New York Supreme Court

Appellate Division—First Department

Index No. 13/101559

TALIB W. ABDUR-RASHID

Petitioner-Appellant,

– against –

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

Defendants-Respondents.

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 20 MEDIA ORGANIZATIONS* IN SUPPORT OF APPELLANT

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IDENTITY OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press

Advance Publications, Inc.

American Society of News Editors

AOL-Huffington Post

Association of Alternative Newsmedia

Association of American Publishers, Inc.

Bloomberg L.P.

Buzzfeed

Daily News, LP

The E.W. Scripps Company

First Look Media, Inc.

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Investigative Reporting Workshop at American University

The National Press Club

National Press Photographers Association

The New York Times Company

North Jersey Media Group Inc.

Online News Association

The Seattle Times Company

Society for Professional Journalists

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Reporters Committee for Freedom of the Press and 17 news media organizations. *Amici* are described in more detail in Appendix A.

As representatives and members of the news media, *amici* frequently rely on state and federal freedom of information laws, including New York's Freedom of Information Law ("FOIL"), to gather information about the government and report on matters of vital public concern. *Amici* thus have a strong interest in ensuring that such laws are interpreted by courts in a manner that facilitates public access to government records and assures government accountability.

The Supreme Court's decision below, authorizing a municipal agency to refuse to either confirm or deny whether public records exist in response to a FOIL request, is not only contrary to the express language of FOIL, it amounts to a significant revision of that law that risks jeopardizing its ability to serve as an effective tool for public oversight of state and local government. Because the interests of the news media and the public will be harmed should this Court uphold the lower court's decision allowing the New York City Police Department to issue a so-called "Glomar" response to a FOIL request, *amici* write separately to urge the Court to reverse.

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[1] All parties to the appeal have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

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

At the federal level, as well as in every state and the District of Columbia, freedom of information laws like FOIL exist to facilitate public access to government information and ensure public oversight of government agencies and officials. *See, e.g.*, FOIL § 84 ("a free society is maintained . . . when the public is aware of governmental actions"). Such laws generally require a government agency in receipt of a request for public records to respond in one of three ways: (1) to produce the requested records, (2) if a specific exemption applies, to withhold the requested records or the portions thereof that are exempt from disclosure under applicable law, or (3) to inform the requester if it does not have responsive records.

In this case, the New York City Police Department ("NYPD") adopted a fourth approach not found in any provision of FOIL. It issued what is known at the federal level as a "Glomar" response, refusing to either confirm or deny the existence of requested records. A Glomar-type response, however, has never been

authorized by the language of FOIL, or any other state public records statute. Nor has it ever been recognized by any court to be a permissible response to a request for public records under state law. The Glomar doctrine, which is a creature of federal decisional law, and was developed to address uniquely federal concerns, has never been a feature of the public records law of New York or any other state.

Judicial incorporation of the Glomar doctrine into FOIL would work a profound change to this State's statutory open records regime that was not contemplated, let alone adopted, by the State Legislature. Indeed, to understand just how substantial a change it would be, one need only look to the impact that the Glomar doctrine has had at the federal level. The Glomar doctrine was created by federal courts at the height of the Cold War to protect the most sensitive of national security activities from being revealed through records requests made under the federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). Since then, use of the Glomar response has broadly expanded, including into areas that could not have been imagined by the federal court that first authorized it. The Glomar doctrine has crippled the efficacy of FOIA in a wide range of areas it was never intended to apply to, and it has had a marked negative effect on the ability of the news media and the public to monitor federal government activity. This experience at the federal level counsels strongly against insertion of the Glomar doctrine into FOIL, particularly without any legislative input. Such a significant

amendment to an existing law that, for decades, has played a vital role in keeping the public informed about their government—if it is to be made at all—should only be made through the legislative process.

Members of the news media routinely rely on FOIL in order to gather news and information about the government, including law enforcement agencies like the NYPD, for the benefit of the public. Indeed, the NYPD—the largest municipal police force in the United States—is already a notoriously opaque agency with a history of failing to comply with its obligations under FOIL. *See* James Barron, *Times Sues City Police, Saying Information Has Been Illegally Withheld*, N.Y. Times (Dec. 21, 2010), http://nyti.ms/1g1rhyM ("The Times said the [NYPD's] handling of the requests reflected a pattern and practice by which the police avoided providing material that the State Freedom of Information Law said must be released."); *see also* CJ Ciarmella, *Secrets of the NYPD*, Salon.com (May 8, 2013), http://perma.cc/27KH-9TPN (reporting that the NYPD routinely ignores a third of all FOIL requests it receives). To permit state and local agencies like the NYPD to issue Glomar responses would only make it more difficult for the press to utilize FOIL as a tool to keep citizens informed about the activities of their government, including their law enforcement agencies. *See Hashmi v. N.Y.C. Police Dep't*, 46 Misc.3d 712, 722 (Sup. Ct. N.Y. Cnty. 2014) ("The insertion of

the Glomar doctrine into FOIL would build an impregnable wall against disclosure of any information concerning the NYPD's anti-terrorism activities.").

"The premise of FOIL is that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." *Newsday, Inc. v. State DOT*, 5 N.Y.3d 84, 88 (N.Y. 2005) (citations and quotations omitted). This Court should ensure that FOIL continues to fulfill that purpose and, for the reasons set forth herein and in Appellant's brief, reverse.

ARGUMENT

I. Neither New York, nor any other state, has incorporated the federal Glomar doctrine into its public records law.

A. The Glomar doctrine is incompatible with the language of FOIL.

The federal FOIA establishes a limited number of ways that a federal government agency may respond to a public records request. Specifically, an agency must grant the request, deny the request on the basis of specific exemptions that allow the agency to withhold the requested records, or indicate that no records responsive to the request exist. *See* 5 U.S.C. § 552. Since 1975, federal agencies have also used a fourth type of response, known as the "Glomar" response, whereby they refuse to confirm or deny whether they have responsive records. *See Phillippi v. Central Intelligence Agency*, 546 F.2d 1009 (D.C. Cir. 1976). The rationale for permitting use of the Glomar response, as one court has stated, is that

> [i]n certain cases, merely acknowledging the existence of responsive records would itself cause harm cognizable under [a] FOIA exception. In that event, an agency can issue a Glomar response, refusing to confirm or deny its possession of responsive documents.

People for the Ethical Treatment of Animals v. National Institutes of Health, 745 F.3d 535, 540 (D.C. Cir. 2014) (internal citations and quotations omitted).

In *Phillippi*, the D.C. Circuit allowed the CIA to "neither confirm nor deny" the existence of records related to the Hughes Glomar Explorer, a ship that was part of a covert operation to recover a nuclear Soviet submarine. *Phillippi*, 655 F.2d at 1013; *see also* Norman Polmar & Michael White, *Project Azoran: the CIA and the Raising of the K-129* (2012). The operation was designed to "recover the missiles, codes, and communications equipment on board for analysis by United States military and intelligence experts." *Phillippi*, 655 F.2d at 1327. Since that time, however, use of the Glomar response has spread, and it has become "a staple of evasion" for federal agencies who wish to avoid public accountability. Paul H.B. Shin, *The CIA's Secret History of the Phrase 'Can Neither Confirm Nor Deny'*, ABC News (Jun. 6, 2014), http://perma.cc/7Z65-HMNE.

Despite decades-long use of the Glomar response at the federal level, *amici* are not aware of *any* state legislature that has authorized use of a Glomar-like response to a request for public records made pursuant to a state public records law. The absence of such legislation in New York, or in any other state, is telling. Given the fact that federal government agencies have been using this type of

response for almost 40 years, state legislatures have had ample opportunity to incorporate it into state public records laws. That state legislatures have chosen not to do so indicates a prevailing view that adoption of the Glomar doctrine at the state level is either unnecessary or unwise, or both. And, given the problematic impact of the Glomar doctrine on the federal FOIA, as discussed in more detail below, that view is well supported.

If the State Legislature had intended to give state and local agencies in New York the authority to issue a Glomar-like response under FOIL, it would have enacted legislation that did so expressly. Instead, it did the opposite. FOIL expressly *prohibits* evasive, Glomar-like responses to public records requests by making it a violation of the law for any person to willfully conceal a public record with the intent to prevent public inspection. *See* FOIL § 89(8) ("Any person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation."); *see also* FOIL § 84 ("Access to [government] information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality."). For that reason alone, this Court should reverse.[2]

[2] This clear legislative directive in FOIL has no analogous provision in the federal FOIA. *Compare id. with* 5 U.S.C. § 552. Thus, unlike the Supreme Court below, the D.C. Circuit in *Phillippi* did not authorize a response that was expressly prohibited by the language of the statute when it authorized the CIA to issue a Glomar response to a FOIA request.

B. No other state court has authorized use of a Glomar-like response to a request for public records under state law.

Amici have identified only three cases involving a Glomar-like response to requests for records made under state law. In two of those cases the state trial courts did not directly address—and thus did not approve of—the practice. In the third case, decided in New York Supreme Court, application of the Glomar doctrine to FOIL was expressly rejected.

In *DiMartino v. Pennsylvania State Police*, No. 340 C.D. 2011, 2011 WL 10841570 (Pa. Commw. Ct. Sept. 19, 2011), the Pennsylvania State Police cited several specific exemptions when it denied a request for information sought under the state's Right-To-Know Law, but added that with regard to certain police records it could "neither confirm, nor deny the existence of such records without risk of compromising investigations and imperiling individuals." *Id.* at *2. The trial court in *DiMartino* did not reach the issue of whether this Glomar-like response was permissible. The second case, *North Jersey Media Group, Inc. v. Bergen County Prosecutor's Office*, 2013 WL 6122922 (N.J. Sup. Ct. Law Div. Nov. 15, 2013), involved a request by a reporter under New Jersey's Open Public Records Act for police records related to a local pastor. The prosecutor's office responded to the request by stating that it would "neither confirm nor deny whether an individual who has neither been charged nor arrested is, or has been, the subject of an investigation." *Id.* at *4. While the New Jersey trial court in that case noted

the extraordinary nature of the response, it did not explicitly address its legality under New Jersey law. Instead, assuming the records existed, it concluded that they need not be disclosed pursuant to certain specific exemptions under New Jersey's Open Public Records Act. *Id.* at *34–35; 40–41. An appeal is currently pending.

In the third case, a companion to the one before this Court, the Supreme Court directly considered and explicitly rejected application of the Glomar doctrine to FOIL, reasoning persuasively that such a significant change—if it is to be made at all—should be left to the legislative branch. In *Hashmi v. N.Y.C. Police Dep't*, 46 Misc.3d 712 (Sup. Ct. N.Y. Cnty. 2014), a Muslim student at Rutgers University sought records from the NYPD related to its alleged surveillance and investigation of him and a Muslim student group. *Id.* at 713. The NYPD responded, as it did in this case, by refusing to state whether or not it had responsive records. *Id.* Unlike this case, however, in *Hashmi* the court squarely rejected the "NYPD's proposal to engraft the Glomar Doctrine into FOIL . . . ." *Id.* at 720.

In its well-reasoned opinion, the court in *Hashmi* explained that application of the Glomar doctrine to the public records laws of New York and other states was inappropriate, citing, among other things, statutory features of FOIA that differ from FOIL, and reflect fundamental differences between the responsibilities

of the federal government and state governments. For example, as the *Hashmi* court noted, "the vast majority of Glomar cases . . . [are] tethered to FOIA exemptions 1 and 3. FOIA exemption 1 protects 'classified documents' designated by 'Executive order.'" *Id.* at 723. "Municipal governance does not include an analogous category of documents." *Id.* Similarly, there is no New York law that designates the NYPD as an intelligence agency, unlike the CIA and FOIA's Exemption 3. *Id.* Finally, while there is an exemption under both FOIL and FOIA applicable to law enforcement records, as the court in *Hashmi* explained, application of the Glomar doctrine to that exemption under federal law has been shaped by the federal government's unique and "preeminent role in national defense [and] foreign policy," a role not shared by the NYPD. *Id.* at 724 (citing 5 U.S.C. § 552(b)(1)) (quotations omitted).

Notably, the Supreme Court's decision in *Hashmi* also highlights the lack of any demonstrated need for New York's state and local agencies to invoke the Glomar doctrine:

> [T]here is nothing in the record before the court that indicates the NYPD's work has been compromised by its inability to assert a Glomar response. To the contrary, case law demonstrates that the NYPD has been able to protect sensitive information very well within the existing procedures that FOIL currently provides.

Id. at 724 (citations omitted).

In sum, New York would be an extreme outlier if its courts were to append the Glomar doctrine to FOIL, and, for the reasons articulated by the Supreme Court in *Hashmi*, this Court should reject any invitation to do so. If the NYPD or other state and local agencies believe that FOIL's current exemptions and procedures are insufficient to shield sensitive law enforcement records from disclosure, and that they need the ability to issue Glomar-like responses to FOIL requests, they should address those concerns to the State Legislature, not to the courts.

II. Adoption of the Glomar doctrine by New York courts will fundamentally alter FOIL and improperly circumvent the legislative process.

A. The impact that the Glomar doctrine has had at the federal level is ample reason for the State Legislature to reject it.

As the Supreme Court in *Hashmi* correctly concluded, inserting the Glomar doctrine into FOIL would work a "profound change to a statutory scheme that has been finely calibrated by the legislature . . . ." *Id.* at 722. Decades of experience with the Glomar doctrine at the federal level—and the deleterious effects it has had on the federal FOIA—only underscore the significance of that change, and highlight precisely why "the decision to adopt the Glomar doctrine is one better left to the State Legislature, not to the Judiciary." *Id.*

Widespread invocation of the Glomar doctrine by agencies throughout the federal government, particularly in recent years, has had a marked negative impact on the ability of the press and the public to access government information under

the federal FOIA. "The Glomar response, as it stands now, allows the government to publicize its successes, [and] to influence policy [. . . ,] all while also enjoying near-impenetrable protection from the FOIA." 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, 700 (2012). Avoiding the problems attributable to use of the Glomar response under FOIA, which are discussed in more detail below, is a sound reason for the State Legislature to decline to incorporate any aspect of the Glomar doctrine into FOIL. At the very least, those problems suggest that the State Legislature would not wish to adopt fully the federal Glomar model, without modification, or without careful consideration of the full scope of its potential impact. *See Hashmi*, 46 Misc.3d at 723 (noting that "[u]nlike a court, the legislature is not limited to the record presented by parties to a lawsuit").

As the Supreme Court in *Hashmi* correctly stated, "the Glomar doctrine has been shaped by more than thirty years of judicial precedent. It may be that the State Legislature would not choose to adopt wholesale that body of law." *Id.* at 723 Indeed, in light of the numerous problems associated with use of the Glomar response at the federal level, it seems almost certain that the State Legislature would choose to "strike a different balance." *Id.*

B. Overuse of the Glomar response—coupled with over-classification—has led to pervasive secrecy at the federal level.

Classification of records and information at the federal level has become "rampant" in the last few decades, damaging both government operations and democratic governance. *See* Elizabeth Goitein and David M. Shapiro, *Reducing Overclassification Through Accountability*, Brennan Center for Justice (2011), http://perma.cc/43J6-JSRM. This drive to keep vast amounts of information secret, according to commenters, threatens to overtake the "singularly American" commitment to open government. *See* Daniel Patrick Moynihan, *Secrecy* 227 (1998) (quoted in *ACLU v. Dep't of Defense*, 389 F. Supp. 2d 547, 562 (S.D.N.Y. 2005)).

Over-classification often works hand in hand with the Glomar doctrine to keep information about federal government activities from the public. As one federal district court put it:

> The danger of Glomar responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods. [. . .] The practice of secrecy, to compartmentalize knowledge to those having a clear need to know, makes it difficult to hold executives accountable and compromises the basics of a free and open democratic society.

ACLU v. Dep't of Defense, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005).

There is good reason to think that New York state and local agencies could fall into a similar secrecy trap if use of the Glomar doctrine is judicially approved,

particularly agencies like the NYPD that have already demonstrated an "unfortunate tendency" toward excessive secrecy that has made public oversight of their activities difficult. *Id.* For example, despite the fact that municipal governments do not have the authority to classify documents, *Hashmi*, 998 N.Y.S.2d at 604, the NYPD maintains an extensive system whereby it labels some internal documents "Secret." Matt Sledge, *NYPD 'Secret' Classification For Documents 'Means Diddly' In Eyes of Legal Experts*, The Huffington Post (Sep. 16, 2013), http://perma.cc/TE4V-HVGE. New York open government advocates have already expressed concerns that this "Secret" designation will serve as an "internal administrative obstacle to the NYPD releasing documents under [FOIL]." *Id.* Similarly, another troubling feature of this trend toward secrecy at the federal level that has already shown signs of seeping into New York is the so-called "mosaic theory," which "posits that '[e]ven disclosure of what appears to be the most innocuous information" may pose "a threat to national security . . . because it might permit our adversaries to piece together sensitive information.'" Wessler, 85 N.Y.U. L. Rev. at 1397. The NYPD has already cited the "mosaic theory" as a basis for denying FOIL requests for financial information relating to its Zone Assessment Unit, which until recently surveilled local Muslim communities. *See* Matt Sledge, *NYPD Cites Mosaic Theory, Favored by FBI and NSA, To Deny Access to Budget Records*, The Huffington Post (Dec. 30, 2013),

http://perma.cc/LCF3-PJRU; Matt Apuzzo & Joseph Goldstein, *New York Drops Unit That Spied on Muslims*, N.Y. Times (Apr. 15, 2014), http://nyti.ms/1evdnCO.[3] Permitting the NYPD and other agencies to issue Glomar-like responses to FOIL requests is likely to only intensify what is already a growing and problematic trend toward secrecy at all levels of government.

While a federal agency's issuance of a Glomar response may be warranted in some circumstances, executive branch agencies have expanded its use to the point of absurdity—a risk that New York could also face if the Glomar doctrine were to be inserted wholesale into FOIL. Federal agencies far removed from the national security concerns that gave rise to the Glomar doctrine have seized upon the opportunity to "neither confirm nor deny" the existence of public records requested under FOIA. In 2002, for example, the Securities and Exchange Commission alone issued 99 Glomar responses. *Securities and Exchange Commission Freedom of Information Act Annual Report for the Fiscal Year Ending September 30, 2003*, http://perma.cc/7WEZ-JN33 (last accessed Jun. 17, 2015). Indeed, recently, the Internal Revenue Service and even the U.S. Postal

[3] The NYPD's development of a surveillance program secretly targeting American Muslims has been widely reported. *See* Matt Apuzzo & Adam Goldman, *With CIA help, NYPD moves covertly in Muslim areas*, The Associated Press (Aug. 23, 2011), http://perma.cc/TQP9-QWBW. *See also* Charlie Savage, *C.I.A. Report Finds Concern With Ties to New York Police*, N.Y. Times (Jun. 26, 2013), http://nyti.ms/10WOAAB. According to the Associated Press, NYPD officials say the make no apologies for the surveillance, but admit they've been "careful to keep information about some programs out of court, where a judge might take a different view. The NYPD considers even basic details, such as the intelligence division's organization chart, to be too sensitive to reveal in court." Apuzzo & Goldman, *supra.*

Service have taken to issuing Glomar responses. Alex Richardson & Joshua Eaton, *Postal Service and the IRS join the CIA in handing out GLOMAR denials*, MuckRock (Mar. 17, 2015), https://perma.cc/4RBN-B26K. And, in addition to invoking the Glomar doctrine under Exemptions 1 and 3, which address national security concerns, agencies have used Glomar responses to address purported privacy concerns under Exemptions 6 and 7(C), Nathan Freed Wessler, *"[We] Can Neither Confirm nor Deny the Existence or Nonexistence of Records Responsive to Your Request": Reforming the Glomar Response Under FOIA*," 85 N.Y.U. L. Rev. 1381, 1389 (2010), and to answer requests for information about employee wrongdoing. *See* John Y. Gotanda, *Glomar Denials Under FOIA: A Problematic Privilege and a Proposed Alternative Procedure of Review*, 56 U. Pitt. L. Rev. 165, 166 (1994).

The sheer number of Glomar responses is also on a steady rise at the federal level. From 1976, when *Phillippi* was decided, to 2009, federal courts issued approximately 80 decisions involving a Glomar response—60 of which were decided after September 11, 2001. Amicus Curiae Brief of Nat'l Sec. Archive in Support of Appellants to Vacate and Remand at 9, *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60 (2d Cir. 2009). Dozens more Glomar cases have been decided since then. *See Court Decisions*, United States Department of Justice, http://perma.cc/KKH9-7M3V (last accessed Jun. 17, 2015). And these cases likely

represent just the tip of the iceberg. It is impossible to know precisely how frequently agencies invoke the Glomar doctrine, since most denials of FOIA requests do not wind up in court.[4]

Such overuse of the Glomar doctrine has led to bizarre results, such as in the case of a former CIA employee, Eduardo Frugone, who requested his personnel file from the agency in an effort to prove he was entitled to retirement benefits. *See Frugone v. CIA*, 169 F.3d 772 (D.C. Cir. 1999). The Office of Management and Budget had acknowledged Mr. Frugone's former employment status, and indicated the CIA would have his personnel file. *Id.* at 773. The CIA, however, issued a Glomar response, refusing to confirm or deny the existence of any records concerning its former employee, Mr. Frugone. *Id.*

More recently, a federal inmate requested records related to a confidential informant the government used to prosecute him. In spite of the fact that the government had confirmed the informant's status as an informant in open court in an earlier proceeding, the Department of Justice still issued a Glomar response to the inmate's request. *Pickard v. Dep't of Justice*, 653 F.3d 782, 784 (9th Cir. 2011). The Ninth Circuit concluded that the government had gone too far in invoking the Glomar doctrine:

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[4] *Compare* United States Department of Justice, www.foia.gov (last accessed Jul. 7, 2015) (stating that 38,674 FOIA requests were denied in full in FY 2014), *with* The FOIA Project, *FOIA Lawsuits*, http://foiaproject.org/lawsuit/ (last accessed Jul. 7, 2015) (stating that 422 FOIA lawsuits were filed in FY 2014).

> The government basically argues that federal law enforcement agencies should be able to develop a case for the United States Attorney, have their agents and confidential informants testify at trial in open court about the identity and activities of those confidential informants, but then refuse to confirm or deny the existence of records pertaining to that confidential informant. We cannot abide such an inconsistent and anomalous result.

Id. at 787–88.

C. The Glomar doctrine has inhibited meaningful judicial review at the federal level, further limiting the public's ability to obtain information under FOIA.

Glomar proceedings are unique in public records law because they shift the balance of power from requesters and courts to the executive branch. At the federal level, the issuance of a Glomar response is usually a death knell for the public's right to know. It forces the requester to sue to challenge the agency's response, but then deprives the plaintiff (and the courts) of the information they need to evaluate the agency's refusal to provide any substantive response. As stated in *Hashmi*: "A Glomar response virtually stifles an adversary proceeding." 46 Misc.3d at 723. Thus, if an agency wishes to get evade a records request for any reason and escape meaningful judicial review of that conduct, a Glomar response is the first—and often final—weapon of choice.

Generally speaking, under the federal FOIA requesters have several options for redress if their request is denied. All of those options involve requiring the

agency to provide specific information to justify the denial.[5] But this is not the case with Glomar. Instead, after a lawsuit is brought the agency will simply submit an affidavit to the court saying that the broad category of records sought "logically falls within the claimed exemptions." *Wilner*, 592 F.3d at 68. Part of the difficulty for courts evaluating Glomar responses is that agencies tend to submit "increasingly boilerplate" public declarations to justify the response. Becker, 64 Admin. L. Rev. at 689. Courts may review more detailed reasoning behind a Glomar response *in camera*, but even that is atypical. Generally, "[c]ourts give tremendous deference to agency arguments, accepting them if they are 'logical or plausible.'" Wessler, 85 N.Y.U. L. Rev. at 1393. In fact, reviews of Glomar responses have typically been so cursory that commentators have called on courts to conduct more *in camera* reviews, despite the fact that such closed-door deliberations are themselves contrary to the goals of openness and government transparency. *See, e.g., id.* at 1409 ("Courts could also take advantage of their *in camera* review power to demand that agencies produce more evidence to justify their invocation of the Glomar response, including any underlying records (if they exist) or an admission that records do not exist if that is the case").

[5] For example, filing an administrative appeal, or filing suit and requesting that the court order the government to produce a Vaughn Index, which describes the documents it is withholding and the justification for withholding each document. *Vaughn v. Rosen (II)*, 523 F.2d 1136 (D.C. Cir. 1975).

Moreover, if a court decides that an agency used a Glomar response properly—meaning the response was "logical or plausible"—requesters have only two ways to try to force an agency to confirm or deny the existence of a record. They must either show that the same agency has already officially acknowledged the existence of the record or that the agency is acting in bad faith. Wessler, 85 N.Y.U. L. Rev. at 1393. Both of those burdens are extremely demanding, and requesters cannot often meet them.[6] As a result, even if an agency has invoked the Glomar doctrine improperly, requesters are often unwilling to dedicate the time and expense to take the agency to court.

Moreover, while use of a Glomar response effectively stacks the deck against the requester seeking access to government records, federal courts have declined to revisit what has now, at the federal level, become an entrenched doctrine. *See, e.g., Pub. Citizen v. Dep't of State*, 11 F.3d 198, 204 (D.C. Cir. 1993) (stating "Public Citizen's contentions that it is unfair, or not in keeping with FOIA's intent, to permit [the government] to make self-serving partial disclosures of classified information are properly addressed to Congress, not to this court.").

Given the experience with the Glomar doctrine at the federal level, it is not difficult to understand why the State Legislature would choose not to authorize the

[6] *See Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) ("[A] plaintiff asserting a claim of prior disclosure must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld. Prior disclosure of similar information does not suffice; instead, the specific information sought by the plaintiff must already be in the public domain by official disclosure.") (internal citations and quotations omitted).

NYPD and other state and local agencies to issue Glomar-like responses to requests for public records made under FOIL. Indeed, if New York were to adopt the federal Glomar doctrine wholesale, it is highly likely that it would face the same problems that now plague federal courts and public records requesters under the federal FOIA. This Court and the other courts of this State should reject invitations by agencies like the NYPD to inject this federal doctrine into FOIL, and ensure that the balance struck by that law continues to weigh in favor of public access. *See Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (N.Y. 1987) ("FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government.") (citations omitted).

III. FOIL is a critically important tool for keeping the public informed about the activities of state and local government agencies, including law enforcement agencies.

Journalists across New York frequently use FOIL to help them gather news and keep the public informed about the activities of government. The importance of this constitutionally-recognized role of the press cannot and should not be understated:

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents

> open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.

Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491-92 (1975). *See also* FOIL § 84 (acknowledging that "government is the public's business and [] the public, individually and collectively and *represented by a free press*, should have access to the records of government in accordance with the provisions of this article") (emphasis added). But the insertion of the Glomar doctrine into FOIL would significantly hamper the ability of the press to perform this vital function.

Time and time again, FOIL has proven itself to be an invaluable tool for ensuring that the citizens of this State are informed, through the news media, about their government, including the actions of law enforcement agencies and officers. For example, in 2014 a reporter used FOIL requests to gain access to information about a disciplinary trial of a NYPD officer that shed light on the use of chokeholds, and the role of the Civilian Complaint Review Board. Jon Campbell, *'I was choked by the NYPD': New York's Chokehold Problem Isn't Going Away*, The Village Voice (Sep. 23, 2014), http://perma.cc/JZ53-7FYH. FOIL played a particularly important role in that reporting, as most other information about the prevalence of chokeholds is not available to the public. *Id.*

FOIL was also recently used to obtain records showing that New York City paid more than $428,000,000 to settle more than 10,000 civil rights lawsuits

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

FOIL is also an important tool for obtaining information that allows the public to understand and oversee how the NYPD trains its officers and interacts with the public. For example, a FOIL request submitted by a reporter in 2012 revealed that the NYPD showed a racist anti-Muslim film to almost 1,500 police officers as part of their training. Michael Powell, *In Police Training, a Dark Film on U.S. Muslims*, N.Y. Times (Jan. 23, 2012), http://nyti.ms/1mOC8IV. When news first broke that the NYPD had been screening that film for trainees, a top

official said it had been "mistakenly screened 'a couple of times'." *Id.* But documents obtained under FOIL told a different story: The NYPD had run the film "on a continuous loop" for between three months and one year of training. *Id.*

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

In addition, ProPublica recently prevailed in a FOIL action seeking "records on a secretive [NYPD] program that uses unmarked vans equipped with X-ray

machines to detect bombs." Michael Grabell, *Judge Orders NYPD to Release Records on X-ray Vans*, ProPublica (Jan. 9, 2015), https://perma.cc/5EFE-3NYX. As noted by the Supreme Court in that case, ProPublica argued, and it was "not disputed by the NYPD, that '[t]here may be significant health risks associated with the use of backscatter x-ray devices [as] these machines use ionizing radiation, a type of radiation long known to mutate DNA and cause cancer'." *Matter of Grabell v. N.Y.C. Police Dep't*, 47 Misc.3d 203, 205 (Sup. Ct. N.Y. Cnty. 2014). The FOIL request at issue had been strongly opposed by the NYPD, which argued that release of records relating to the vans would, among other things, "reveal the kind of mission for which the NYPD would or would not use the technology[,] and that [s]uch records might include descriptions of areas being surveyed, the reasons for surveillance, the NYPD personnel (and their respective ranks) involved in such surveillance, and the dates, times and duration of such surveillance." *Id.* at 211. The trial court soundly rejected such arguments as "mere speculation." *Id.* The NYPD has appealed.

These stories represent only a handful of examples from the countless pieces of important journalism that FOIL has made possible. From raising questions about the accuracy of criminal convictions,[7] to showing the inefficiency of

[7] Jeff Morganteen, *The NYPD's secrecy weapon*, The N.Y. World (Aug. 2, 2013), http://perma.cc/R79B-BR3S.

Cooper's Law,[8] to revealing information about the NYPD's massive video surveillance network,[9] to forcing the NYPD to release information about civilian shootings,[10] the list of what FOIL has brought to light for the public goes on[11] and on.[12] *Amici* and the citizens of New York have a compelling interest in ensuring that this law is not amended by the judiciary to allow agencies like the NYPD to refuse to either confirm or deny whether they have public records responsive to a FOIL request.

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

CONCLUSION

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

Dated: New York, New York
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Respectfully submitted,

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APPENDIX A

Descriptions of *amici*:

The **Reporters Committee for Freedom of the Press** is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

Advance Publications, Inc., directly and through its subsidiaries, publishes more than 20 print and digital magazines with nationwide circulation, local news in print and online in 10 states, and leading business journals in over 40 cities throughout the United States. Through its subsidiaries, Advance also owns numerous digital video channels and internet sites and has interests in cable systems serving over 2.3 million subscribers.

With some 500 members, **American Society of News Editors** ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors

with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

AOL Inc. (NYSE: AOL) is a media technology company with a mission to simplify the internet for consumers and creators by unleashing the world's best builders of culture and code. As the 4th largest online property in the U.S., with more than 200 million monthly consumers of its premium brands, AOL is at the center of disruption of how content is being produced, distributed, consumed and monetized by connecting publishers with advertisers on its global, programmatic content and advertising platforms. AOL's opportunity lies in shaping the future of the digitally connected world for decades to come.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The **Association of American Publishers, Inc.** ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and

nonprofit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Bloomberg L.P. operates Bloomberg News, a 24-hour global news service based in New York with more than 2,400 journalists in more than 150 bureaus around the world. Bloomberg supplies real-time business, financial, and legal news to the more than 319,000 subscribers to the Bloomberg Professional service world-wide and is syndicated to more than 1000 media outlets across more than 60 countries. Bloomberg television is available in more than 340 million homes worldwide and Bloomberg radio is syndicated to 200 radio affiliates nationally. In addition, Bloomberg publishes Bloomberg Businessweek, Bloomberg Markets and Bloomberg Pursuits magazines with a combined circulation of 1.4 million readers and Bloomberg.com and Businessweek.com receive more than 24 million visitors each month. In total, Bloomberg distributes news, information, and commentary to millions of readers and listeners each day, and has published more than one hundred million stories.

BuzzFeed is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

Daily News, LP publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is the sixth-largest paper in the country by circulation. The Daily News' website, NYDailyNews.com, receives approximately 22 million unique visitors each month.

The **E.W. Scripps Company** serves audiences and businesses through television, radio and digital media brands, with 33 television stations in 24 markets. Scripps also owns 34 radio stations in eight markets, as well as local and national digital journalism and information businesses, including mobile video news service Newsy and weather app developer WeatherSphere. Scripps owns and operates an award-winning investigative reporting newsroom in Washington, D.C. and serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

First Look Media, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Hearst Corporation is one of the nation's largest diversified media companies. Its major interests include the following: ownership of 15 daily and 38 weekly

newspapers, including the Houston Chronicle, San Francisco Chronicle and Albany (N.Y.) Times Union; nearly 300 magazines around the world, including Good Housekeeping, Cosmopolitan and O, The Oprah Magazine; 29 television stations, which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E and ESPN; business publishing, including a joint venture interest in Fitch Ratings; and Internet businesses, television production, newspaper features distribution and real estate.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation,

editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The New York Times Company is the publisher of The New York Times and The International Times, and operates the news website nytimes.com.

North Jersey Media Group Inc. ("NJMG") is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: The Record (Bergen County), the state's second-largest newspaper, and the Herald News (Passaic County). NJMG also publishes more than 40 community newspapers serving towns across five counties and a family of glossy magazines, including (201) Magazine, Bergen County's premiere magazine. All of the newspapers contribute breaking news, features, columns and local information to NorthJersey.com. The company also owns and publishes Bergen.com showcasing the people, places and events of Bergen County.

Online News Association ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper The Seattle Times, together with The Issaquah Press, Yakima Herald-Republic, Walla Walla Union-Bulletin, Sammamish Review and Newcastle-News, all in Washington state.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry,

works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

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