearing the cases together, the Appellate Division affirmed in Abdur-Rashid and, among other things, reversed the order denying the motion to dismiss in Hashmi, granting the motion and dismissing the petition (140 AD3d 419 [1st Dept 2016]). The Appellate Division reasoned that, through the affidavits of Chief Galati, the NYPD had "establish[ed] that confirming or denying the existence of the records would reveal whether petitioners or certain locations or organizations were the targets of surveillance, and would jeopardize NYPD investigations and counterterrorism efforts" in contravention of the law

enforcement and public safety exemptions (see id. at 421). Thus, the court held that NYPD's refusal to confirm or deny the existence of responsive records was consistent with FOIL and the cases construing it. We granted petitioners leave to appeal (28 NY3d 908 [2016]).

To promote open government and public accountability, FOIL imposes a broad duty on government agencies to make their records available to the public (see Public Officers Law § 84). The statute is based on the policy that "the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government" (Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [1979]). Consistent with the legislative declaration in Public Officers Law § 84, FOIL is liberally construed and its statutory exemptions narrowly interpreted (see Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 462 [2007]). All records are presumptively available for public inspection and copying, unless the agency satisfies its burden of demonstrating that "the material requested falls squarely within the ambit of one of [the] statutory exemptions" (Fink, 47 NY2d at 571). "While FOIL exemptions are to be narrowly read, they must of course be given their natural and obvious meaning where such interpretation is consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL" (Matter of Hanig v State of N.Y. Dept. of Motor Vehs., 79 NY2d 106, 110 [1992] [internal quotation marks and citation omitted]). Nor may the courts order disclosure of records deemed confidential by the

Legislature: "[o]nce it is determined that the requested material falls within a FOIL exemption, no further [balancing of interests] or policy analysis is required" (id. at 112).[2]

From the outset of FOIL, the legislature expressly exempted certain agency records from public access, recognizing that there is sometimes "a legitimate need on the part of government to keep some matters confidential" (Fink, 47 NY2d at 571). For example, the law enforcement exemption and the public safety exemption, which the NYPD relied on here, protect records that, if disclosed, would interfere with law enforcement investigations or judicial proceedings, reveal nonroutine criminal investigative techniques or endanger the life or safety of any person (Public Officers Law § 87 [2][e][i], [e][iv], [f]). When interpreting these provisions, we have emphasized that "the purpose of [FOIL] is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution" (Matter of Madeiros v New York State Educ. Dept., 30 NY3d 67, 77 [2017] [quotation marks and citation omitted]). FOIL was not designed to assist wrongdoers in evading detection or, put another

[2] In New York, challenges to FOIL determinations are resolved in summary proceedings pursuant to CPLR article 78 (see Public Officer's Law § 89[4][b]). Where – as here – exemptions are relied upon, "the agency involved shall have the burden of proving that such record falls within" the claimed exemptions (id.). Beyond merely disposing of motions to dismiss, here the Appellate Division considered the petitions on the merits, concluding the NYPD met its burden of justifying its reliance on FOIL exemptions in each instance to shield the existence and contents of any responsive records. Whether the court erred in that regard presents an issue of law in this Court. We therefore disagree with the suggestion that the merits are not ripe for adjudication by virtue of a "scant record" or "contested facts" (Wilson, J., opn at 26). In each proceeding, the record here was fully developed; the NYPD supplied all of the documents comprising a return, supported by a detailed affidavit explaining the basis for the claimed exemptions, which submissions were addressed by petitioners.

way, "to furnish the safecracker with the combination to the safe" (Fink, 47 NY2d at 573). As this Court has acknowledged, the disclosure of information acquired by the police during a criminal investigation "could potentially endanger the safety of witnesses, invade personal rights, and expose confidential information of nonroutine police procedures" (Matter of Gould v New York City Police Dept., 89 NY2d 267, 278 [1996]).

In Matter of Lesher v Hynes (19 NY3d 57, 59 [2012]), an author sought "any and all" records from a District Attorney's office concerning its pending prosecution of a defendant charged with sexual abuse who fled the country "one step ahead of an arrest warrant." The District Attorney declined to turn over any records, broadly asserting that any records relevant to the pending prosecution – including correspondence with federal officials relating to extradition efforts – were protected from disclosure under the law enforcement exemption. Petitioner argued, among other things, that the District Attorney had not adequately explained how the release of records relating to a publicly acknowledged prosecution would interfere with law enforcement investigations or judicial proceedings. In rejecting that argument, we adopted the analysis in NLRB v Robbins Tire & Rubber Co. (437 US 214 [1978]) in which the United States Supreme Court held – interpreting its own analogous law enforcement exemption (5 USC § 552[b][7][A]) – that courts may determine that "with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings'" (Robbins, 437 US at 236, quoting 5 USC 552[b][7][A]). Thus, in the case of a pending criminal investigation or prosecution, a law enforcement agency is not required to make a specific evidentiary showing relating

to the likelihood that disclosure of records would pose any unique or unusual danger of interference in the individual case that is the subject of the request (Lesher, 19 NY3d at 67). Rather, the agency may fulfill its burden to articulate a factual basis for the exemption under FOIL by "identify[ing] the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of [those] categories of documents" (id.). In Lesher, for example, the prosecutor's general explanation that the correspondence sought contained information concerning the particulars of the crime and the identities and statements of witnesses and that "its release posed an obvious risk of prematurely tipping the District Attorney's hand" was sufficient to support reliance on the exemption (id. at 67-68).

We recognized the need to protect investigative information in Lesher even though the existence of the criminal action was a matter of public record. Before criminal proceedings have commenced, the inherent dangers of premature disclosure are even greater. In fact, the need for government confidentiality may be at its zenith when a law enforcement agency is undertaking a covert investigation of individuals or organizations, where the lives of the public, cooperators and undercover officers may hang precariously in the balance and the reputation, livelihood or liberty of the subject may be at stake. This Court has never held that FOIL compels a law enforcement agency to reveal records relating to an ongoing criminal investigation of a particular individual or organization to the target, the press or anyone else – and the structure and purpose of the law enforcement and public safety exemptions in Public Officers Law § 87 are rendered meaningless by a contrary conclusion. The dissent does not argue otherwise and petitioners in this case no

longer challenge the applicability of the cited exemptions to the content of the investigation and surveillance records they requested.[3]

Rather, the thrust of petitioners' argument is that, when declining to disclose records which fall squarely within an exemption, the NYPD must specify whether or not it possesses materials responsive to the FOIL request even when doing so would reveal information safeguarded by that same FOIL exemption. Taken to its logical extreme, petitioners argue a Catch-22 paradigm where the NYPD would have to acknowledge the existence of an investigation involving a particular person notwithstanding that the contents of any responsive records would be exempt and revelation of their existence would result in the same harm justifying exemption of the contents – whether the FOIL request comes from the target, a newspaper or some other member of the public.

The NYPD counters that this Court should follow the commonsense doctrine employed by the federal courts, which have recognized that it is permissible under the

[3] Nowhere in their briefs do petitioners analyze the propriety of the exemptions as applied to their requests. Petitioners cite with approval the Appellate Division decision in Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept. (125 AD3d 531 [1st Dept 2015], lv denied 26 NY3d 919 [2016] ["AALDEF"]) in which an organization sought thirteen categories of documents generated by the NYPD Intelligence Division relating to investigation of Muslim persons, among others. There the Appellate Division indicated that these documents fell within the law enforcement exemption. Petitioners do not dispute that the "investigation" and "surveillance" records they seek here, if they exist, would be a subset of the documents they acknowledge were properly treated as exempt in AALDEF. While, as the dissent notes, petitioners have not been provided with the records requested, they could have argued that records of a recent or pending covert investigation of specific individuals are not exempt from disclosure – but it is telling that neither they nor the dissent make such a claim. Instead, the dissent essentially ignores the fact that petitioners specifically requested "investigation" and "surveillance" records – not some other class of documents without a clear connection to such activities.

federal statutory scheme of FOIA for a federal agency to decline to acknowledge possession of responsive records when the fact that responsive records exist would itself reveal information protected under a FOIA exemption. Federal recognition of this policy dates back to Phillippi v Central Intelligence Agency (546 F2d 1009 [DC Cir 1976]), in which a reporter sought records from the CIA concerning its relationship with a vessel known as the Hughes Glomar Explorer, purportedly owned by a private corporation but believed to have been used by the CIA to gather information concerning sunken Russian submarines. The District of Columbia Circuit credited the CIA's explanation that, to require it to reveal whether it possessed records relating to the vessel would be tantamount to requiring it to reveal its connection to the vessel – a fact exempt from disclosure under FOIA exemptions 1 (5 USC 552[b][1], protecting materials classified pursuant to Executive Order) and 3 (5 USC 552[b][3], protecting materials "specifically exempted from disclosure by statute"). Thus, in federal parlance, when an agency neither confirms nor denies that it possesses records in response to a FOIA request, it is known as a Glomar response (see e.g. Wilner v Natl. Sec. Agency, 592 F3d 60, 64 [2d Cir 2009], cert denied 562 US 828 [2010]).

The federal courts have recognized that "'[FOIA's] exemptions cover not only the content of the protected government records but also the fact of their existence or nonexistence, if that fact itself properly falls within the exemption'" (id., at 68, quoting Larsen v Dept. of State, 565 F3d 857, 861 [DC Cir 2009]). Thus, as the Second Circuit has explained, "[t]he Glomar doctrine is well settled as a proper response to a FOIA request because it is the only way in which an agency may assert that a particular FOIA statutory

exemption covers the 'existence or nonexistence of the requested records' in a case in which a plaintiff seeks such records" (Wilner, 592 F3d at 68). The burden is on the agency to submit an affidavit explaining in as much detail as possible why the information protected by a Glomar response – i.e., whether the agency possesses responsive documents – logically falls within the claimed FOIA exemptions (Phillippi, 546 F2d at 1013).

Although pointed FOIA requests analogous to the inquiries here are rare, the dangers of disclosure of the existence of an investigation of a particular person have been acknowledged under that statute. In Vazquez v U.S. Dept. of Justice (887 F Supp 2d 114, motion for summary affirmance granted 2013 WL 6818207 [DC Cir 2013]), plaintiff sought records about him maintained by the FBI's National Crime Information Center (NCIC), a compilation of 19 separate databases containing investigative material compiled for law enforcement purposes. In upholding the use of a Glomar response under FOIA law enforcement exemption 7(E), the court credited the FBI's assertion

> "that public confirmation of NCIC transactions would alert individuals that they are the subject of an investigation as well as reveal[] the identity of the investigative agency. With this information, individuals could modify their criminal behavior, thereby preventing detection by law enforcement agencies and risking circumvention of the law. . . . In other words, persons knowing that they are being investigated by a law enforcement entity, which the requested information would reveal, could reasonably be expected to use the information to circumvent the law. Conversely, . . . knowledge that there have been no NCIC checks run [would indicate the person] is not on law enforcement's radar [permitting them] to continue to engage in unlawful endeavors with renewed vigor"

(887 F Supp 2d at 117-118).

FOIA cases involving counterintelligence records are also particularly instructive. In Hunt v Central Intelligence Agency (981 F2d 1116 [9th Cir 1992]), a defendant on trial for murder sought disclosure from the CIA of records regarding his victim, an Iranian national. The Ninth Circuit upheld the CIA's use of a Glomar response, crediting its explanation in supporting affidavits that:

> "the disclosure of the existence or non-existence of documents must not be viewed in isolation but rather as one tile in a mosaic of intelligence gathering. Through the CIA's disclosure of the existence or non-existence of records on particular individuals, a FOIA requester could make the information public or otherwise available to counter-intelligence operations from other nations. . . . [T]hose experts could then determine the contours and gaps of CIA intelligence operations and make informed judgments as to the identities of probable sources and targets [who] . . . could find themselves under suspicion and in grave danger. . . . [P]otential future sources would be reluctant to come forward; targets of intelligence scrutiny would be alerted and could take additional precautions; and foreign operatives could learn whether or not the CIA was aware of their activities"

(981 F2d at 1119).

The same risk has been recognized when the subject of the request is not an individual but a specific organization or institution. For example, in Gardels v Central Intelligence Agency (689 F2d 1100 [DC Cir 1982]), the FOIA request sought records from the CIA relating to its past and present relationships with the University of California. The District of Columbia Circuit emphasized that the specific request could not be viewed in isolation, particularly there where the CIA had received 125 similar requests seeking information relating to about 100 American colleges and universities. Acknowledgment of the existence of records concerning any one institution, when aggregated, could reveal

substantial information relating to the CIA's covert activities and assist foreign intelligence bodies in determining which institutions to avoid and where to concentrate their efforts. In Gardels, the court reasoned that the CIA could properly treat all such requests uniformly by providing a Glomar response, neither revealing the existence or nonexistence of responsive records with respect to any one institution.

Given that our statute was modeled after FOIA, we have repeatedly looked to federal precedent when interpreting FOIL, particularly in relation to the law enforcement exemptions (see Matter of Friedman v Rice, 30 NY3d 461 [2017]; Madeiros, 30 NY3d 67; Lesher, 19 NY3d 57). And while it is not necessary for us to consider on this appeal whether there are other circumstances when a Glomar-type response might be permissible under FOIL, the analysis in the federal cases is instructive in the unique situation presented here where a targeted request seeks records concerning a specific individual's involvement in a pending NYPD investigation. As these cases demonstrate, there are indeed occasions when, due in large part to the precise manner in which the FOIL request is structured, an interpretation of the statute that compels a law enforcement agency to reveal that responsive records exist with respect to a specific individual or organization would, in effect, force the agency to disclose substantive information that is protected under FOIL's law enforcement and public safety exemptions. Just as requiring the CIA to state whether it possesses documents relating to the Hughes Glomar explorer would reveal whether or not it was connected to that vessel, compelling the NYPD to state whether or not it possesses "investigative or surveillance" records would reveal substantive information concerning an individual's involvement with the NYPD investigation. Put another way,

when there is a FOIL request as to whether a specific individual or organization is being investigated or surveilled, the agency -- in order to avoid "tipping its hand" -- must be permitted to provide a Glomar-type response.[4]

We reject petitioners' argument that there is a textual basis in New York's FOIL statute foreclosing an agency from declining to reveal whether responsive documents exist when it is denying a FOIL request based on a statutory exemption. The general rule requiring an agency to acknowledge the existence of responsive records stems from the presumption of access – it is usually necessary for an agency to reveal that a particular record exists in order to demonstrate the applicability of an exemption.[5] But there is no

[4] Although we find federal law persuasive, we reach this conclusion by interpreting FOIL's statutory exemptions and our cases construing them – there has been no "blind adoption of a federal judicial doctrine" (see dissenting opn at 13). That being said, we are unpersuaded that there are relevant textual distinctions between the provisions of FOIA and FOIL. The fact that FOIL requires that a request be "denied" whereas FOIA permits an agency to treat FOIA as "not apply[ing]" to exempt matters in no way impacts the Glomar issue, nor has any federal court relied on the dissent's novel textual analysis. The 1986 amendment adding 5 USC § 552(c) -- discussed extensively by the dissent -- likewise in no way undermined the commonsense analysis underlying the federal Glomar cases that precede or follow it, which do not restrict the doctrine to classified or national security materials under exemptions 1 and 3. The dissent's speculation that the analysis is unavailable or limited in cases involving FOIA's law enforcement exemptions is unsupported and inconsistent with cases indicating just the opposite (see Vazquez, 887 F Supp 2d 114; see e.g. United States Dept. of Justice v Reporters Comm. for Freedom of Press, 489 US 749 [1989] [upholding denial of request under law enforcement exemption 7(c) where agency neither confirmed nor denied possession of information on rap sheet involving specific individual]). Moreover, the dissent's analysis misses the mark for the more fundamental reason that it fails to focus on the facts of this case and the contours of New York's law enforcement and public safety exemptions – which are controlling here.

[5] In most instances, the fact that an agency possesses responsive records does not itself provide substantive information protected by an exemption. For example, in Lesher, the pending prosecution was a matter of public record and, as such, the fact that the District Attorney possessed responsive records did not reveal confidential information – only the

specific statutory language requiring an agency to certify the existence of records wholly protected under an exemption. Petitioners rely on Public Officers Law § 89(3)(a), which states that an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." However, that provision is triggered when, in lieu of granting a FOIL request, the agency finds that it either does not possess the item requested or is unable to locate it after a diligent search (see Matter of Rattley v New York City Police Dept., 96 NY2d 873, 874-875 [2001]); it does not require certification of the existence of records for which the agency is claiming an exemption. Here, the NYPD based its denial on the applicability of various exemptions and not on an inability to locate responsive documents after a diligent search. Nor is the response inconsistent with the provisions in section 89(3)(a) identifying the three permissible final responses to a FOIL request: (1) grant the request and disclose documents, (2) certify that the record cannot be found after a diligent search, or (3) "deny such request," invoking one or more exemptions (see Matter of Beechwood Restorative Care Ctr. v Signor, 5 NY3d 435, 440-441 [2005]). The determinations under review, in which the NYPD refused to

contents of those records fell within an exemption. Thus, in cases like Lesher involving pending or completed prosecutions, a request for records related to a defendant in the possession of the pertinent police agency would be unlikely to engender a Glomar-type response because the fact that that defendant has been the subject of investigation is obvious from the prosecution itself. In that scenario, the contents of the records may or may not be exempt under FOIL, but the fact that responsive records exist would not be.

turn over any records relying on multiple exemptions, fell into the third category – a denial of the request for records.[6]

It is the rare case where, due to the surrounding circumstances and the manner in which a FOIL request is structured, acknowledging that any responsive records exist would, itself, reveal information tethered to a narrow exemption under FOIL. But when a FOIL request seeks to ascertain if a specific person or organization is under investigation by the NYPD Intelligence Bureau, such a response is entirely consistent with the purpose and structure of our statute. To recognize that those unusual circumstances coalesce here does not create a broad judicial exemption as the dissent erroneously claims. Rather, we are applying a commonsense interpretation of the relevant statutory language to give full effect to the law enforcement and public safety exemptions carefully crafted by the legislature, as interpreted for decades by this Court. A model of understatement, the dissent recognizes that requiring an agency to acknowledge the existence of records in these circumstances "may have concerning implications" (dissenting opn at 18-19) but protests that the Court is powerless to avoid such a result – that only the Legislature can intervene.

[6] The dissent's conclusion to the contrary is puzzling. FOIL provides a mechanism for public access to records and, here, the NYPD expressly and categorically denied petitioners' FOIL requests. In this case, if responsive records do not exist, petitioners were not entitled to disclosure of anything. If responsive records do exist, the question is whether either their contents – or the fact that they exist, which itself may disclose confidential information – is protected under one or more FOIL exemptions. We believe this is the central issue in the case, which the dissent entirely fails to confront. If the existence of records is protected information under a statutory exemption, nothing in FOIL compels its disclosure. In this regard, it is the dissent that adopts a new requirement found nowhere in the text of the statute – a requirement that, in all instances, an agency expressly certify that responsive records exist, regardless of whether the existence of the records is protected under an exemption.

We disagree. The Legislature has already acted by adopting the law enforcement and public safety exemptions – the task of interpreting them falls squarely within the province of the courts. At bottom, the legislative intent was not to provide public access to information, the secrecy of which is necessary to sustain the government's legitimate exercise of police powers to investigate criminal activity. We will not abdicate our fundamental role to interpret the statutory language to give full effect to the FOIL exemptions implicated in this case, just as the federal courts have done in the Glomar cases. While the dissent rightfully expresses concern about "blanket" or "carte blanche" exemptions, we endorse nothing of the sort here as our decision is premised on respondents' factual demonstration of the necessity for non-access, which is addressed below. Like the federal courts, our courts must scrutinize an agency's refusal to confirm or deny the existence of responsive documents on a case-by-case basis to ensure it is warranted under the particular circumstances presented.

Here, in assessing the propriety of the agency's refusal to reveal whether responsive records exist, we begin with the requests themselves, which were both extremely specific and quite unusual. Indeed, we know of no other FOIL case in which individuals who had never been arrested, involved in a police confrontation or formally charged have asked a police agency to acknowledge if they were under investigation. Abdur-Rashid requested records relating to any "investigation" or "surveillance" of himself, individually or in his capacity as leader of a religious institution. Hashmi similarly sought all records relating to "investigation" or "surveillance" of himself or a student group with which he is associated. In their petitions, both men referred to news articles describing the NYPD's ongoing

counterterrorism investigation and surveillance program.[7] Petitioners seek to learn their connection, if any, to this endeavor – anyone who suspects, reasonably or otherwise, that they are the subject of or even a peripheral figure in a covert police investigation might understandably feel the same. However, FOIL was never designed to compel a law enforcement agency to disclose inherently confidential, investigatory information of this nature.

Petitioners' requests for information concerning a recent or ongoing investigation by a law enforcement agency implicate the core concerns underlying the law enforcement and public safety exemptions. Under Lesher, the agency could meet its obligation to provide a factual basis for the exemptions by identifying the generic kind of records for which the exemption was claimed and the generic risks posed by disclosure of those types of records. The Galati affidavits fulfilled that requirement. Without revealing any specific information about these petitioners (which it could not do without revealing the very

[7] The dissent faults the Galati affidavit for justifying the NYPD's response by referencing its counterterrorism investigation, lamenting that "we do not know if any past or current investigations of petitioners actually related to counterterrorism" (dissenting opn at 11). However, the NYPD response cannot be so easily dismissed. In the petitions, petitioners referenced news articles alleging that the NYPD was engaged in an ongoing domestic surveillance program involving Muslim individuals and institutions. The news articles reported that, in the wake of the September 11th attacks, the NYPD, with the assistance of the CIA, had undertaken a covert domestic counterterrorism operation in the tri-state area. The NYPD thus interpreted petitioners' request for "investigation" and "surveillance" records (for a discrete time period immediately preceding the request) as relating to that ongoing investigation, described in detail in the Galati affidavit; this was not the product of an "unsupported assumption" (see dissenting opn at 10). The NYPD could not have provided more specific information relating to these individuals without disclosing precisely the information claimed to be exempt – i.e., whether petitioners were subjects of the investigation they referenced – which is exactly the purpose of the refusal to confirm or deny the existence of the information sought.

information it claimed was exempt), the affidavit explained in extensive detail how disclosing the information sought – i.e., who has been the subject of investigation or surveillance – would imperil its ongoing counterterrorism efforts to protect New York City.

Chief Galati noted that, unlike other NYPD units that investigate crimes after they have occurred (essentially gathering evidence to reconstruct a past event), the intelligence unit of the NYPD is tasked with the objective to be preemptive – amassing information to deter, detect and thwart future terrorist activity. He described numerous, recent cases involving terrorist activity in New York City, demonstrating that the City remains a primary target for terrorist attacks and that, working jointly and sharing information with other state and federal law enforcement agencies, his unit plays a pivotal role in identifying terrorist plots and arresting those involved in order to prevent planned attacks designed to cause mass casualties. The unit gathers information from a myriad of sources, from undercover operations and confidential informants to open sources, as well as a well-publicized counterterrorism hotline, welcoming any and all leads from the public on a promise of confidentiality. Chief Galati averred that it was essential to the operational integrity of the intelligence program that it be able to keep confidential the information it gathers, the sources it uses and the methodologies and tactics it employs to defend against countermeasures used by individuals and organizations to expose the vulnerabilities in the NYPD program. The NYPD's role in preventing the next attack is dependent on its ability to collect information without publicizing its methods or sources to anyone who can use the information to counter its efforts, an assertion consistent with the basic realities of intelligence work.

Further, Chief Galati asserted that the FOIL requests under review here could not be viewed in isolation, noting that the NYPD was beginning to receive similar requests from others. In particular, Chief Galati highlighted the recent initiation of a mass FOIL campaign by a local organization, which encouraged and assisted constituents in submitting requests to the NYPD "FOILing" themselves. The affidavit explained that, if records from disparate requests were aggregated, this would place any individual response into a larger mosaic which could be used to analyze NYPD's counterterrorism operation and identify areas of focus and sources of information. Critically, Chief Galati contended that compelling the NYPD to acknowledge that it possesses records responsive to the request – even if it did not turn over documents – would reveal whether petitioners or the organizations with which they are affiliated were subjects of NYPD investigative interest, information that is itself exempt from disclosure.

The Appellate Division did not err in determining that the Galati affidavit established a factual basis for the exemptions claimed under the circumstances presented. This is true even though the NYPD does not claim (nor could it, consistent with its desire to maintain secrecy) that petitioners or their organizations are connected in any way with its pending counterterrorism investigation. As the federal courts have recognized (see generally Gardels, 689 F2d 1100), a Glomar-type response would be ineffective if it were permissible only when the agency possesses responsive records, even though that is the situation when it is most evident that revealing the existence of the records would damage a pending investigation. Such a myopic approach would prove unworkable because it would not be difficult to distinguish between individuals and organizations who are under

investigation (who would receive a Glomar-type response) and those who are not (who would be told that responsive records do not exist). Thus, in the circumstances presented here, when confronted with a targeted FOIL request of this nature, a police agency must be permitted to give a uniform response – to decline to confirm or deny the existence of responsive material in either scenario – on the rationale that whether or not it is investigating a particular person or organization constitutes information that is itself statutorily exempt from disclosure.

Finally, petitioners argue that even if – as we have concluded – an agency can decline to acknowledge that responsive records exist in these unique circumstances, various safeguards recognized by the federal courts preclude the NYPD's use of such a response here. For example, petitioners contend that an agency cannot decline to reveal the existence of records when it has publicly revealed the information for which it is claiming an exemption. They further argue that the NYPD invoked Glomar in a bad faith effort to cover up embarrassing or unlawful acts, such as its use of racial or religious profiling. We caution that we have no occasion in this case to consider whether a Glomar-type response is available under FOIL in any circumstance other than that presented here where the request involves an ongoing criminal investigation, nor do we adopt wholesale the approach taken by the federal courts. That being said, we agree that a police agency that has already revealed the records sought and for which it claims an exemption cannot credibly support such a response. Here, petitioners have not come forward with any evidence that the NYPD publicly acknowledged that it investigated or surveilled petitioners or the organizations referenced in their specific FOIL requests.

As for bad faith, the strongest safeguard against misuse of a FOIL exemption is the factual showing requirement. An agency denying a FOIL request must establish a bona fide, factual basis for the exemptions claimed and any evidence that undermines that showing is material to the court's assessment of the adequacy of the agency's submission – including a claim of bad faith. Although there is no language in the statute authorizing the procedure, New York courts have interpreted FOIL to permit in camera review of sensitive or confidential materials when the court deems such a procedure appropriate or necessary in a particular case to test the legitimacy of a claim of confidentiality or to oversee the redaction process in cases where portions of a record are subject to disclosure (see e.g. Matter of New York Times Co. v City of N.Y. Fire Dept., 4 NY3d 477, 490 [2005]).[8] Given that the requests here sought "investigative" and "surveillance" records involving a specific person relating to a discrete time period immediately preceding the request, and in light of the comprehensive affidavit supporting application of the claimed exemptions, there was certainly no abuse of discretion in declining to order in camera review in these cases.

Moreover, other than general allegations arising from news reports, petitioners offered no evidence that the NYPD's response to these particular requests is a function of

[8] Despite its concern about judicial overreach, the dissent endorses the in camera review procedure, taking no issue with this exercise of judicial prerogative. While noting the absence of in camera review (see dissenting opn at 12), the dissent neither suggests that the nisi prius court abused its discretion by failing to invoke the procedure nor explains what types of materials could have been submitted that would have warranted a different outcome here where no one disputes that the requested "investigation" or "surveillance" records, if they exist, are exempt from disclosure.

bad faith, rather than the legitimate law enforcement concerns identified in the comprehensive Galati affidavit. Notably, the Galati affidavit set forth the types of investigative activities which the NYPD is authorized to conduct in furtherance of its goals of detecting or preventing terrorist activities, none of which hinted at an insidious type of surveillance (see e.g. People v Capolongo, 85 NY2d 151, 160 [1995]). Here, the Galati affidavit was properly deemed sufficient to meet the factual basis requirement for the invocation of the statutory exemption. However, there may well be instances when the FOIL request is more general, either in terms of its subject or the nature of the materials sought, where the propriety of a Glomar-type response is less clear from the law enforcement agency affidavit, or where indicia of improper motive significantly undermine the asserted basis for the exemption. In that event, some form of in camera review may be warranted, even if modifications to the typical procedure are necessary. Thus, our existing FOIL paradigm contains important safeguards against misuse of the exemptions that are no less available in the rare instance when a law enforcement agency denying a request neither confirms nor denies the existence of responsive records.

It bears emphasizing, as is also true under FOIA, that if an agency establishes that the records sought fall within a FOIL exemption adopted by the legislature, the courts cannot order disclosure based on some other public policy concern asserted by a party or the court (see Hanig, 79 NY2d at 112; see Minier v Central Intelligence Agency, 88 F3d 796, 802-803 [9th Cir 1996]). While FOIL is an important tool in ensuring government transparency and public accountability, it is not – and was never designed to be – the only check against government overreach. For example, post-use notice requirements are set

by the legislature for intrusive police surveillance, taking into account the need to protect the secrecy of the pending investigation (see CPL 700.50[3]). Complaints of unconstitutional discriminatory actions have resulted in federal court actions and settlements (see Handschu v Special Services Div., 605 F Supp 1384, 1416 [SD NY 1985]). Further, petitioners' claims that an NYPD investigative unit engaged in improper racial and religious profiling were the subject of numerous press articles. As averred in the Galati affidavit, the NYPD – while denying any wrongdoing – has nonetheless changed its policy.

For all of these reasons, under the circumstances presented here, where necessary to give full effect to the law enforcement and public safety statutory exemptions, the NYPD's response neither confirming nor denying the existence of the investigative or surveillance records sought is compatible with FOIL and the policy underlying those exemptions, which is to provide the public access to records without compromising a core function of government – the investigation, prevention and prosecution of crime.

Accordingly, in each case, the order of the Appellate Division should be affirmed, with costs.

Matter of Abdur-Rashid v New York City Police Department

No. 19

WILSON, J. (concurring in part and dissenting in part):

We have not before been asked whether a governmental agency may, in response to a FOIL request, decline to confirm or deny the existence of documents. All of us agree that FOIL expresses New York's strong policy command that, subject to limited exceptions, government documents must be made available to the public; that FOIL differs from and is more powerful than FOIA, and that the public is not permitted to use FOIL to disrupt law enforcement operations. FOIL eschews a police state in which citizens are subject to the secret whims of government, yet recognizes the immense public interest in the effective and faithful enforcement of law. As the majority points out, the dissent's position is unsupportable, because FOIL does not require that an agency state whether documents exist if that disclosure itself would reveal information falling within an exemption. As the dissent explains, the majority's position, though repeatedly self-described as narrow and pertaining solely to the facts of this case, logically requires that

the NYPD – or any other governmental agency charged with law enforcement – should respond to all FOIL requests seeking information about investigations by refusing to state whether any responsive documents exist.

I write separately to explain what the process compelled by FOIL and our prior decisions should be. In this case, that process would result in a partial remittal. I have organized my explanation as follows. First, neither FOIL nor our decisional law interpreting it requires an agency to confirm or deny the existence of protected documents if such confirmation or denial would itself be protected by an exemption. Second, conforming our FOIL doctrine to FOIA Glomar doctrine is inappropriate, because of the unique foreign policy concerns underlying the Glomar doctrine and the criticism of federal decisions expanding that doctrine into more mundane areas. Third, agencies must evaluate the specific terms of each FOIL request and, if appropriate, make partial responses differentiated by the scope of the request and the nature of documents the agency possesses. Fourth, the procedural safeguards proffered by the NYPD, along with some additional safeguards, should be part of the Article 78 process when a FOIL applicant seeks to challenge an agency's refusal to confirm or deny the existence of records on the ground that the act of doing so would itself disclose protected information. Fifth, the evidence tendered here by the NYPD is not sufficient to meet its prima facie burden to justify its wholesale nonresponse or to overcome the objections raised by the petitioners. Although that evidence is presently insufficient, I would remit to Supreme Court to give the parties the opportunity to present evidence in line with the process and guidelines I suggest.

I.

I begin with FOIL's language. Within five business days of receiving a written request for records, an agency "[i] shall make such record available to the person requesting it, [ii] deny such request in writing or [iii] furnish a written acknowledgement of the receipt of such request and a statement of the approximate date . . . when such request will be granted or denied." (id. § 89 [3] [a]). The statutory language authorizing denial of a request does not require the agency to offer any reason for the denial at this stage. Thus, at this initial stage an agency is permitted merely to deny a request, without explanation – and certainly without any requirement to state whether such documents do or do not exist.

As a second step, any person whose request is denied may take an administrative appeal to the agency's director or her designee, who then has ten business days to provide the responsive records or "fully explain in writing to the person requesting the record the reasons for further denial" (id. § 89 [4] [a]). The statute does not state that the "full explanation" must identify any particular document's existence, or the existence of responsive documents at all. Thus, if the response to a request would itself reveal exempt information, the "full explanation" could state only that. For example, § 87(2)(h) exempts "examination questions or answers which are requested prior to the final administration of such questions." In anticipation of sitting for a police officer examination, I might lodge a FOIL request asking for all documents concerning any questions on the forthcoming test that relate to this court's DeBour factors. Confirming that such documents exist would tell me that I should study those factors; confirming that they do not exist would tell me not to

bother. I might serve hundreds of similar requests which, if answered, would give me a very good idea of the test's composition. A satisfactory "full response in writing" to my request would be that the request seeks to compromise the test, and without confirming or denying whether any such documents exist, if they did they would be exempt from disclosure. But if I asked the same questions for a test given in the 1970s, that response would be patently unsatisfactory.

As a third step, a person displeased with the result of the second step (or whose administrative appeal is not timely resolved) may commence an Article 78 petition in Supreme Court (id. § 89 [4] [b]). In that proceeding, the agency "shall have the burden of proving that such record falls within the provisions of" one of the exceptions contained in § 87 (2) (id.). That, then, brings us to the question in this case: what does the agency's burden entail when the agency asserts that the acknowledgement of the existence or nonexistence of documents would itself fall within an exception?

The statute is silent as to any requirements specifically pertaining to such an Article 78 challenge. Although FOIL's process requires agencies to explain why any records they withhold are be exempt from disclosure, no provision in the statute requires those agencies in possession of responsive but exempt documents to disclose the existence of those documents in every case. Instead, the statute contemplates a spectrum of increasingly circumscribed, and increasingly difficult to justify, responses. To be sure, FOIL's goal of extending public accountability "wherever and whenever feasible" requires agencies to disclose as much information as is not protected by an exemption (id. § 84); exemptions

are to be applied only to the relevant "records or portions thereof" and requests are to be "granted . . . in part" whenever possible. Thus, if an agency establishes a responsive document contains protected information, it will be "required to prepare a redacted version" (Data Tree, LLC v Romaine, 9 NY3d 454, 464 [2007]). If no sufficient redaction is possible, it will be permitted to instead provide a list "enumerating or describing . . . the documents withheld" (Matter of Rose v Albany County Dist. Attorney's Off., 111 AD3d 1123, 1126 [3d Dept 2013]; see West Harlem Bus. Grp. v Empire State Dev. Corp., 13 NY3d 882, 885 [2009] [calling "conclusory characterizations" "insufficient"]; Ciracle v 80 Pine St. Corp., 35 NY2d 113, 119 [1974] [requiring agencies, in the context of the common-law privilege for official information but with an eye toward the recently passed FOIL, to provide a "description of the material sought, the purpose for which it was gathered and other similar considerations" when invoking an exception]). By extension, if an agency establishes that enumeration would divulge protected information, it may acknowledge the existence of, but choose not to in any way describe, the withheld documents (see American Civil Liberties Union v C.I.A., 710 F3d 422, 433 [DC Cir 2013]). In the "rare case" (majority op. at 15) where an agency establishes that even acknowledging the existence of responsive documents would divulge information protected by any one of the FOIL exemptions, it may provide an evidentiary basis for its conclusion while refusing to admit or deny the existence of any requested documents.

II.

The majority's reliance on federal Glomar doctrine is misplaced. Yes, FOIL was structurally modeled on FOIA. However, as the dissent explains, the Glomar doctrine arises not from FOIA's law enforcement exemption, but from FOIA's exemption of documents "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy," which has no analog in FOIL. The Constitution arrogates national defense and foreign policy to the federal government; the NYPD is not searching for a lost Soviet submarine or worried about the foreign policy consequences thereof. Both the majority and dissent tar their FOIL analysis by referring to the NYPD's response as a "Glomar" response.

Glomar's peculiar history has had a profound effect on its logic. FOIA Exemptions 1 and 3, together with certain national security-related statutes, create a "near-blanket . . . exemption" for properly classified materials and CIA records (Minier v Cent. Intelligence Agency, 88 F3d 796, 801 [9th Cir 1996]). The exemptions' near-blanket nature opens the door to the federal judiciary's hands-off approach. The national security-related content of FOIA exceptions 1 and 3, coupled with a sense of the uniquely executive purview of national security, pushes judges through it: federal courts consistently reaffirm their "deferential posture" in Glomar cases (Larson v Dep't of State, 565 F3d 857, 865 [DC Cir 2009]). By way of example, the U.S. Court of Appeals for the D.C. Circuit believes that it is "in an extremely poor position to second-guess the predictive judgments made by the government's intelligence agencies regarding questions such as whether a country's

changed political climate has yet neutralized the risk of harm to national security posed by disclosing particular intelligence sources" (id.)

The federal courts' routine deference to Glomar responses "has been justified on both constitutional and prudential separation of powers grounds: Courts opine that protection of national security information is entrusted to the executive under Article II of the Constitution and that courts lack the competence to assess executive determinations to withhold national security information" (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 NYU L Rev 1381, 1398 [2010]). It has also been criticized for resting on "concerns about comparative competence [that] are overblown and are outweighed by the institutional conflict of interest that arises when the executive branch makes essentially unreviewed decisions to withhold its own records from disclosure" (id.)

Those foreign-policy insecurities have no place in New York State's excellent unified court system. Our government features neither a unitary executive tasked with the national defense nor an elaborate system of classified information to which courts routinely defer. Most CIA endeavors will never see the light of day, let alone that of a courthouse; the destiny of every successful NYPD investigation is to appear before a judge. Regardless of federal courts' competence to evaluate foreign countries' changing political climates, we are not similarly handicapped in judging the soundness of FOIL exemptions based on police, privacy, or other justifications. Our courts are fully capable of scrutinizing an

agency's "response on a case-by-case basis to ensure it is warranted under the particular circumstances presented" (majority op. at 16).

III.

Glomar aside, both the majority and the dissent come to what I view as unsound resolutions because they fail to consider two important propositions. First, the scope of a particular FOIL request affects the appropriateness of a response refusing to admit or deny the existence of documents. Second, an agency, in responding to a FOIL request, may not be able to make a single response that is appropriate for all the information sought by the request.

Consider two requests: (1) all documents the NYPD possesses concerning any investigation of me; (2) all documents the NYPD possesses concerning any female undercover officer present at the XYZ bar on the evening of February 27, 2018. FOIL requires a different agency response to these two requests, and the former requires far more proof than the latter to justify a refusal to admit or deny the existence of documents. In the case of the latter request, the request facially is to determine the identity of an undercover officer or the existence of an ongoing investigation, and no extrinsic proof should be required to justify the NYPD's refusal to admit or deny the existence of documents. The dissent's absolutist position would require the NYPD to respond that documents do (or do not), exist, which is neither required by FOIL nor responsible public policy.

On the other hand, the majority's treatment of Mr. Abdur-Rashid's request – which is very much like request (1) above – prompts the dissent's salvo at the expansive

implications of the majority's writing, allowing the NYPD to "claim the right to refuse to confirm or deny the existence of any record that even tangentially relates to any past, present, or future investigation of 'crime,' thereby avoiding its FOIL obligations in innumerable cases" (dissenting op. at 12).[1] If the NYPD has in its possession documents from its surveillance of Mr. Abdur-Rashid in 1993, when he attended the Parliament of World Religions in Chicago, the majority has exempted the NYPD from saying whether it has such documents.

Neither the majority nor the dissent acknowledges that, in the case of a broad request such as (1) above, the agency is not entitled to give a monolithic response, and cannot give any response without examining the documents in its possession, if any. That is, FOIL expressly states that agencies may grant or deny requests "in whole or in part", and a broad request likely calls for a differentiated response, based on the agency's examination of what, if anything, it possesses.

Here, as the dissent notes, the requests seek information about current investigations as well as past investigations. Those two differ in the proof required. As to pending investigations, an agency's refusal to admit or deny the existence of responsive records should require little, if any, proof, because the acknowledgement of the existence of an

[1] The majority, too, resorts to occasional hyperbole. It describes the logical conclusion of the petitioners' argument as the NYPD having to acknowledge the existence of an investigation involving a particular person "whether the FOIL request comes from the target, a newspaper, or some other member of the public" (majority op. at 8). The NYPD, however, demands a release before commencing a search for records that could implicate an individual's privacy and are being requested by the third party. The petitioners' requests are restricted to requests for information about themselves.

investigation while it is pending (or being contemplated) is clearly likely to "interfere with law enforcement investigations". However, absent some specific proof that would bring disclosure of the existence of a past investigation within a FOIL exception, documents related to closed matters do not presumptively interfere with law enforcement investigations. Although agnostic on the question, today's decision, if properly implemented, should allow the NYPD categorically to refuse to confirm or deny the existence of records only if those records "involve[] an ongoing criminal investigation" or were provided to it under an information-sharing agreement with federal agencies whose records are specifically exempted from disclosure (majority op. at 20). I discuss the application to the facts of this matter in part V.

IV.

I agree with the majority that "our existing FOIL paradigm contains important safeguards against misuse of the exemptions that are no less available in the rare instance when a Glomar-response is asserted" (majority op. at 22).

Chief among those safeguards is the parties', our lower courts', and the majority's recognition that an agency declining to confirm or deny the existence of responsive records must be held to the same standard expected of every agency that denies any part of a FOIL request.[2] To withhold responsive records, or any information about those records

[2] That standard is stricter than federal courts' "deferential posture" toward agency affidavits attempting to justify Glomar responses under FOIA Exemptions 1 and 3 (Larson, 565 F3d at 865). Although courts in those cases "must accord substantial weight to an

(including the fact of their existence or nonexistence), an agency must demonstrate that they, or the information, "fall[] squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" (Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 566 [1986]). Those "exemptions are to be narrowly interpreted so that the public is granted maximum access to the records of government" (Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 462 [2007]). For the same reason, those justifications must present "specific, persuasive evidence" and "cannot merely rest on a speculative conclusion that disclosure might potentially cause harm" (Markowitz v

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agency's affidavit", their relaxed scrutiny has nothing to do with the portable logic of a Glomar-like response (Wolf v C.I.A., 473 F3d 370, 374 [DC Cir 2007]). Instead, it is the result of a Congressional dictate specific to affidavits "'concerning the details of the classified status of the disputed record'" (Ray v Turner, 587 F2d 1187, 1194 [DC Cir 1978], quoting S Rep No 93–1200, 93d Cong., 2d Sess. 12 [1974], reprinted in 1974 USCCAN 6267, 6290). New York, as already noted, has no analog to the first FOIA exemption, no Congress, and no classification authority.

In any case, the lower federal standard is simply incompatible with our precedents (compare Larson, 565 F3d at 862 ["Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible'"] with Data Tree, 9 NY3d at 462 [an agency must meet its burden "in more than just a 'plausible fashion'"]; compare also Gardels v CIA., 689 F2d 1100, 1105 [DC Cir 1982] ["The test is not whether the court personally agrees in full with the CIA's evaluation of the danger—rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility"] with Markowitz, 11 NY3d at 51 [the court must find the agency's evidence "persuasive"]). The lower courts properly rejected its application here (see Matter of Abdur-Rashid v New York City Police Dep't, et al, 140 AD3d 419, 420-21 [1st Dept 2016] [holding the NYPD to FOIL cases' usual "error of law" standard under Article 78]; Matter of Abdur-Rashid v New York City Police Dep't, 45 Misc3d 888, 893 [Sup Ct, NY County 2014] [observing that the federal standard stems from a unique national security context and concluding that "(a)lthough federal cases note that a court must accord 'substantial weight' to the agency's affidavits, this court only looks to federal cases for guidance in interpreting the requirement and is not required to give the same substantial weight to the affidavits"]).

Serio, 11 NY3d 43, 50–51 [2008]). In other words, the NYPD must meet its burden "in more than just a 'plausible fashion'" (Data Tree, 9 NY3d at 462).

Another familiar safeguard is the expectation, shared by the majority, that courts unable to determine whether withheld documents fall entirely within the scope of the asserted exemption will "test the legitimacy of a claim of confidentiality" by ordering an "in camera review of sensitive or confidential materials" (majority op. at 21; see Matter of Gould v New York City Police Dep't, 89 NY2d 267, 275 [1996]).[3] "Supreme Court should decide" whether in camera review is necessary on the basis of an agency's submission, regardless of whether the petitioner raises the issue (New York Times Co. v City of New York Fire Dep't, 4 NY3d 477, 491 [2005]; see also Xerox Corp. v Town of Webster, 65 NY2d 131, 133 [1985]; Church of Scientology Int'l v US Dep't of Justice, 30 F3d 224, 233 [1st Cir 1994] ["The fact that the Church did not request in camera review in no way lessens

[3] I join the majority in rejecting our federal counterparts' reluctance to review in camera documents whose existence the agency wishes neither to confirm nor to deny (see Phillippi, 546 F2d at 1012 ["When the Agency's position is that it can neither confirm nor deny the existence of the requested records, there are no relevant documents for the court to examine other than the affidavits"]). That reluctance is not only at odds with our precedent, but also predicated on Glomar's unique context. Because federal courts have committed to policing, absent a showing of bad faith, only the formal logic of an agency's affidavit, they have less need to examine the documents, if any, underlying that affidavit. Furthermore, the blanket nature of the first and third FOIA exemptions makes in camera review both less relevant and considerably more time-consuming for the court. As most equally circumscribed responses under FOIL will be justified by the extremely specific way in which the requests are phrased, they are likely to involve more exercises of discretion and fewer responsive records through which the court, aided by a confidential index, can be expected to sift. This aspect of the Glomar doctrine has sustained particularly heavy criticism (Wessler, 85 NYU L Rev at 1409-1410 [calling "in camera review of any underlying records . . . an important first step toward reform of the Glomar response"]).

the government's burden to make an adequate showing . . . In other words, in camera review is a tool available to a court when the government's showing otherwise is inadequate to satisfy the burden of proving the exempt status of withheld documents. The Church had no obligation to request such a review"]). The more circumscribed the response, the more necessary the review: in the "rare case"—like this one—where no index of withheld documents can be provided, "it would seem proper that the material requested be examined by the court in camera" (Ciracle, 35 NY2d at 119).

A third and final familiar safeguard is the provision, recently augmented by the legislature, for attorney's fees to be awarded to petitioners who substantially prevail over an agency's effort to restrict the freedom of information (Public Officers Law § 89 [4] [c] [i]-[ii]). As I understand the majority's logic, agencies refusing to confirm or deny the existence of responsive records first establish an exemption applies to the contents of that record. Then, they rerun their analysis, under the same or another exemption, against the bare fact of the record's existence. Petitioners who prevail over that second iteration of the FOIL provision, even if they do not succeed in accessing the document itself, may be entitled to whatever attorney's fees are attributable to that portion of their effort.

In addition to those familiar safeguards, all parties in this case suggest—and the majority agrees—that further precautions should be adopted in FOIL cases where the agency neither confirms nor denies the existence of responsive records.

First, the "burden is on the agency to submit an affidavit explaining in as much detail as possible why the information protected by [the agency's response]–i.e., whether

the agency possesses responsive documents—logically falls within the claimed [FOIL] exemptions" (majority op. at 10).

Second, as the NYPD proposes, a petitioner should have the opportunity to test the affidavit by (a) "argu[ing] that the agency's claims are insufficient to show that acknowledging the existence of records implicates an exemption to disclosure" and (b) "producing competent evidence" that rebuts the agency's proffered justification for using a circumscribed response (Resp. Brief at 43-44). To "create as complete as public record as is possible", the petitioner "should be allowed to seek appropriate discovery" (Phillippi, 546 F2d at 1013).

Third, a petitioner should have the opportunity to challenge the asserted FOIL exemption by advancing "a claim of bad faith" (majority op. at 21). "[T]he mere allegation of bad faith should not undermine the sufficiency of agency submissions" (Minier v Cent. Intelligence Agency, 88 F3d 796, 803 [9th Cir 1996]). Should a court find that an agency's refusal to disclose information is motivated not by the spirit of the exemption but by some more invidious purpose, the primary remedy is "to review the agency affidavits with greater scrutiny" (id.).

Fourth, a petitioner should have the opportunity to establish an exemption to the exemption by demonstrating that the agency "has already revealed the records sought and for which it claims an exemption" (majority op. at 20). If so, that agency "cannot credibly support a Glomar-type response" and the court should "compel the disclosure of information over an agency's otherwise valid exemption claim" (id.; Fitzgibbon v CIA,

911 F2d 755, 765 [DC Cir 1990]). Although the longstanding test for whether information has been officially acknowledged by an agency appears quite narrow (see id.), more recent decisions have compelled disclosure when an agency, or another high-ranking public official, has revealed not the document itself but the information that would otherwise justify withholding the document (New York Times Co. v US Dep't of Justice, 756 F3d 100, 120-121 (2d Cir 2014); Am. Civil Liberties Union, 710 F3d 422, 241-245 [DC Cir 2013]). The world's few Glomar watchers would see the federal courts move still further in that direction (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, 698 [2012]; Wessler, 85 NYU L Rev at 1414).

Moreover, the federal official acknowledgement doctrine is instructive, but—even at its broadest—too narrow for FOIL. As with other concepts borrowed from Glomar cases, its birth "in the arena of intelligence and foreign relations" has stunted its growth (Fitzgibbon, 911 F2d at 765). In those arenas, "there can be a critical difference between official and unofficial disclosures" (id.; see Wilson v CIA, 586 F3d 171, 186 [2d Cir 2009] ["Foreign governments can often ignore unofficial disclosure of CIA activities that might be viewed as embarrassing or harmful to their interests, they cannot, however, so easily cast a blind eye on official disclosures made by the CIA itself"]; Afshar v Dep't of State, 702 F2d 1125, 1130–31 [DC Cir 1983] ["Unofficial leaks and public surmise can often be ignored by foreign governments that might perceive themselves to be harmed by disclosure of their cooperation with the CIA, but official acknowledgment may force a government

to retaliate"]). "In the world of international diplomacy, where face-saving may often be as important as substance, official confirmation . . . could have an adverse effect on our relations" with other countries (Phillippi, 655 F2d at 1333).

The NYPD, however, has no international diplomacy docket. Accordingly, the official acknowledgement doctrine should yield, here, to the broader public domain doctrine (see Chesapeake Bay Found., Inc. v U.S. Army Corps of Engineers, 722 FSupp2d 66, 72 n 3 [DDC 2010] [refusing to apply the open acknowledgement doctrine in a case involving law enforcement records]). "Under the public domain doctrine, FOIA-exempt information may not be withheld if it was previously disclosed and preserved in a permanent public record. The plaintiff bears the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." (id. at 72). If FOIL petitioners can establish that the existence of a document, or the information an agency seeks to protect by refusing to confirm the existence of a document, is already included in a public record, then agencies should have to disclose that information.

Together, these safeguards—as well as others that courts deem appropriate in discharging their obligations to adjudicate FOIL determinations challenged pursuant to Article 78—suffice to protect petitioners from overzealous assertions of an agencies' inability to confirm or deny the existence of response.[4]

[4] Although I have discussed the safeguards in isolation in the interest of analytical clarity, there is interplay between them. For instance, "[w]here there is evidence of bad faith on the part of the agency, in camera inspection is plainly necessary" (Carter v US Dep't of Commerce, 830 F2d 388, 393 [DC Cir 1987] [internal quotation marks omitted]).

V.

Here, the NYPD moved to dismiss petitioners' Article 78 proceeding because it alleged confirming or denying the existence of any records responsive to their requests would cause harms cognizable under FOIL's law enforcement and public safety exemptions (Public Officers Law § 87 [2] [e], [f]). In support of that contention, it offered a public affidavit from NYPD Chief of Intelligence Thomas Galati. Chief Galati's "22-page affidavit" consists of five pages describing his background and the organization of the NYPD's Intelligence Division, and another seven listing public accounts of apprehending and trying terrorists. The balance avers that "disclosure of whether responsive documents even exist necessarily would reveal whether Petitioner currently is or previously has been the subject of a counter-terrorism investigation." Chief Galati lists four consequences the NYPD seeks to avoid:

(1) "The knowledge that a person or group is the subject of a NYPD counter-terrorism investigation would allow that person or group to alter their behavior so as to avoid detection"

(2) "Conversely, the knowledge that a person or group is not a subject of investigation would allow such persons to more freely engage in illegal activity"

(3) "A person who knows he or she is under investigation might scrutinize his or her contacts more carefully and, in doing so, could discern the identity of an undercover police officer or confidential informant working on the case. Not only would this compromise the integrity and value of any information to be learned from such sources, but it could endanger the lives and safety of such sources"

(4) "Disclosure of whether a particular individual or group is the subject of investigation would allow those bent on unlawful activity to prepare a roadmap of investigatory operations, decisions, techniques and information

> that would enable every group to anticipate investigative tactics and activities, and undermine current and future investigations."

In opposing the motion to dismiss, the petitioners argued that Chief Galati's affidavit failed to establish a prima facie case for asserting such a severely circumscribed response. They also argued that, even had the case been established, it would have been defeated by the fact that the information the NYPD sought to protect was already a matter of public record, by the stricter scrutiny turned on agencies that assert FOIL exemptions in bad faith, and by in camera review.

A. The NYPD's Prima Facie Case

As discussed in part III, in response to a FOIL request seeking information about investigations, I would hold that the NYPD has the right to refuse to confirm or deny the existence of documents as to any pending investigation, because such a request facially interferes with a law enforcement investigation.[5] However, the requests here are not limited to present investigations, but include past ones as well. As to those, the NYPD has not carried its burden of articulating a particularized and specific justification for refusing to confirm or deny whether documents responsive to any of petitioners' 22 requests exist.

The first three harms it alleges are premised on the conjecture that individuals—presumably other than Mr. Hashmi and Mr. Abdur-Rashid, whom the record suggests are

[5] It is important to remember that the proper denial of a FOIL request, whether a refusal to state whether responsive documents exist or merely a refusal to furnish the documents, means only that the documents will not be publicly available to all – not that courts must refuse their disclosure if relevant to a civil lawsuit. Thus, the majority correctly identifies civil litigation as a further check on government overreach, independent of FOIL (majority op. at 19).

upstanding citizens—inclined to terrorism or organized crime will FOIL themselves, and then tailor the scope of their activities to either stymie investigators or exploit the discovery that they are not (or were not) under investigation. Chief Galati's affidavit, however, "does not state whether it is aware of any instance of this use of FOIL by terrorists" (Hashmi v New York City Police Dep't, 46 Misc3d 712, 721 [Sup Ct, NY County 2014]), nor does it provide any factual basis to conclude that terrorists have used similar information to tailor their activities. Absent such a statement, let alone the evidence thereof that our probing standard would require, it strains belief that terrorists are self-identifying themselves to the NYPD by filing regular FOIL requests.

Those three harms fail to justify the NYPD's refusal to confirm or deny the existence of past investigations. Contrary to the majority's insistence that the requests were "extremely specific" and related to "a discrete time period immediately preceding the request", many of them were unbounded in time and in type (majority op. at 16, 21). Petitioners requested, for instance, "[a]ll records related to the surveillance of Imam Talib W. Abdur-Rashid by NYPD", "[a]ll records related to the Mosque of Islamic Brotherhood . . . relied upon by the NYPD that led to any report being filed", and "[a]ll records related to any investigation of Samir Hashmi, between 2006-2012". Chief Galati's affidavit does not suggest that law enforcement purposes or the public safety would be compromised if the agency revealed that it had records from the 1960s pertaining to Mr. Abdur-Rashid or the mosque with which he is now affiliated (see Matter of Lesher v Hynes, 19 NY3d 57 [2012]), or to an investigation into noise complaints against Mr. Hashmi's college parties.

FOIL's demand that agencies provide in part what records or information they cannot provide in whole should have led the agency to disclose, or Supreme Court to require it to disclose, whether relevant records from a time or of a type that did not trigger the affidavit's concerns existed. The NYPD could readily have accompanied that admission with a statement that it would neither confirm nor deny the existence of any records related to ongoing terrorism investigations.

The fourth harm alleged in Chief Galati's affidavit is more substantial. Acknowledging the existence of records responsive to requests of the kind submitted by these petitioners could, in the aggregate, provide terrorists and other criminals or criminal organizations with a guide to the people and places, or the type of people and places, monitored by the NYPD.

That rationale, however, is subject to the same time and type restrictions as its companions. As to time, there is some point, which the NYPD should have specified or Supreme Court should have determined, prior to which information about the NYPD's historical capabilities, strategies, and operating tactics will cease to provide today's threats with relevant information. A map of NYPD activities around Rutgers may continue to reveal important general practices, or may be considerably less germane to a world in which the NYPD has substantially curtailed or abandoned its out-of-state activities. Given the constant improvements to and alterations in NYPD capabilities and strategies, as well as the significant changes made to the Intelligence Division in the wake of the 2013 mayoral election that separated the initial request for records from the hearing on the

motion to dismiss, Chief Galati's affidavit either failed to justify categorically refusing to acknowledge the existence of records pertaining to closed investigations or—equally fatally—must be taken to justify withholding such information permanently. As to type, whatever the counter-intelligence capacities of gangsters and terrorists, garden-variety criminals (and law-abiding citizens) are probably not piecing FOIL reports into a jigsaw puzzle depicting the anticipated movements of NYPD officers.

Put aside the deficiencies in Chief Galati's affidavit. Still, its purported justification goes to terrorism-related threats only, and the NYPD's FOIL response should at a minimum have read "We [have] [do not have] records of investigating or surveilling the petitioners on suspicions other than terrorism. As to whether terrorism-related records exist, we cannot say." Accordingly, I would reverse the Appellate Division's order granting the motion to dismiss and remand the case to Supreme Court, where the NYPD can augment Chief Galati's affidavit and the parties can hash out, on a request-by-request basis, to what extent an entirely circumscribed response is appropriate as to past investigations.

B. The Petitioners' Rebuttal Evidence

In addition to challenging the sufficiency of the NYPD's affidavit, petitioners invoked one other safeguard native to FOIL and two modeled on federal FOIA decisions.

As to the native safeguard, petitioners have steadfastly requested in camera review.[6] Here, although the NYPD could have refused to confirm or deny the existence of records relating to ongoing investigations on the strength of only a public affidavit, the doubts the petitioners raised about the propriety of withholding information about prior investigations should have required Supreme Court, absent a very different affidavit, to order in camera review of responsive documents, if any. In Abdur-Rashid, the court abused its discretion in impliedly deciding to forego that review. In Hashmi, uncontrovertibly, the court committed an error of law in concluding that in camera review, which it wished to undertake, was, by spurious analogy to the Glomar doctrine, unavailable.

In addition to requesting in camera review, petitioners alleged facts invoking two additional FOIL safeguards: the bad faith and official acknowledgment doctrines. The NYPD urges not only those safeguards' adoption but also their zealous enforcement; "Federal courts employing similar safeguards do not operate as a rubber stamp on agencies' use of the circumscribed response . . . [P]rocedural safeguards are far from a paper tiger

[6] Their Article 78 petitions, memoranda of law in opposition to the motion to dismiss, and their combined brief on appeal all request the court either direct the NYPD to release the records or order an in camera view. The NYPD understood petitioners to be asking the courts to base their decisions on the motions to dismiss on not only the public affidavit but also on an in camera review of responsive documents, if any, but argued that review was "inapposite and entirely premature" under the Glomar doctrine. In Hashmi, Supreme Court's decision and statements at oral argument on the motion for leave to appeal left little doubt that it would have evaluated the motion to dismiss in the light of an in camera review of the responsive documents, if any, had it not been already inclined to deny the petition on theoretical grounds and had it not thought in camera review precluded by analogy to the Glomar doctrine. Supreme Court in Abdur-Rashid, and the Appellative Division in the combined appeal, did not address the request.

and allow for meaningful judicial review" (NYPD AD Reply Brief, reprinted at A837). Because respondents are here on a motion to dismiss, it is our responsibility to accept all the facts claimed in the petitions as true, accord petitioners the benefit of every possible favorable inference, and determine only whether the facts as alleged make out any cognizable legal theory for defeating the protections of the FOIL exemptions (see Leon v Martinez, 84 NY2d 83, 87–88 [1994]). Under that standard, even had Chief Galati's affidavit made out a prima facie case for non-disclosure, the motion to dismiss should have been denied and the cases remitted to Supreme Court.

Turning first to the bad faith doctrine, petitioners allege several grounds for their assertion that the NYPD is refusing to confirm or deny the existence of responsive records not because that would cause a harm cognizable under a FOIL exemption, but because it wishes to conceal evidence of underlying illegality: an investigation and surveillance program premised on religious discrimination. The majority dismisses that argument by complaining that "other than general allegations arising from news reports, petitioners offered no evidence that the NYPD's response to these particular requests is a function of bad faith" (majority op. at 22). In so doing, it ignores the standard of review appropriate on a motion to dismiss. The AP's Pulitzer Prize-winning series of articles detailing the NYPD's questionable conduct and efforts to cover up that conduct satisfies the threshold showing required to allow petitioners to "seek appropriate discovery . . . to identify the procedures by which [the NYPD's] position was established" (Phillippi, 546 F2d at 1013). That showing is buttressed by the allegations that the NYPD, which took nearly eight

months to respond substantively to the petitioners' requests, was "purposefully delaying the process" by supplying sequential notices of delay and by throwing up unusual objections to the form of the requests, including a particularly obstructionist cavil regarding a typographical error in Mr. Abdur-Rashid's name.

Second, the petitioners alleged the NYPD has already officially acknowledged the information it hopes to conceal by refusing to confirm or deny the existence of responsive records. In a June 2012 deposition in a different case, Chief Galati acknowledged that "none of the visits conducted by the Zone Assessment Unit resulted in an investigation." Although that statement is followed by some discussion of what constitutes an investigation and whether the ZAU was designed to pursue them, it seems in tension with the NYPD's claim that it had not already denied having, for example, "records related to any investigation of Talib W. Abdur-Rashid in relation to his activities as Imam as the Mosque of Islamic Brotherhood." In addition, in Hashmi, it is ambiguous whether Supreme Court found nothing in "Mayor [d]e Blasio's well-publicized decision to disband the NYPD unit that had conducted the surveillance" that undermined the agency's ability to deny the existence of records or erroneously concluded, as the prior sentence of its opinion suggests, that the mayor was not the kind of senior executive branch official whose statements are "sufficient to effect waiver of a Glomar response" (Hashmi, 46 Misc3d at 723). It may be that "whatever protection" the records "might once have had has been lost by virtue of public statements at the highest levels" (New York Times Co. v United States Dep't of Justice, 756 F3d 100, 120-121).

Even if those disclosures do not satisfy the official acknowledgment doctrine, they, coupled with the information in the AP articles and in the leaked NYPD documents that accompanied those articles, may defeat the NYPD's refusal to confirm or deny the existence of certain responsive documents. Rather than grapple with the full scope of the disclosures, the NYPD fixates on the fact that the they emanate from the AP, rather than from its own officials. That fixation "confuses the act of waiver . . . with an agency's independent obligation to 'carry its burden'" of showing the mere disclosure of a document's existence would be protected (Florez v Cent. Intelligence Agency, 829 F3d 178, 186 [2d Cir 2016] [rejecting a "per se rule barring consideration of third party disclosures" and instead remanding "to allow the district court to weigh the facts in the first instance"]). A third party's disclosures "cannot waive the asserting agency's right to a Glomar response, but such disclosures may well shift the factual groundwork upon which a district court assesses the merits of such a response" (id.).

Several references in the existing record suggest that has happened in this case. To give but one example, the petitioners requested "[a]ll directives and/or memoranda sent or received by the NYPD related to surveillance of the Rutgers Muslim Student Associations from 2006-2012." The AP published a copy of the NYPD's weekly Muslim student association report responsive to that request. It is untenable for the NYPD to neither confirm nor deny the existence of that responsive record. Once the existence of one record in a category must be disclosed, it may be that the existence of other records in the same category are not protected. "The Glomar doctrine is in large measure a judicial construct,

an interpretation of . . . exemptions that flows from their purpose rather than their express language. In this case, the [agency] asked the courts to stretch that doctrine too far—to give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible. 'There comes a point where . . . Court[s] should not be ignorant as judges of what [they] know as men' and women" (American Civil Liberties Union, 710 F3d at 431, quoting Watts v Indiana, 338 US 49, 52 [1949]). The cases should be remitted to Supreme Court so the petitioners can augment the record with additional documents disclosed by the AP and so the court can consider the implications of the disclosure of those documents.

The majority's insistence on resolving these cases on the scant record before us privileges the expectation that FOIL suits will be resolved on the law over the reality that these FOIL suits turn, in part, on contested facts. It is at odds with our standard of review for motions to dismiss and inconsistent with the federal practice in Glomar cases of "first determin[ing] whether the district court had an adequate factual basis upon which to base its decision" (Minier, 88 F3d at 800). Whatever the majority's confidence in its conclusions, "[p]laintiffs are entitled to an opportunity to conduct their own litigation" (Phillippi, 546 F2d at 1015).

Even were the record not riddled with opportunities for further development, the appropriate remedy after resolving the thorny theoretical issue in this case of first impression would be to remit the petitions to Supreme Court for consideration unclouded by the overarching and overwhelming question of whether an agency may ever refuse to confirm or deny the existence of responsive records. Simply put, "we lack the benefit of

an evaluation of th[ese] issue[s] by the [lower] court[s]" (Florez, 429 F3d at 183-184, quoting Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F3d 73, 79 [2d Cir 2006] [Sotomayor, J.]; id. at 189 [collecting cases]). Whereas the U.S. Court of Appeals for the Second Circuit was able when first addressing the Glomar doctrine to "adopt the District Court's careful and well-reasoned analysis" as that court "in the interest of thoroughness . . . provided a detailed explanation and analysis of the affidavits submitted" (Wilner, 592 F3d 60, 71-73 [2009]), none of the three lower courts whose decisions are before us today reached the fact-specific issues the majority now decides.

* * *

For that and the foregoing reasons, I would remit these cases to Supreme Court to provide both parties with a fair opportunity to litigate their cases on the terms described herein.

Matter of Abdur-Rashid v New York City Police Department

No. 19

STEIN, J. (dissenting):

Whether, and to what extent, law enforcement agencies should be permitted, under the Freedom of Information Law (FOIL), to issue "Glomar" responses (see Phillippi v Central Intelligence Agency, 546 F2d 1009, 1012 [DC Cir 1976]) that refuse to confirm or deny the existence of requested records is a thorny question with strong competing public policy concerns on each side of the debate. However, this Court must look to New York's FOIL statute, as it is written and has been interpreted by our prior case law, to answer the question of whether Glomar responses are permissible and, if so, under what circumstances. In my view, authorization for such responses cannot be found in, or reconciled with, the language of FOIL, and the majority's determination to the contrary

sanctions a blanket exemption from disclosure for a vast amount of information and records. Granting such a broad judicial exemption is at odds with the express will of the legislature, as reflected in the statutory text.

It is beyond dispute that terrorism presents a significant threat that our law enforcement agencies must be equipped to combat. Undoubtedly, the concerns of respondent New York Police Department (NYPD) and various amici warrant legislative attention with regard to whether FOIL should be amended to allow agencies to refuse to acknowledge the existence of certain records when confronted with requests seeking targeted information regarding, among other things, "pending" or "ongoing" law enforcement investigations of particular persons or organizations (majority op, at 7, 8). Conversely, there are compelling policy arguments raised by petitioners and amici on the other side of the issue, pertaining to governmental transparency and accountability, and to a citizen's right to access information pursuant to FOIL. These concerns also merit legislative consideration. Because existing state law does not accommodate Glomar responses, weighing these competing interests is a matter for the legislature, not the Court. I, therefore, respectfully dissent.

I.

FOIL is founded upon the "'premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government'" (Matter of Madeiros v New York State Educ. Dept., 30 NY3d 67, 73 [2017], quoting Matter of Fink

v Lefkowitz, 47 NY2d 567, 571 [1979]). As explained in the FOIL "Legislative Declaration,"

> "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.
>
> As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.
>
> 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. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.
>
> The legislature therefore declares that government is the public's business and that 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"

(Public Officers Law § 84). Consistent with this legislative intent, we have recognized that "judicious use of the provisions of [FOIL] can be a remarkably effective device in exposing waste, negligence and abuses on the part of government; in short, 'to hold the governors accountable to the governed'" (Matter of Fink, 47 NY2d at 571, quoting NLRB v Robbins Tire & Rubber Co., 437 US 214, 242 [1978]).

To effectuate these goals, FOIL incorporates a presumption of access to records (see Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 462 [2007]). More specifically, Public

Officers Law § 87 (2) states that an agency "shall … make available for public inspection and copying all records" (emphasis added). This open access is qualified by the caveat that an agency "may deny access to records or portions thereof" which, "if disclosed," would cause certain specified harms (Public Officers Law § 87 [2]). The harms justifying an agency's denial of access include, as relevant here, disclosure of records and information that would constitute an unwarranted invasion of privacy or endanger the life or safety of any person, as well as disclosure of records compiled for law enforcement purposes, where such disclosure would interfere with law enforcement investigations or judicial proceedings, identify confidential sources or confidential information relating to a criminal investigation, or reveal criminal investigative techniques or procedures (see Public Officers Law § 87 [2] [b]; [2] [e] [i], [ii], [iv]; [2] [f]). The crux of the question before us on this appeal is whether FOIL authorizes a "Glomar" response – i.e., an agency response that neither confirms nor denies the existence of requested records but, rather, presupposes that, if the requested materials did exist, they would qualify for exemption under one of these provisions.

To that end, "our primary consideration 'is to ascertain and give effect to the intention of the Legislature'" as indicated through the statutory text (Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653, 660 [2006], quoting Riley v County of Broome, 95 NY2d 455, 463 [2000]). Further, we must "giv[e] effect to the plain meaning" of unambiguous language (Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583 [1998]), and "the failure of the Legislature to include a matter within the scope of an

act may be construed as an indication that its exclusion was intended" (Statutes Law § 74; see Matter of Corrigan v New York State Off. of Children & Family Servs., 28 NY3d 636, 642 [2017]; Commonwealth of N. Mariana Is. v Canadian Imperial Bank of Commerce, 21 NY3d 55, 61 [2013]).

As written, FOIL permits an agency to "deny access" to records or information where the requested "disclosure" meets certain criteria (Public Officers Law § 87 [2]), and regulations governing the FOIL process require that any "[d]enial of access shall be in writing stating the reason therefor" (21 NYCRR 1401.7 [b]; see Public Officers Law §§ 86 [3]; 89 [b] [iii]; 21 NYCRR 1401.1 [b]).[1] The FOIL statutes and regulations do not expressly allow an agency to refuse to acknowledge the existence of the record or information that is responsive to the FOIL request (see Public Officers Law §§ 87, 89; 21 NYCRR 1401.5). Moreover, such a refusal would be inconsistent with Public Officers Law § 89 (3) (a), which sets forth the permissible responses to a FOIL request: grant the request and "make such record available to the person requesting it"; deny the request for access; acknowledge the request and specify the date on which it will be granted or denied; or certify that the record cannot be found or is not in the agency's possession (see Matter of Beechwood Restorative Care Ctr. v Signor, 5 NY3d 435, 440-441 [2005] ["When faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested

[1] It is, therefore, inaccurate to state that, at the initial stage of a FOIL denial, an agency "is permitted merely to deny a request, without explanation" (partial dissenting op of Wilson, J., at 3).

document and that it could not be located after a diligent search"]; Comm on Open Govt FOIL-AO-18946 [2012] ["interpret[ing] the certification requirement to be necessary if requested, after the agency has indicated that there are no records"]).[2] These permitted responses do not contemplate an agency's refusal to acknowledge the existence or non-existence of information or a record that the agency possesses. The majority's novel interpretation of the heretofore generally accepted responses available to agencies responding to FOIL requests introduces new uncertainty into the FOIL process.

Pursuant to Public Officers Law § 89 (4) (b), "[i]n the event that access to any record is denied pursuant to the provisions of … section [87 (2)] of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision." We have long held that, to meet this burden, an agency must "'articulate particularized and specific justification'" for denying disclosure (Matter of Friedman v Rice, 30 NY3d 461, 475 [2017], quoting Matter of Fink, 47 NY2d at 571; see Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 566 [1986]), and we have made it clear that "blanket exemptions for particular types of documents are inimical to

[2] In analyzing the sufficiency of such a certification, this Court observed in Matter of Rattley v New York City Police Dept. that a certification is required "[w]hen an agency is unable to locate documents properly requested under FOIL" (96 NY2d 873, 875 [2001]). However, we have never held that a certification is required only when an agency grants a FOIL request and subsequently discovers that it has lost or does not possess the relevant records. Indeed, it would make little sense for the certification to apply only where a FOIL request has already been granted because an agency will not always be able to ascertain whether, and to what extent, a requested record is disclosable under FOIL without undertaking a review thereof.

FOIL's policy of open government" (Matter of Gould v New York City Police Dept., 89 NY2d 267, 275 [1996]).

We also have emphasized that FOIL "exemptions are to be narrowly interpreted so that the public is granted maximum access to the records of government" (Matter of Data Tree, LLC, 9 NY3d at 462; see Matter of Madeiros, 30 NY3d at 73). An agency "cannot merely rest on a speculative conclusion that disclosure might potentially cause harm" (Matter of Markowitz v Serio, 11 NY3d 43, 51 [2008]). Rather, "[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" (Matter of Fink, 47 NY2d at 571).

The NYPD attempts to circumvent the plain language of FOIL and these principles governing the use of FOIL exemptions – and, ultimately to avoid their burden of proving the applicability of such an exemption – by arguing that a Glomar response must be permissible because, in some limited contexts, a FOIL request may be framed in such a way that disclosure of the existence of the record, alone, causes the same harm as disclosure of the actual record sought. To be sure, "'the purpose of [FOIL] is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution'" (Matter of Madeiros, 30 NY3d at 77, quoting Matter of Fink, 47 NY2d at 572). For that reason, and consistent with the statutory exemption for such disclosures, we have held that FOIL does not require the disclosure of records when it would interfere with a "pending" investigation or prosecution

or one that is "plainly contemplated in the near future" (Matter of Madeiros, 30 NY3d at 77; see Public Officers Law § 87 [2] [e] [i]).

The flaw in the NYPD's position is that, in order for a Glomar response to be effective, it must be utilized whether or not the requested record exists and whether or not a FOIL exemption actually applies. In other words, to permit the Glomar response is to authorize the agency – here, the NYPD – to give the same response to individuals requesting information pertaining to its investigations regardless of whether the subject of the requested information is actively being investigated, was never investigated, or was investigated and cleared of any wrongdoing in the past. After all, the Glomar response would be the equivalent of an implicit concession that responsive records exist if invoked only when there is an ongoing investigation.

To illustrate how the Glomar response can protect information otherwise disclosable under FOIL, we need only point out that the Glomar response will inevitably cloak in secrecy records pertaining to closed investigations. Without additional factual explanation, the NYPD would lack a valid claim that revealing the nonexistence of records would cause any harm qualifying for FOIL exemption, such as interference with a law enforcement investigation, identification of a confidential source, or endangerment of life and safety (see Matter of Lesher v Hynes, 19 NY3d 57, 68 [2012]). In such instances, it is likely that a FOIL exemption would not apply and, typically, "[i]f the [agency] fails to prove that a statutory exemption applies, FOIL 'compels disclosure, not concealment'" (Matter of Data

Tree, LLC, 9 NY3d at 463, quoting Matter of Westchester Rockland Newspapers v Kimball, 50 NY2d 575, 580 [1980]). The Glomar doctrine, however, permits concealment.

To adopt the Glomar doctrine is, therefore, to endorse an impermissible blanket exemption that is not set forth in the statute and which applies without regard to whether the harm protected by the relevant FOIL exemption is actually implicated or whether it is merely speculative. Contrary to the majority's suggestion, such a result is not sanctioned by our holding in Matter of Lesher v Hynes (19 NY3d 57). In Lesher, we held that law enforcement agencies may determine that disclosure of particular kinds of investigatory records would generally interfere with pending investigations or proceedings and that an agency need not, in responding to every specific request, always articulate facts demonstrating that the particular pending investigation in question would be jeopardized by disclosure (see id. at 67). However, we "emphasize[d] that this does not mean that every document in a law enforcement agency's criminal case file is automatically exempt from disclosure simply because kept there" and that "[t]he agency must identify the generic kinds of documents for which the exemption is claimed" (id. at 67). In that case, the District Attorney met this burden by identifying the responsive documents as "crime summaries, timelines of when and where each crime occurred, witness names and personal information, and witness statements" (id. at 63). Here, in stark contrast, the NYPD has not indicated whether any responsive documents even exist, let alone the nature of such documents, to support their claimed exemptions as required by Lesher. Further, we made clear in Lesher that disclosure may be mandated where there is "no longer any pending or

potential law enforcement investigation" (id. at 68). The majority does not explain how the Glomar response can be applied in a manner consistent with this directive.

In view of our recognition that "the Legislature established a general policy of disclosure by enacting the Freedom of Information Law" (Matter of Fink, 47 NY2d at 571), this Court recently held that "we cannot undermine that policy by exempting a large category of information from FOIL in a manner inconsistent with the plain language of the statute" (Matter of Friedman, 30 NY3d at 478). Yet, the majority does just that by giving a law enforcement agency carte blanche to exempt, with precious little (if any) judicial oversight, a broad swathe of governmental records, without regard to whether the records requested – assuming they do exist – actually fall within the plain language of the exemption on which the Glomar response is purportedly based or whether the agency has made any factual showing to that effect.

Here, no "particularized and specific justification" was offered for the exemptions claimed (Matter of Fink, 47 NY2d at 571), as reflected by the fact that the NYPD submitted identical affidavits justifying use of the Glomar response to FOIL requests made by, and concerning investigations and surveillance of, two different individuals and the distinct organizations with which they are associated. In fact, while the majority repeatedly characterizes the requested records as relating to a "pending" or "ongoing" "covert" investigation (majority op, at 6, 8), those characterizations are based on both an unsupported assumption and an astonishingly expansive view of the relevant "investigation." To be clear, we do not know whether either of the petitioners here were

ever investigated or whether they are currently implicated in any ongoing or pending investigations, warranted or otherwise. We do not know if any past or current investigations of petitioners actually related to counterterrorism or whether any such investigations involved some other matter where disclosure would not implicate the same concerns posited by the NYPD. Frankly, we know very little beyond the undeniable reality that terrorism and the NYPD's counterterrorism efforts are of significant importance. However, this does not obviate the requirement that the agency comply with the mandate of the FOIL statute, as enacted by the legislature.[3]

[3] The majority asserts that petitioners do not "analyze the propriety of the exemptions as applied to their requests" (majority op, at 8 n 3). Considering that petitioners are unaware of what, if any, records exist and cannot discern when, if ever, they were investigated, it is unclear exactly what argument the petitioners could make, other than that which is currently presented, which is that the NYPD's Glomar response is an impermissible blanket exemption that has not been authorized by the legislature. Again, the majority's response to this is to assume, without foundation, that the only records that exist, if any, relate to a "pending covert investigation" (majority op, at 9 n 3) and are, therefore, "protected under one or more FOIL exemptions" (majority op, at 15 n 6).

Further, the majority completely fails to address the implications of Glomar responses in cases where records exist that are not protected by a statutory exemption but which, nevertheless, will be shielded from disclosure and judicial review by such a response. Instead, the majority avoids this problematic aspect of its position by suggesting that petitioners limited the dispute to records concerning terrorism-related investigations. This is inaccurate. Petitioners' FOIL requests are devoid of any reference to terrorism investigations or to news articles relating to the NYPD's covert domestic counterterrorism operations. Petitioners requested, among other things, "[a]ll records related to any investigation of [petitioners] between 2006-2012," "[a]ll records related to [the petitioners] relied upon by the NYPD that led to any report being filed," and "[a]ll records related to the surveillance of [the petitioners] by [the] NYPD" (emphasis added). Indeed, the majority's apparent claim that the Glomar response was given only because the investigations at issue related to terrorism is untenable considering that the NYPD denied petitioners' administrative appeals, in part, on the ground that petitioners failed to specifically identify the nature of the investigations to which the FOIL requests pertained. Moreover, while it is true that petitioners referenced a series of news articles concerning

Moreover, despite our repeated direction that, "[i]f the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material" (Matter of Gould, 89 NY2d at 275; see Matter of Fink, 47 NY2d at 571), the majority abdicates this oversight in adopting the Glomar doctrine in this case, resulting in our inability to determine whether a FOIL exemption squarely applies. Rather, the majority accepts, without any scrutiny, the NYPD's claim that the scope of the relevant "investigation" is "terrorism," and that revelation of any investigation – apparently of any person for any reason – could impede its counterterrorism efforts.[4] Viewed in this light, it follows that the NYPD could claim the right to refuse to confirm or deny the existence of any record that even tangentially

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NYPD surveillance of Muslim communities in their CPLR article 78 petitions – filed after the Glomar responses had been conveyed – at no point did they disavow or narrow their earlier requests for records pertaining to "any investigation." In addition, they maintained that the NYPD's response was an impermissible blanket exemption and that the NYPD should instead redact any records containing protected information. Despite the majority's repeated attempts to shift the blame to petitioners for the agency's noncompliant response here, it is unquestionably the NYPD's burden to demonstrate the applicability of an exemption to any records withheld – a showing that is woefully lacking.

[4] The majority's failure to require any in camera review also increases the likelihood that a Glomar response will violate the precept that an agency "cannot refuse to produce the whole record simply because some of it may be exempt from disclosure" and, instead, should make every effort to redact protected information while disclosing exempt information (Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v Mills, 18 NY3d 42, 46 [2011]). Further, contrary to the majority's likening of its creation of a blanket exemption to this Court's prior approval of in camera review, unlike the Glomar response, FOIL expressly authorizes judicial review of an agency's response to a FOIL request (see Public Officers Law § 89 [4] [b]), and our precedent clearly establishes the propriety of in camera review.

relates to any past, present, or future investigation of "crime," thereby avoiding its FOIL obligations in innumerable cases. It is the legislature's prerogative to decide whether a blanket exemption of this type is consistent with the objectives of FOIL.

II.

To support its position before us, the NYPD relies heavily on federal case law interpreting the Freedom of Information Act (FOIA) and adopting the Glomar doctrine. This reliance is understandable considering that the doctrine originated in federal courts, FOIL is modeled on FOIA, and we have often found FOIA case law to be instructive (see e.g. Matter of Lesher, 19 NY3d at 64; Matter of Madeiros, 30 NY3d at 76). Nevertheless, we have never before endorsed a blind adoption of a federal judicial doctrine in analyzing a matter of state statutory construction and, in my view, it is inappropriate to follow federal case law here in light of material distinctions between the two statutory schemes.

The Glomar doctrine originated in 1976 when the Central Intelligence Agency (CIA) responded to a request for information regarding the Hughes Glomar Explorer – an oceanic research vessel that was allegedly owned by the United States government and used to retrieve a sunken Soviet Union submarine during the Cold War – by refusing to either confirm or deny the existence of relevant records (see Phillippi, 546 F2d at 1012). The CIA asserted that the existence or nonexistence of the requested records was, itself, a classified fact since admitting their existence would implicitly reveal that the CIA had some affiliation with the Explorer. Accordingly, the CIA argued that the existence or nonexistence of records was exempt from disclosure pursuant to FOIA Exemptions (1) and

(3), which exempt "classified" information (see 5 USC § 552 [b] [1]) and certain additional information that is specifically exempted from disclosure by other statutes (see 5 USC § 552 [b] [3]), such as the National Security Act of 1947. As the majority recognizes, Glomar has since been adopted by other federal Circuits (see e.g. Taylor v National Sec. Agency, 618 Fed Appx 478, 482 [11th Cir 2015]; Wilner v National Sec. Agency, 592 F3d 60, 67-68 [2d Cir 2009], cert denied 562 US 828 [2010]; Bassiouni v Central Intelligence Agency, 392 F3d 244, 246 [7th Cir 2004], cert denied 545 US 1129 [2005]).

At its inception, the Glomar doctrine was not expressly authorized by the FOIA statute (see e.g. Shapiro v United States Dept. of Justice, 153 F Supp 3d 253, 275 [D DC 2016] [recognizing that the Glomar doctrine is a judicial "gloss" on FOIA's text]; American Civ. Liberties Union v Central Intelligence Agency, 710 F3d 422, 431 [DC Cir 2013] ["The Glomar doctrine is in large measure a judicial construct"]). Nevertheless, federal courts concluded that the doctrine did not directly conflict with the text of FOIA which, unlike FOIL, does not limit the agency's available responses but, rather, permits an agency to treat FOIA as "not apply[ing] to matters that are" delineated as exempt (5 USC § 552 [b] [emphasis added]). This language leaves substantially more room for judicial interpretation.

In those federal courts in which the Glomar doctrine has gained acceptance, it has been invoked almost exclusively in connection with FOIA Exemptions (1) and (3) (see 5 USC § 552 [b] [1]; [b] [3]) and, to a lesser extent, Exemption 7 (c) (see 5 USC § 552 [b] [7] [c] [pertaining to disclosures that would constitute an unwarranted invasion of personal

privacy]; see e.g. Cause of Action v Treasury Inspector Gen. for Tax Admin., 70 F Supp 3d 45, 55 [D DC 2014]). Notably, there is no counterpart in FOIL to the exemption for "classified" information under FOIA Exemptions (1) and (3), and the NYPD does not claim to have any state-authorized classification authority (see Public Officers Law § 87 [2]). Nor does the NYPD point to any other statutes through which the requested records "are specifically exempted from disclosure by state or federal statute" (Public Officers Law § 87 [2] [a]). Inasmuch as the federal cases relied on by the majority primarily concern FOIA Exemptions (1) and (3), they are inapposite for the reasons explained in Judge Wilson's partial dissent (see Hunt v Central Intelligence Agency, 981 F2d 1116 [9th Cir 1992]; Larson v Department of State, 565 F3d 857 [DC Cir 2009]; Gardels v Central Intelligence Agency, 689 F2d 1100 [DC Cir 1982]). [5] It merits comment that, in Hunt v Central

[5] To the extent the NYPD also relies on New Jersey Media Group Inc. v Bergen County Prosecutor's Office (447 NJ Super 182, 188, 146 A3d 656, 660 [NJ Super Ct App Div 2016]), such reliance is misplaced. In that case, a New Jersey appellate court interpreted the New Jersey Open Public Records Act (OPRA), to permit an agency to neither confirm nor deny the existence of records when the agency "(1) relies upon an exemption authorized by OPRA that would itself preclude the agency from acknowledging the existence of such documents and (2) presents a sufficient basis for the court to determine that the claimed exemption applies" (New Jersey Media Group, 447 NJ Super at 189). That court held that a Glomar-type response was authorized in limited circumstances by language in OPRA providing that the statute "shall not abrogate … [a] grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record" (NJ Stat Ann 47:1A-9). Under New Jersey law, "before OPRA was enacted, judicial decisions recognized the need to maintain 'a high degree of confidentiality' for records regarding a person who has not been arrested or charged" (New Jersey Media Group, 447 NJ Super at 203-204). Accordingly, the New Jersey court held that the mere existence of records pertaining to someone who had been investigated, but not charged or arrested, was exempt under the statutory provision

Intelligence Agency, quoted by the majority at length, the Ninth Circuit recognized that federal courts are, through the Glomar doctrine, "only a short step [from] exempting all CIA records from FOIA" and that this "result may well be contrary to what Congress intended" (981 F2d at 1120 [internal quotation marks omitted]). The majority overlooks this cautionary warning and ignores the reality that the Glomar response operates as a blanket exemption.

Cases applying the Glomar doctrine to the law enforcement exemptions in FOIA – the federal analogues to the exemptions on which the NYPD principally rely here – are scarce.[6] This is likely because, ten years after the judicial formulation of the Glomar doctrine, Congress enacted 5 USC § 552 (c) (see Pub L No. 99-570, §§ 1801-04, 100 Stat. 3207-48 to -50), which sets forth exclusions that specifically authorize agencies to "treat the records as not subject to the requirements of" FOIA. The section 552 (c) exclusions apply where a FOIA request involves access to records: (1) compiled for investigations of criminal violations of the law, where disclosure can reasonably be expected to interfere

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exempting materials that were confidential under prior case law. FOIL, however, does not contain a similar provision.

[6] The majority concedes this point, but claims – without any basis in record or fact – that FOIA requests analogous to those presented here are "rare" (majority op, at 11). Moreover, while there certainly exists a federal case or two applying the Glomar doctrine to the FOIA law enforcement exemption (see Vazquez v United States Dept of Justice (887 F Supp 2d 114 [DC Cir 2013]), we note that the United States Supreme Court has never addressed the propriety of the Glomar doctrine, despite the majority's suggestion otherwise (see States Dept of Justice v Reporters Committee for Freedom of Press, 489 US 749 [1989] [addressing only whether the actual contents of a rap sheet are exempt under FOIA exemption 7 (c)]).

with enforcement proceedings and "there is reason to believe that … the subject of the investigation or proceeding is not aware of its pendency"; (2) "maintained by a criminal law enforcement agency under an informant's name or personal identifier [that] are requested by a third party according to the informant's name or personal identifier, … unless the informant's status as an informant has been officially confirmed"; and (3) "maintained by the [FBI] pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information" (5 USC § 552 [c] [1]-[3]). Thus, in enacting subdivision 552 (c), Congress codified the use of a Glomar-type response for law enforcement investigations, including those that do not necessarily involve "classified" information (see Benavides v Drug Enforcement Admin., 968 F2d 1243, 1246 [DC Cir 1992] [concluding "from the text and legislative history that Congress intended [§ 552 (c)] to provide express legislative authorization for a Glomar response"], op mod on reh 976 F2d 751 [DC Cir 1992]; see Light v Department of Justice, 968 F Supp 2d 11, 30 [D DC 2013]; see e.g. Pickard v Department of Justice, 653 F3d 782, 786 [9th Cir 2011] [analyzing Glomar response under 5 USC § 552 (c)]). Indeed, the enactment of section 552 (c) was largely prompted by the FBI's recognition that, while the CIA could utilize Exemptions (1) and (3) to issue a Glomar response, "using such a response to protect 'sensitive, ongoing criminal investigations' would not be 'in full compliance with the letter and spirit of the FOIA'" (American Civil Liberties Union of Mich. v Federal Bureau of Investigation, 734 F3d 460, 469 [6th Cir 2013], quoting

Hearings on the Freedom of Information Reform Act Before a Subcomm. of the H. Comm. On Gov't Operations, 98th Cong. 906-910 [Aug 9, 1984]).

Although years have passed since the proliferation of the Glomar doctrine under federal case law, and decades have gone by since congressional enactment of section 552 (c) to define the narrow circumstances in which the Glomar doctrine should be applied to law enforcement investigations, our state legislature has not authorized the Glomar response. This is so despite numerous other amendments to FOIL. Abiding by the principle that "courts are not to legislate under the guise of interpretation" or by reading into a statute an exception that does not exist," it is not our place to do so now (People v Finnegan, 85 NY2d 53, 58 [1995], cert denied 516 US 919 [1995]).

III.

The majority repeatedly asserts that permissible use of the Glomar doctrine will be "rare" and "unusual" (majority op, at 16). However, application of the doctrine under the circumstances presented here – despite the absence of in camera review to determine whether any of the exemptions set forth in FOIL actually apply and by defining the relevant investigation at the macro level of "terrorism" – casts doubt on whether that will, or indeed can ever be, the reality. While complete rejection of the doctrine may have concerning implications of its own, even federal courts have recognized that "[t]he 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" (American

Civ. Liberties Union v Department of Defense, 389 F Supp 2d 547, 561 [SD NY 2005]). Adoption of the Glomar doctrine without legislative guidance in the statutory text, and with insufficient procedural safeguards, is bound to unduly "constrict[] the broad access to which the public is entitled under the law" (Matter of Friedman, 30 NY3d at 477).

In my view, the analyses of the majority and the partial dissent tread too closely to a weighing of policy arguments relating to the wisdom of the respective parties' perspectives with regard to society's interests in government transparency during dangerous times. These difficult choices are for the legislature, not for this Court to make under the guise of statutory interpretation. Ultimately, our task is to read and give effect to the statute "as it is written by the [l]egislature, not as the court may think it should or would have been written if the [l]egislature had envisaged all the problems and complications which might arise" (People v Tychanski, 78 NY2d 909, 911 [1991] [internal quotation marks and citations omitted]).

Accordingly, I dissent.

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Order affirmed, with costs. Opinion by Chief Judge DiFiore. Judges Fahey, Garcia and Feinman concur. Judge Wilson dissents in part in an opinion. Judge Stein dissents in an opinion in which Judge Rivera concurs.

Decided March 29, 2018