

CONTROLLING DISCOURSE, FORECLOSING RECOURSE: THE CREEP OF THE GLOMAR RESPONSE

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The Glomar response to Freedom of Information Act requests – “we can neither confirm nor deny the existence or nonexistence of records responsive to your request” – was the product of extraordinary circumstances, to be applied sparingly by the federal government in withholding national security information. Since 2013, instances of state and local use of the Glomar response have signaled a potentially problematic expansion. Establishment of non-federal agency use of the Glomar response poses the threat of an exponential increase in the practice, making oversight difficult. This article considers the recent use of the Glomar response in four cases in which state or local agencies utilized the reply to withhold law enforcement records. The origin and case law of the Glomar response, methods for compelling disclosure after a Glomar response are considered, before a discussion of potential threats of expansion and productive paths forward.

Dr. Armando Florez was a Cuban diplomat turned dissident. He served as the chief Cuban attaché in Washington, D.C., before U.S.-Cuban relations deteriorated following the 1959 Cuban Revolution. He held prominent Cuban posts in Belgium, India and Czechoslovakia – once infamously refusing to shake the hand of the Soviet envoy.¹ He grew disillusioned with the autocratic Castro regime and, after an attempt on his partner’s life, sought asylum in the United

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¹ See C.J. Ciaramella, *The True Story of the Last Cuban Diplomat to the U.S.*, WASH. FREE BEACON, May 19, 2014, <http://freebeacon.com/national-security/the-true-story-of-the-last-cuban-diplomat-to-the-u-s/>

States. In exchange for intelligence on the Castro government, Florez and family were escorted by the Central Intelligence Agency from Spain to the United States. He was granted citizenship in 1979 and lived out his life working a series of jobs in New York City, culminating in an editorial position with the Associated Press.²

As Florez slipped into early-onset Alzheimer's, his son, Sergio Florez, sought to build a record of his father's colorful, politically charged life. In doing so, he filed a 2001 Freedom of Information Act request with the CIA, hoping to get at least a sketch of his father's past. The agency agreed to release the responsive records once Sergio submitted a notarized privacy waiver signed by his father.³ Given his father's medical condition, this was unlikely. Rather than further appeal, Sergio dropped the matter.

Shortly after his father's 2013 death, Sergio filed another FOIA request for the same information. This time, the CIA provided a different answer, utilizing the expansive powers of Exemption 1, the national security exception to disclosure, and issuing what is known as a "Glomar response" – "we can neither confirm nor deny the existence or nonexistence of records responsive to your request"⁴ – despite acknowledging existence of the records in the past.⁵

² See Complaint for Injunctive Relief at 6, *Florez v. Central Intelligence Agency*, 14-Cv-1002 (SHS), 2015 U.S. Dist. LEXIS 20009 (S.D.N.Y. Feb. 19, 2015).

³ See *Florez v. Cent. Intelligence Agency*, 14-Cv-1002 (SHS), 2015 U.S. Dist. LEXIS 20009, *2 (S.D.N.Y. Feb. 19, 2015).

⁴ Letter from Delores M. Nelson, Info. & Privacy Coordinator, CIA, to Melissa Goodman, Staff Attorney, Nat'l Sec. Project, ACLU (May 13, 2009), *available at* https://www.aclu.org/sites/default/files/pdfs/natsec/CIA_05132009.pdf

Sergio Florez filed an appeal, claiming there was an inadequate search by the CIA and that use of the Glomar response was improper. Further complicating the situation, Florez had discovered two public CIA records mentioning his father.

In its decision, the United States Court of Appeals for the Second Circuit suggested the Glomar response to be appropriate so long as an “exemption itself would preclude the *acknowledgement* of such documents.”⁶ This burden is satisfied by submitting an affidavit to the court which bears “substantial weight” if “justifications for non-disclosure are not controverted by contrary evidence in the record or by evidence of bad faith.”⁷ CIA counsel declared that no matter the previously disclosed relationship, national security would be jeopardized by rejecting Florez’s request in the conventional statutory manner.⁸ The CIA refused the typical denial process and issued a Glomar response under the premise that recognizing any relationship between the government and the elder Florez would harm national security. The decision was affirmed even though the relationship between Armando Florez and the CIA was widely known and documented in public records.⁹

⁵ See *infra* note 23 and accompanying text.

⁶ *Wilner v. NSA*, 592 F.3d 60, 68 (2nd Cir. 2009).

⁷ *Florez*, 2015 U.S. Dist. at *7.

⁸ *Id.* at *14.

⁹ *Id.* at *31 (“Based on the effort shown by the CIA in its supplemental search and disclosure and the lack of contrary evidence revealing any classified interest in Dr. Florez, the CIA’s Glomar response remains valid.”).

The case of the Florez family highlights a troublesome development in government implementation of the FOIA. Signed into law in 1966 by President Lyndon B. Johnson, it exists as the American public's primary method for gathering information on the activities and agents of the state.¹⁰ The Supreme Court of the United States has reiterated this fundamental rationale for access to government records, and specifically the FOIA, as a method for holding those in power answerable to their constituency. The Court has repeatedly identified it as a crucial element to a functioning democratic government. In the 1978 case *NLRB v. Robbins Tire & Rubber Co.*, the Court stated, "The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."¹¹ A decade later, the Court restated its primary function as a transparency mechanism for civilians, providing the ability to know "what their Government is up to."¹² The Court emphasized FOIA's legitimacy, suggesting it "not be dismissed as a convenient formalism. . . . It defines a structural necessity in a real democracy."¹³ A 1976 opinion called for access as not only a method for educating the citizenry, but as an awl "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."¹⁴ President Barrack

¹⁰ See Richard Shelby, *Accountability and Transparency: Public Access to Federally Funded Research Data*, 37 HARV. J. ON LEGIS. 369, 383 (2000) (Sen. Shelby states, "FOIA is the public's primary mechanism for accessing information held by the government.").

¹¹ 437 U.S. 214, 242 (1978).

¹² Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

¹³ Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157, 171-72 (2004).

¹⁴ Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976).

Obama¹⁵ and the 114th Congress¹⁶ have also recognized FOIA as a vital democratic element, affirming their commitment to an accountable and transparent government through the access statute.

Scholars have conducted significant research on the purpose of FOIA, with a consensus that access statutes ultimately must help generate an informed public.¹⁷ The prevailing notion is that without access to government information, we cannot understand “the paradoxical relation between free men and their legislative agents.”¹⁸ In an early study on the FOIA and the necessity of an informed public, Lillian BeVier pointed to the guiding voice of such thought: “The conception of democracy apparently embraced by proponents of the ‘right to know’ echoes the view of Alexander Meiklejohn, whose insights into the relevance of self-government to First Amendment analysis have been of seminal importance.”¹⁹

¹⁵ Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683, 4683 (Jan. 21, 2009) (“In our democracy, the Freedom of Information Act. . . is the most prominent expression of a profound national commitment to ensuring an open Government.”).

¹⁶ S. REP. NO. 114-4, at 2 (2015) (The Freedom of Information Act “has become an indispensable tool for ensuring our Government remains transparent and accountable to the people.”).

¹⁷ See SHANNON E. MARTIN, *FREEDOM OF INFORMATION: THE NEWS MEDIA USE* (2008); Fred H. Cate, D. Annette Fields & James K. McBain, *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41 (1994); Phillip J. Cooper, *The Supreme Court, the First Amendment, and Freedom of Information*, 46 PUB. ADMIN. REV. 622 (1986); Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L. Q. 1 (1976); Martin E. Halstuk, *Blurred Vision: How Supreme Court FOIA Opinions on Invasion of Privacy Have Missed the Target of Legislative Intent*, 4 COMM. L. & POL'Y 111 (1999).

¹⁸ Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

¹⁹ Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 483, 503 (1980).

Yet, fulfilling this covenant between the public and its elected officials has proven difficult, fraught with concerns of government malfeasance and disingenuousness in implementing the FOIA.²⁰ The Glomar response presents a specific set of issues, most notably (1) a curtailment of the appeals process, and as a result, (2) a destabilizing of the primary purpose of the access statute: providing the material for an informed public able to knowledgeably participate in a robust public discourse.

The Glomar response was created as an unusual tactic to be applied in only extraordinary circumstances. In legally short-circuiting the FOIA mechanism, it accords with a diplomatic imperative – protecting national security. But recently, the Glomar response has seen expanded application, finding use not only across the exemption spectrum but also cascading into state FOIA replies. State-level courts have for the first time begun considering the Glomar response’s place in non-federal access statutes, portending a possible explosion of implementation.²¹ Federal use of the Glomar response has faced

²⁰ See *Ensuring Agency Compliance with the Freedom of Information Act, Hearing Before Comm. on Oversight & Gov’t. Reform*, 114th Cong. (2015); *Ensuring Government Transparency Through FOIA Reform: Hearing Before Subcomm. on Gov’t. Op.*, 114th Cong. (2015); REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2 (1997); Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL. REV. 399 (2009); David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L. J. 628 (2005); Josh Gerstein, *Judge Says Hillary Clinton’s Private Emails Violated Policy*, POLITICO, Aug. 20, 2015, <http://www.politico.com/story/2015/08/judge-says-hillary-clintons-private-emails-violated-policy-121568>.

²¹ Brief for Reporters Comm. for Freedom of the Press as Amicus Curiae, p. 15, *Abdur-Rashid v. N.Y. City Police Dep’t*, 992 N.Y.S. 2d 870 (2014) (“Permitting the NYPD and other agencies to issue Glomar-like responses to FOIA requests is likely to only intensify what is a growing and problematic trend toward secrecy at all levels of government.”).

considerable scrutiny in the courtroom, the press²² and among transparency advocates and scholars,²³ but state and local claims pose the possibility of limited oversight. In less populous jurisdictions, with fewer interested individuals and less familiarity with the intricacies of access statutes, the risk of exploitation rises.

Outside of litigation and anecdotal reports, use of the non-disclosure rationale is difficult to track as it exists predominately as a common law mechanism, and no formal efforts in accounting for its implementation have ever

²² See Brian Anderson, *Glomar: The Ship that Sinks FOIA Requests*, VICE, June 20, 2012, available at <http://motherboard.vice.com/blog/glomar>; Jameel Jaffer & Nathan Freed Wessler, *The C.I.A.'s Misuse of Secrecy*, N.Y. TIMES, Apr. 30, 2012, available at http://www.nytimes.com/2012/04/30/opinion/the-cias-misuse-of-secrecy.html?_r=0; Karen McVeigh, *Drone Strikes: Activists Seek to Life Lid on Open Secret of Targeted Killings*, THE GUARDIAN, June 20, 2012 available at <http://www.theguardian.com/world/2012/jun/20/drone-strikes-targeted-killings-case?intcmp=239>; Kevin Collier, *NSA Emails Show How Much Work the Agency Does to Say Nothing*, THE DAILY DOT, June 28, 2014, <http://www.dailydot.com/politics/nsa-foia-glomar-response-emails/>; Jeff Larson, *NSA: Responding to this FOIA Would Help "Our Adversaries"*, PROPUBLICA, June 25, 2013, <https://www.propublica.org/article/nsa-responding-to-this-foia-would-help-our-adversaries>; David Kravets, *CIA Must End Silence on Drone Targeted Kills*, WIRED, Mar. 15, 2013, <http://www.wired.com/2013/03/cia-drones-foia/>.

²³ See Michael D. Becker, *Piercing Glomar: Using the Freedom of Information Act and the Official Acknowledgement Doctrine to Keep Government Secrecy in Check*, 62, ADMIN. L. REV. 673, 700 (2012) (calling the Glomar response important, but advocating a lower official acknowledgement threshold.); Gregory G. Brooker, *FOIA Exemption 3 and the CIA: An Approach to End the Confusion and Controversy*, 68 MINN. L. REV., 1231, 1261 (1984) (suggesting FOIA amendments less deferential to national security claims akin to Glomar responses.); Joshua R. Chazen, *Electronic Privacy Information Center v. National Security Agency: How Glomar Responses Benefit Businesses and Provide an Epic Blow to Individuals*, 9 J. BUS. & TECH. L. 315, 334 (2014) (arguing that in the titular case the D.C. Circuit skewed FOIA law towards business interests by recognizing the Glomar response due to vague cyber security concerns.); Andrew Christy, *The ACLU's Hollow FOIA Victory Over Drone Strikes*, 21 GEO. MASON L. REV. 1, 15 (2013) (lamenting the ACLU victory as effectively useless as "the threshold [for official acknowledgement] is still too high to be useful in other cases."); John Y. Gotanda, *Glomar Denials under FOIA: A Problematic Privilege and a Proposed Alternative Procedure of Review*, 56 U. PITT. L. REV. 165, 183-85 (1994) (suggesting the lack of judicial scrutiny of Glomar response is disputable, offering a new "credible evidence" review standard for Glomar claims.); Amy E. Rees, *Recent Developments Regarding the Freedom of Information Act: A "Prologue to a Farce or a Tragedy; or, Perhaps Both,"* 44 DUKE L.J. 1183, 1190 (1994-95) ("[A]pplication of [the Glomar response] has in recent cases become unsatisfactory. The procedural requirements are being used as a substitute for courts' judgments on the merits.").

been established. Since the 1976 case *Phillippi v. CIA*,²⁴ in which the D.C. Circuit first considered the legitimacy of the term, according to Lexis Nexis's comprehensive legal database, the case has been cited in 287 federal FOIA decisions.²⁵ The 1981 case *Military Audit Project v. Casey*,²⁶ where the court recognized the Glomar response as an appropriate reply, has been cited in 951 federal cases.

Until 2013, neither *Phillippi* nor *Military Audit Project* was mentioned in a published state court opinion. Since then, state courts in New York and the District of Columbia have considered three cases where either *Phillippi*, *Military Audit Project* or both were cited after local law enforcement provided Glomar responses to state records requests.²⁷ A Lexis-Nexis search uncovered an Illinois case related to the "Glomar response,"²⁸ and a search of the same phrase in the Google Scholar case law search turned up a decision involving the New York City Police Department.²⁹ A 2013 New Jersey case considers the legality of the "confirm nor deny the existence" language without citing federal Glomar cases

²⁴ 546 F.2d 1009, 1013 (D.C. Cir. 1976).

²⁵ Lexis-Nexis was searched for cases in which the Glomar response was used. There is no other formal documentation of the practice and for the purposes of this study, the search of the Lexis Nexis case database represents as consistent of an accounting measure available.

²⁶ 656 F.2d 724 (D.C. Cir. 1981).

²⁷ One of which, *Fraternal Order of Police v. District of Columbia*, 79 A.3d 347, 356 (D.C. 2013), referenced *Military Audit Project* in considering the "bad faith" standard and is unrelated to concerns related to the Glomar response.

²⁸ In an effort to capture all relevant cases regarding the Glomar response, a second search of the Lexis Nexis database was conducted. The second query used the search phrase "Glomar response." For the purposes of this study, in review of all Lexis Nexis results, cases unrelated to the FOIA were removed from consideration.

²⁹ The Google Scholar case database was also queried for landmark cases and key search phrases to ensure all relevant cases were included in the study.

or using the “Glomar response” phrase. Of these six responsive cases, two are ultimately unrelated to the specific cause of the Glomar response,³⁰ leaving four state-level cases - *North Jersey Media Group v. Bergen County Prosecutor’s Office*,³¹ *Better Government Association v. Zaruba*,³² *Abdur-Rashid v. New York City Police Department*,³³ and *Hashmi v. New York City Police Department*³⁴ considering the applicability of the Glomar response in non-federal claims. In addition to these court decisions, Indiana amended language to its state access statute, the Access to Public Records Act, in 2013 that effectively codified the Glomar response.³⁵

Legal recognition on the state level threatens freedom of information laws at their most basic, grassroots level, making them liable to a precipitous rise in the number of Glomar responses, impugning the very integrity of access and transparency laws. This rash of like cases, along with the statutory amendment, signals the possibility of new paradigm in access law, one where equivocation passes as an acceptable and common reply. Acquiring sensitive information is difficult enough under current regimes. Adding a layer of ambiguity, appropriate only when dealing with the most precarious of records and information, is a bridge too far. It would provide a power originally crafted for

³⁰ The two were *Asian American Fund v. New York City Police Department*, 41 Misc. 3d 471 (N.Y.S. 2013), which made no explicit reference to any Glomar-related issues and is primarily concerned with investigatory exemptions; and *Fraternal Order of Police*, 79 A.3d 347 (D.C. 2013); see also *supra* note 27.

³¹ No. BER-L-6741-13 LEXIS 2766 (N.J. Super. Ct. L. Div. Nov. 15, 2013).

³² 21 N.E.3d 516 (Ill. App. 2d 2014).

³³ 992 N.Y.S. 2d 870 (2014).

³⁴ 998 N.Y.S.2d 596 (2014).

³⁵ IND. CODE ANN. §§ 5-14-3-4.4 (Pub. L. 248-2013 § 4) (2013) (allowing for information appropriate to the state’s investigatory or criminal intelligence exemptions to fall into a Glomar response.).

the protection of national security secrets to rank-and-file police forces in towns and villages across the country.

This study seeks to document the early evidence of the Glomar response moving into state and local FOI laws. It will do so by exploring the origins of the Glomar response as a result of the heightened political tensions of the Cold War, before considering several recent decisions in New York, Illinois and New Jersey, where courts considered cases of state and local authorities denying access to records with Glomar response claims. These cases mark a new territory for the practice, which originally saw use as a federal response to national security threats. The four decisions discussed herein demonstrate this expanded use; each involves local police authorities refusing a records request with a Glomar response justified by law enforcement exemption claim. Coincidentally, all of the denied requests were seeking information that would have provided oversight of the law enforcement agency, and each received a Glomar response where previously such a request would have been available or withheld according to conventional FOIA procedure.

The next section documents the disconcerting nature of the Glomar response as the official acknowledgement and waiver of exemption protection standards for appealing such a reply have proved particularly challenging to overcome. The article concludes with recent legislative efforts to constrain use of the Glomar response and a discussion of the threat and potential ways forward.

THE FOUNDATIONS OF THE GLOMAR RESPONSE

The Glomar response originates in an unusual Cold War story, in which a sunken Soviet submarine lay on the Pacific floor. Interested in the possibility of nuclear weapons, codebooks and cryptographic machines, the CIA launched Project Azorian to retrieve the sub from three miles underwater.³⁶ The complicated effort would draw public attention, and in an attempt to keep the project clandestine, the CIA brought on board eccentric millionaire Howard Hughes, developing a cover story that Hughes was searching the deep for the valuable mineral manganese.³⁷ The name of the ship was the Hughes Global Marine Explorer, with “Glomar” the portmanteau of “Global Marine.”³⁸

Shortly after publication of the Pentagon Papers and the Watergate scandal, government skepticism was high and the FOIA was newly strengthened by a 1974 amendment.³⁹ The CIA received a torrent of FOIA requests for information on its curious efforts.⁴⁰ Hoping to keep the Soviets unaware of the project and protect a considerable expenditure in resources (and the ultimate failure of the project), the associate general counsel at the CIA was charged with crafting a FOIA response allowing the organization to retain its secrets, without

³⁶ See DAVID H. SHARP, *THE CIA'S GREATEST COVER OPERATION: INSIDE THE DARING MISSION TO RECOVER A NUCLEAR-ARMED SOVIET SUB* (2012).

³⁷ See *Radiolab: Neither Confirm Nor Deny*, WNYC, Feb. 12, 2014, available at <http://www.radiolab.org/story/confirm-nor-deny/>.

³⁸ See *id.*

³⁹ Privacy Act, Pub. L. 93-502, 88 Stat. 1561-1564; §§ 1-3 (1974).

⁴⁰ *Radiolab*, *supra* note 37.

lying.⁴¹ The result is the Glomar response – “we can neither confirm nor deny the existence of requested records” – that allows agencies to make an end-run around the FOIA.

The Glomar language, established under these very unusual circumstances where national security and diplomatic concerns were at stake, soon found traction in a wider range of non-disclosure claims. National security concerns became conflated with internal disciplinary reports, individuals’ law enforcement files and the government’s relationship with Google. The related federal case history demonstrates the Glomar response distancing itself from its original purpose, moving from a rare exception to regular application. The proliferation occurred under little oversight and for much of its life with no government guidance or regulation. The Glomar response did, however, find pushback from the public, facing frequent challenges in the courtroom, including two appeals on the inaugural application.⁴²

Phillippi v. CIA

Reticence from federal judges was evident in the early cases considering use of the Glomar response. The Glomar Explorer operation was splashed onto

⁴¹ See Nate Jones, “Neither Confirm, Nor Deny”: The History of the Glomar Response, NAT. SEC. ARCHIVES, Feb. 11, 2014, available at <https://nsarchive.wordpress.com/2014/02/11/neither-confirm-nor-deny-the-history-of-the-glomar-response-and-the-glomar-explorer/>

⁴² See *Military Audit Project v. CIA*, 656 F.2d 724 (D.C. Cir. 1981); *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

the front page of the *New York Times* in a Seymour Hersh story.⁴³ Reporter Harriet Ann Phillippi, among others, followed up and filed a FOIA request with the CIA seeking information on the covert mission. The CIA supplied her with the original Glomar response, which she challenged in federal court. In an initial appeal, the D.C. Circuit determined that the evasive reply did not comply with previous Exemption 1 decisions requiring an affidavit justifying non-disclosure.⁴⁴ In fact, the ambiguity curtailed scrutiny of any kind, be it *in camera* or a written justification subject to “criticism and illumination by a party with the actual interest in forcing disclosure.”⁴⁵ The case was remanded due to a technicality.⁴⁶ On the second appeal, the new Jimmy Carter administration dropped the Glomar response language from the denial, and the D.C. Circuit ruled that records on the Glomar Explorer operation were properly withheld according to Exemptions 1 and 3, the national security and other statutes exemptions.⁴⁷

Military Audit Project v. Casey

The 1981 *Phillippi* decision rested on the “strikingly similar”⁴⁸ case of *Military Audit Project v. Casey*,⁴⁹ where an organization sought similar records regarding the Glomar Explorer. This time, the Glomar language remained in the

⁴³ Seymour Hersh, *CIA Salvage Ship Brought Up Part of Soviet Sub Lost in 1968*, N.Y. TIMES, Mar. 19, 1975, available at http://www.nytimes.com/1975/03/19/archives/cia-salvage-ship-brought-up-part-of-soviet-sub-lost-1968-failed-to.html?_r=0

⁴⁴ *Phillippi*, 546 F.2d at 1013.

⁴⁵ *Id.* (quoting *Vaughn v. Rosen*, 484 F.2d 820, 825 (1973)).

⁴⁶ *Id.* at 1015.

⁴⁷ *Phillippi v. CIA*, 655 F.2d 1325, 1333 (D.C. Cir. 1981).

⁴⁸ *Id.* at 1328.

⁴⁹ 656 F.2d 724 (D.C. Cir. 1981).

appeal, and the court was faced with confronting the legality of the “neither confirm nor deny” response. In considering the Exemption 1 claim, the court isolated the question as to whether the documents “reasonably could be expected to cause serious damage to the national security,” the standard established in President Carter’s national security order.⁵⁰ The decision included a category-by-category analysis of the varying information under consideration, before deciding whether Exemption 1 was satisfied, allowing summary judgment. In deliberating whether the Glomar response fulfilled the FOIA obligation, the court, with little elaboration, accepted use of the method as in line with the tenets of the FOIA and national security protections, comparing the Glomar response outcome as comparable to a conventional summary judgement under an exemption claim.⁵¹

Hunt v. CIA

In the 1992 case of a prisoner seeking records to exonerate himself, the Ninth Circuit ruled on a Glomar response of a request by an accused murderer seeking CIA information on the murdered individual.⁵² Danae Aitchison called the case a test of whether an “agency’s claimed exemptions fit the records, or if they are a mere pretext for withholding information.”⁵³ The appellant Joe Hunt,

⁵⁰ Exec. Order 12065, 43 Fed. Reg. 28949 § 3-505 (June 28, 1978).

⁵¹ 656 F.2d at 749.

⁵² Hunt v. CIA, 981 F.2d 1116 (9th Cir. 1992).

⁵³ Danae J. Aitchison, *Reining in the Glomar Response: Reducing CIA Abuse of the Freedom of Information Act*, 27 U.C. DAVIS L. REV. 219, 243 (1993).

who was on trial in California for the murder of an Iranian national, requested information on the victim and, specifically, on the victim's relationship with the CIA.⁵⁴ Hunt appealed the Glomar response, questioning whether affidavits allowed for summary judgment under FOIA Exemptions 1 and 3. The decision confirmed that President Ronald Reagan's executive order allowed for an agency to "refuse to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence or non-existence is itself classifiable under the Order."⁵⁵ In ruling that the records were appropriately classified, the Ninth Circuit registered wariness in the latitude and discretion given to national security agencies like the CIA in Glomar responses.⁵⁶ The court held, "Nevertheless, nothing in the statute or case precedent permits us to reach a different result,"⁵⁷ before acknowledging that were this issue to be addressed it was the legislature's duty to do so.⁵⁸

Smith v. FBI

In 2009, a federal court considered a Glomar response claim as part of a larger FOIA appeal, where the requester sought the disciplinary records of an FBI agent. In protecting the agent's privacy, with a special mention of Exemption

⁵⁴ 981 F.2d at 1117.

⁵⁵ Exec. Order No. 12356, 47 Fed. Reg.14874 at 174 (Apr. 2, 1982).

⁵⁶ 981 F.2d at 1120 ("[W]ith this decision, we are now 'only a short step [from] exempting all CIA records' from FOIA. That result may well be contrary to what Congress intended.").

⁵⁷ *Id.*

⁵⁸ *Id.*

6, the personal privacy exemption,⁵⁹ the FBI provided a Glomar response.⁶⁰ In affirming use of the response, the District of Columbia federal district court determined that the requester had failed to show an overriding public interest in the records and confirmation of “adverse action or disciplinary reports...would necessarily reveal precise information Exemption 6 shields.”⁶¹ The decision effectively removed many of the FBI’s internal punishment documents from the ambit of not only public scrutiny but from FOIA consideration altogether, as the D.C. District Court accepted that the mere acknowledgement of a disciplinary record was an invasion of individual privacy.

Wolf v. CIA

In a pivotal 2007 decision, the D.C. Circuit ruled on a requester’s ability to compel agency disclosure after receiving a Glomar response. The case involved historian Paul Wolf and his efforts to receive the CIA records of an assassinated Colombian politician.⁶² Most noteworthy, Wolf contested that the CIA had waived its right to issue a Glomar response when then-CIA Director Roscoe Hillenkoetter read from CIA files at a 1948 congressional hearing, making direct reference to the Colombian politician Jorge Eliecer Gaitan. In recognizing “official acknowledgement,” the court stated, “In most waiver cases, the inquiry

⁵⁹ 5 U.S.C. § 552(b)(2) (2012) (Exemption 6 excludes “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”)

⁶⁰ *Smith v. FBI*, 663 F. Supp. 2d 1, 4 (D.D.C. 2009).

⁶¹ *Id.*

⁶² *Wolf v. CIA*, 473 F.3d 370 (D.C. Cir. 2007).

turns on the match between the information requested and the content of the prior disclosure.”⁶³ This proposal, matching the “specific information at issue”⁶⁴ with what has been publicized, becomes particularly difficult for the requester when the very existence of the sought records is in question. The court determined that the CIA director’s public discussion of the Colombian politician disqualified the CIA from making a Glomar response claim on records involving Gaitan. The case was remanded so that the lower court could consider whether the records previously given a Glomar response were appropriately withheld according to statutory exemptions. The district court ruled all newly acknowledged records were aptly withheld according to Exemptions 1 and 3.⁶⁵

Electronic Privacy Information Center v. NSA

After a 2010 cyberattack on Google, the company altered its privacy and encryption methods. As a result, the Electronic Privacy Information Center filed a FOIA request seeking communications between the NSA and Google. The NSA issued a Glomar response tethered to Exemption 3 (in particular, Section 6 of the National Security Act).⁶⁶ The court decided against EPIC, ruling the Glomar response appropriate in “excurs[ing] caution when the information requested

⁶³ *Id.* at 378.

⁶⁴ *Pub. Citizen v. Dep’t of State*, 11 F.3d 198, 202 (D.C.Cir.1993)

⁶⁵ *Wolf v. CIA*, 569 F. Supp. 2d 1 (D.D.C. 2008).

⁶⁶ *Elec. Privacy Info. Ctr. v. NSA*, 678 F.3d 926 (D.C. Cir. 2012) (citing Section 6 of the National Secrecy Act, 50 U.S.C. § 3144 (2006)).

‘implicat[es] national security, a uniquely executive purview.’”⁶⁷ EPIC argued that a public relationship existed between Google and the NSA, and, thus, a Glomar response was inappropriate. The D.C. Circuit agreed that a public relationship existed, but ruled that this public relationship accounted for NSA activity, qualifying for nondisclosure under Section 6 of the NSA Act. This creates a double-bind between intelligence organizations that hold “operational files” exemptions⁶⁸ and requesters’ ability to appeal Glomar responses. Nonetheless, the D.C. Circuit ruled that not only is the operational files provision adequate in Glomar response claims, but that the provision would receive a generous interpretation in federal courts, finding it “broadly exempts any information pertaining to the agency’s ‘activities’ or ‘functions.’”⁶⁹

The legal berth shown to the Glomar response directly relates to the lack of judicial scrutiny in national security exemption cases. The *EPIC* and *Hunt* opinions demonstrate the *laissez faire* attitude common to courts’ opinions to the national security exemption. While the FOIA statute itself has been amended and judicial doctrine has evolved, Justice Potter Stewart’s concurring opinion in 1974’s *EPA v. Mink* best exemplifies judicial deference to the national security exemption in FOIA cases: “(I)n enacting Section 552(b) (1) Congress chose,

⁶⁷ *Id.* at 930 (quoting *Ctr. for Nat’l Sec. Studies v. Dep’t of Justice*, 331 F.3d 918, 926-27 (D.C. Cir. 2003)).

⁶⁸ In addition to the NSA, these agencies hold “operational files” exemptions: the CIA (50 U.S.C. § 3141) (1984), the National Geospatial-Intelligence Agency (50 U.S.C. § 3142) (1999), and the National Reconnaissance Office (50 U.S.C. § 3143) (2002).

⁶⁹ 678 F.3d at 933.

instead, to decree blind acceptance of executive fiat.⁷⁰ “Executive fiat” refers to the prevailing national security executive order, a decree released by all presidents since Harry Truman, save Gerald Ford and George H.W. Bush, outlining their specific visions of national security interests. For a records refusal based on Exemption 1 to be upheld, it merely must meet this shifting standard. As the development of the Glomar response and judicial interpretation of the reply are inextricably tied with the national security exemption, it follows that the Glomar response has met a similarly deferential fate in the courts. In matters of national security, courts have determined that deference to national security experts to be the preferred path.⁷¹

A RECENT EVOLUTION IN THE GLOMAR RESPONSE

As previously indicated, the Glomar response was born of an uncommon situation. It was established in an effort to protect critical national security information, and, as a result, evolved in tandem with Exemption 1, an exemption that has received an especially broad interpretation in adjudication. In his national security executive order, President George W. Bush explicitly established it as an appropriate federal agency reply to FOIA requests of records

⁷⁰ 410 U.S. 73, 95 (1973).

⁷¹ See, e.g., *Larson v. Dep’t of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) (“Today we reaffirm our deferential posture in FOIA cases regarding the ‘uniquely executive purview’ of national security.”). See also *Pub. Citizen v. Dep’t of State*, 11 F.3d 198 (D.C. Cir. 1993); *Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002).

seen to have national security implications.⁷² The Glomar response cannot be invoked independently, however. The Second Circuit ruled that “an agency must ‘tether’ its refusal to respond... to one of the nine FOIA exemptions.”⁷³ The combination of national security origins and requisite connection to an exemption has manifested itself in a tight correlation of Exemptions 1 and 3 with the Glomar response.

In recent years, the Glomar response has encountered expanded use, broadening in two directions: horizontally across the exemption spectrum and vertically into state and local use. Law enforcement exemptions are customary in access to records statutes, and due to overlap between policing efforts and national security concern this has resulted in Glomar responses tied to law enforcement and investigatory exemptions. *Smith* provided an example of a Glomar response under the rationale of privacy, utilizing Exemptions 6 and 7(C), a subexemption of the law enforcement exemption.⁷⁴ Another recent request saw a Glomar response pegged to Exemption 2.⁷⁵

In October 2014, *New York Times* journalist Ron Nixon published a story on United States Postal Service’s surveillance of individual mail.⁷⁶ The expose detailed the “mail covers” program, where, in targeted instances, the USPS tracks

⁷² Exec. Order No. 12,958, as amended, § 3.6(a), 68 Fed. Reg. 15,315 (Mar. 28, 2003).

⁷³ *Wilner v. NSA*, 592 F.3d 60, 68 (2nd Cir. 2009).

⁷⁴ 5 U.S.C. § 552(b)(7)(C) (2012).

⁷⁵ 5 U.S.C. § 552(b)(2) (2012).

⁷⁶ Ron Nixon, *Report Reveals Wider Tracking of Mail in U.S.*, N.Y. TIMES, Oct. 27, 2014, available at http://www.nytimes.com/2014/10/28/us/us-secretly-monitoring-mail-of-thousands.html?_r=0&module=ArrowsNav&contentCollection=U.S.&action=keypress®ion=FixedLeft&pgtype=article.

the names and addresses on the mail of individuals. Nixon cited records from a series of FOIA requests as his primary source of information, even writing a complementary blog post on the FOIA process itself.⁷⁷

Following up on the story, another media outlet submitted a FOIA request seeking the same records.⁷⁸ In reply, the USPS issued a Glomar response under Exemption 2 (“related solely to the internal personnel rules and practices of an agency”⁷⁹), though Nixon had published two stories explicating the records, uploaded thirty-five pages of the documents online,⁸⁰ and appeared on the *PBS NewsHour* to discuss the mail covers program.⁸¹

Another recent FOIA request received a Glomar response, invoking no less than four qualifying exemptions.⁸² In seeking information on IRS whistleblowers, the Department of Treasury could neither confirm nor deny the existence of the records due to a possible “unwanted invasion of personal privacy,”⁸³ the law enforcement privacy provision,⁸⁴ fear of disclosing a

⁷⁷ Ron Nixon, *Tracking the Postal Surveillance System*, N.Y. TIMES, Oct. 28, 2014, available at <http://www.nytimes.com/times-insider/2014/10/28/tracking-the-postal-surveillance-system/>.

⁷⁸ Alex Richardson & Joshua Eaton, *Postal Service and the IRS Join CIA in Handing Out Glomar Denial*, MUCKROCK, Mar. 17, 2015, <https://www.muckrock.com/news/archives/2015/mar/17/postal-service-and-irs-join-cia-handing-out-glomar/>.

⁷⁹ 5 U.S.C. § 552(b)(2) (2012).

⁸⁰ Ron Nixon, *Mail Covers: Snail Mail Surveillance*, N.Y. TIMES, July 3, 2013, available at http://www.nytimes.com/interactive/2013/06/30/us/30postal-mail-cover-documents.html?_r=0

⁸¹ See *How the Postal Service Is Helping Law Enforcement Monitor Snail Mail*, PBS NEWSHOUR, Oct. 28, 2014, <http://www.pbs.org/newshour/bb/postal-service-helping-law-enforcement-monitor-snail-mail/>.

⁸² *Leonard v. Dep't of Treasury*, No. 10-6625, 2012 WL 813837 (D.N.J. Mar. 9, 2012).

⁸³ 5 U.S.C. § 552(b)(6) (2012).

⁸⁴ 5 U.S.C. § 552(b)(7)(c) (2012).

confidential source of law enforcement⁸⁵ and as statutorily exempted⁸⁶ by Internal Revenue Code.⁸⁷

Perhaps more disconcerting is the vertical progression of the Glomar response with states looking to utilize the technique. While national security concerns have salience at various levels of governance, allowing the latitude of the Glomar response on state and local levels threatens access to an incredible amount of government records, especially considering the deference that comes part and parcel with the Glomar response. Yet, since 2012, four state courts have considered the legitimacy of the practice in application to state freedom of information laws. The four cases center on law enforcement agencies using the Glomar response to withhold records traditionally exempted according to the statutory procedure.

New Jersey Media Group v. Bergen County Prosecutor's Office

In 2013, a New Jersey reporter submitted a request through the state's Open Records Act⁸⁸ for law enforcement reports, complaints, 911 calls and communications regarding a local pastor alleged to have been involved in sexual misconduct. The Bergen County Prosecutor's Office replied, declining to indicate

⁸⁵ 5 U.S.C. § 552(b)(7)(d) (2012).

⁸⁶ 5 U.S.C. § 552(b)(3) (2012).

⁸⁷ 6103(a) & 6103(e)(7) (2012).

⁸⁸ N.J.S.A. 47:1A-1 et seq. (2001) (“[G]overnment records shall be accessible for inspection, copying, or examination by the citizens of this state, with certain exceptions, for the protection of the public interest, and any limitations on the right of access...shall be construed in favor of the public's right to access.”).

“whether it possesses any records that are responsive.”⁸⁹ The North Jersey Media Group filed an appeal, and a trial court declined to compel disclosure, determining, “[T]he investigation of an individual that has not been arrested nor charged with a crime generally must not be disclosed as privacy concerns outweigh the public’s need for information.”⁹⁰ The Media Group appealed to the state superior court, claiming the lower court had “created a new exemption,”⁹¹ with the court ultimately ruling in favor of non-disclosure.

Finding “in favor of accepting the defendants’ reasonable expectation of privacy,” the court has effectively moved a huge swath of public records outside the domain of the New Jersey access to records law.⁹² Acknowledgement and appropriate exemption of private information does not imply innocence or guilt, but in allowing a Glomar response, New Jersey courts have undercut the stated objections of the OPRA and access laws generally.

Abdur-Rashid v. New York City Police Department

In a case involving a New York City-based Imam and his attempts to discover whether he or his congregation was being surveilled, Talib W. Abdur-Rashid, head of the Mosque of Islamic Brotherhood, submitted a records request

⁸⁹ North Jersey Media Group v. Bergen County Prosecutor’s Office, No. BER-L-6741-13 LEXIS 2766, *2 (N.J. Super. Ct. L. Div. Nov. 15, 2013).

⁹⁰ *Id.* at *35.

⁹¹ *Id.* at *23.

⁹² *Id.* at *43.

via New York State's open records law,⁹³ suspecting that the New York Police Department had been surreptitiously watching the activities of his mosque.⁹⁴ His request was denied, using Glomar language, "neither confirm nor deny."⁹⁵ The Reporters Committee for Freedom of the Press has suggested the effort to be first known state-level case considering the federally established Glomar response doctrine.⁹⁶ The opinion directly addressed transferring the federally recognized Glomar response to New York State's freedom of information law, finding that existing precedent "has explicitly stated that it is beyond question that FOIA applies only to federal and not to state agencies."⁹⁷ Nevertheless, the court ruled against Abdur-Rashid and allowed the Glomar response, having found the state's appeal for confidentiality in ongoing law enforcement investigations and the safety of police informants particularly persuasive.⁹⁸

Hashmi v. New York City Police Department

The Supreme Court of New York heard a similar case a few months later.⁹⁹ After reading a series of Associated Press stories on NYPD surveillance of Muslims, Samir Hashmi, treasurer of the Rutgers University Muslim Student Association, submitted a FOIL request seeking records on possible surveillance

⁹³ N.Y. State Freedom of Information Law, Pub. Off. L. art. 6 § 84 et seq. (2014).

⁹⁴ *Abdur-Rashid v. N.Y. City Police Dep't*, 992 N.Y.S. 2d 870, 873 (2014).

⁹⁵ *Id.*

⁹⁶ Adam Marshall, *Glomar Surfaces in State Courts*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (2015), <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2015/glomer-surfaces-state-court>.

⁹⁷ *Abdur-Rashid*, 992 N.Y.S. 2d at 894.

⁹⁸ *Id.* at 895.

⁹⁹ *Hashmi v. N.Y. City Police Dep't*, 998 N.Y.S.2d 596 (2014).

of himself and his organization. In reply, the NYPD issued a Glomar response, explaining, “[M]ere disclosure of the existence of such documents would ‘cause substantial harm to the integrity and efficacy of NYPD’s investigations.’”¹⁰⁰

The NYPD had implored the court to adopt the Glomar response, “as a common law amendment to a statutory scheme.”¹⁰¹ The court ruled in favor of Hashmi, ordering the NYPD to issue a full response to the original request. The court also issued a strong rebuke on state-level Glomar use:

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 wall would be created by the procedures used to vet a Glomar response, outlined above, which ensure that the decision to approve or deny a Glomar response is made with very little information, and with almost no useful input from the person or entity seeking the documents. A Glomar response virtually stifles an adversary proceeding.¹⁰²

Over a period of three months, different districts of the New York Supreme Court came to different conclusions on use of the Glomar response. The *Hashmi* court directly addressed establishing the practice in the state’s FOIL,

¹⁰⁰ *Id.* at 597.

¹⁰¹ *Id.* at 722.

¹⁰² *Id.* at 722-23.

finding the Glomar response to upset the balance between accountability and secrecy.¹⁰³

Better Government Association v. Zaruba

In another case considering oversight of law enforcement, an investigative non-profit based in Chicago requested records from DuPage County on the activities of Patrick Zaruba, the son of DuPage County Sheriff John Zaruba.¹⁰⁴ Acting on a tip that the high school-aged Zaruba had been acting in the capacity of a law enforcement agent, the Better Government Association sought records demonstrating police activities on the younger Zaruba's part, including access to electronic databases.¹⁰⁵ In particular, BGA was interested in discovering whom Patrick Zaruba was searching for in the criminal databases. The Illinois Appellate Court issued an opinion extensively citing a federal court ruling on a Glomar response claim, where a records request from similar criminal repository in Texas was determined to be appropriate due to the risk of circumvention presented by allowing citizens to query the database.¹⁰⁶ In approving the Glomar response, the court stated, "[T]he Department has implemented sanctions and procedures for addressing noncompliance. . . . and entities such as the BGA are not the proper organizations to undertake such an investigation."¹⁰⁷

¹⁰³ *Id.* at 724.

¹⁰⁴ *Better Gov't Ass'n v. Zaruba*, 21 N.E.3d 516, 518 (Ill. App. 2d 2014).

¹⁰⁵ *Id.* at 517-19.

¹⁰⁶ *Id.* at 527.

¹⁰⁷ *Id.*

The decision is short of a clear recognition of Glomar response claims in Illinois. The decision was principally concerned with protecting the identity of individuals in the criminal database, and, curiously, the Glomar response is the method for doing so. This decision – perhaps more so than *Abdur-Rashid*, where the Glomar response was approved for NYPD use – signals cause for concern. Erratic or unreasoned implementation of the Glomar response threatens the purpose of the FOI system, potentially robbing exemptions of consistency and rationale. Further recognition in state and local courtrooms risks myriad applications and interpretations.

PROCEDURE, APPEALS AND REVIEW

The *Hashmi* opinion makes a strong case for the existing statutory scheme, particularly in utilizing the appeals process as outlined in the legislation.¹⁰⁸ That statutory procedure for FOIA was laid out in detail in the original 1966 legislation, but has seen a number of amendments calibrating its presumption of openness while protecting national security concerns. Those subject to FOIA include “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the

¹⁰⁸ *Hashmi v. N.Y. City Police Dep’t*, 998 N.Y.S.2d 596, 604 (2014) (“The adoption would effect a profound change to the statutory scheme that has been finely calibrated by the legislature. Therefore, the decision to adopt the Glomar doctrine is one better left to the state legislature, not to the judiciary.”).

President), or any independent regulatory agency.”¹⁰⁹ Each entity is responsible for making its records “available for public inspection and copying”¹¹⁰ to “any person.”¹¹¹ An individual must “reasonably describe” the records sought and comply with the minimal request standards of the agency.¹¹² There are also expectations of the agency regarding amount of time before initial response (twenty business days)¹¹³ and what constitutes a satisfactory search of agency records.¹¹⁴ There are nine exemptions that allow an agency to withhold disclosure of any responsive records.¹¹⁵

An individual unsatisfied with an agency response to a FOIA request may file an administrative appeal with the head of the agency.¹¹⁶ The agency is expected to provide a determination on the appeal within twenty days.¹¹⁷ A FOIA liaison assigned by each agency is responsible for overseeing the resolution of disputes.¹¹⁸ Typically, a requester must exhaust the administrative appeals process before filing suit in the appropriate federal district court.¹¹⁹ The D.C. Circuit Court has ruled the appeals process to be exhausted once an agency has issued a determination on a request.¹²⁰

¹⁰⁹ 5 U.S.C. § 552(f)(1) (2012).

¹¹⁰ 5 U.S.C. § 552(a)(2) (2012).

¹¹¹ 5 U.S.C. § 552(a)(3)(A) (2012).

¹¹² *Id.*

¹¹³ 5 U.S.C. § 552(a)(6)(A)(i) (2012).

¹¹⁴ 5 U.S.C. § 552(a)(6)(E)(iii) (2012).

¹¹⁵ 5 U.S.C. § 552(b) (2012).

¹¹⁶ 5 U.S.C. § 552(a)(6)(A)(i) (2012).

¹¹⁷ 5 U.S.C. § 552(a)(6)(A)(ii) (2012).

¹¹⁸ 5 U.S.C. § 552(a)(6)(B)(ii) (2012).

¹¹⁹ *See Hidalgo v. FBI*, 344 F.3d 1256, 1258 (D.C. Cir. 2003).

¹²⁰ *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2012).

In appeals concerning exemption use or questions about non-disclosure, a district court will hear the case *de novo* and retains the ability to examine the records *in camera*.¹²¹ The burden of proof in withholding responsive records lies with the agency, but “substantial weight” is to be given to defense affidavits.¹²²

Two important review procedures have been implemented, one developed in common law and the other codified despite presidential objection. The two – Vaughn Indices and *in camera* review – are critical tools in checking overclassification.

Prompted by the Watergate scandal and the controversial case *EPA v. Mink*,¹²³ Congress overrode President Gerald Ford’s veto and passed amendments to the FOIA,¹²⁴ explicitly providing for *in camera* review of documents in appeals litigation.¹²⁵ Prior to the 1974 amendment, brief affidavits were enough to satisfy exemption from disclosure. In fact, the *Mink* decision expressly discouraged further scrutiny, forbidding *in camera* review Exemption 1 appeals and calling it beyond the purview of the statute.¹²⁶

In *Vaughn v. Rosen*, the D.C. Circuit chose to comment directly on the deference of *Mink*, considering the court’s role in determining exemption use.¹²⁷

¹²¹ 5 U.S.C. § 552(a)(4)(B) (2012).

¹²² *Id.*

¹²³ 410 U.S. 73 (1973).

¹²⁴ Privacy Act, Pub. L. 93-502, 88 Stat. 1561-1564; §§ 1-3 (1974).

¹²⁵ 5 U.S.C. § 552(a)(4)(B) (2012).

¹²⁶ 410 U.S. at 93.

¹²⁷ 484 F.2d 820, 824 (D.C. Cir. 1973) (“[T]he Supreme Court in *Mink* provided the outline of how trial courts should approach the job of making this factual determination. Our discussion here is intended to be an elaboration of this outline.”). The Vaughn Index, established in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), is an extension of the affidavit procedure, which asks an

Judge Malcolm Wilkey expressed concern in “assur[ing] a party’s right to information is not submerged beneath governmental obfuscation and mischaracterization.”¹²⁸

In the original case, the court proposed the Vaughn Index as a method of judicial review with the judge calling for an itemized listing of records responsive to the FOIA request and individualized exemptions and justifications for each withheld record.¹²⁹ The court’s stated objective for the Vaughn Index – “to make a rational decision [about] whether the withheld material must be produced without actually viewing the documents themselves . . . [and] to produce a record that will render [its] decision capable of meaningful review on appeal.”¹³⁰ – demonstrated its efforts to provide sufficient review while respecting classification.

agency to provide the court with a justification of exemption claims. Vaughn Indices have become a common tool of judicial review whereby the withholding agency is asked to identify each non-disclosed portion of the sought records and justify withholding in each instance with an appropriate exemption. The practice requires federal agencies to be more exacting in their exemption use and allows courts to examine agency exemption use, particularly in cases involving a large volume of non-disclosed records).

¹²⁸ *Id.* at 826.

¹²⁹ *Id.* at 828 (“The current approach places the burden on the party seeking disclosure, in clear contravention of the statutory mandate. Our decision here may sharply stimulate what must be, in the final analysis, the simplest and most effective solution – for agencies voluntarily to disclose as much information as possible and to create internal procedures that will assure that disclosable information can be easily separated from that which is exempt. A sincere policy of maximum disclosure would truncate many of the disputes that are considered by this court. And if the remaining burden is mostly thrust on the Government, administrative ingenuity will be devoted to lightening the load.”).

¹³⁰ *King v. Dep’t of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987).

Ensuring the release of “reasonably segregable”¹³¹ records is the primary purpose of a Vaughn Index. It is often used to spot check the verisimilitude of agency exemption use, with a sampling of exemptions and justification considered to determine the credibility of exemptions when voluminous records are under consideration.¹³² In a 1991 case, a journalist chose approximately 2% of the responsive documents with the court ordering cited exemptions and explanations for each redaction or withheld document. The resulting Vaughn Index provided justifications for two-thirds of the sampled records while another third was reconsidered and determined to be available for release in full. Though the records released after the court-ordered Vaughn Index were viewed to not be symptoms of agency malfeasance or reason for bad faith, they did “persuade [the court] that it is incumbent upon the district court to examine closely the initial exemption claims.”¹³³

When Vaughn Indices are seen as unsatisfactory in providing enough detail, the Supreme Court has ruled that *in camera* review is an acceptable method of judicial review.¹³⁴ While the use of *in camera* examination of documents was amended to the FOIA, U.S. district courts retain “broad

¹³¹ 5 U.S.C. § 552(b) (2012) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”).

¹³² See *Bonner v. Dep’t of State*, 928 F.2d 1148, 1151 (D.C. Cir. 1991) (“If the sample is well-chosen, a court can, with some confidence, ‘extrapolate its conclusions from the representative sample to the larger group of withheld materials.’”).

¹³³ *Id.* at 1152.

¹³⁴ *Dep’t of Justice v. Landano*, 508 U.S. 165, 180 (1993).

discretion”¹³⁵ in applying the remedy and do so only in exceptional cases.¹³⁶

Though not its central purpose, *in camera* review has been utilized in instances of bad faith.¹³⁷ In *Jones v. FBI*, the court turned to *in camera* scrutiny after finding “evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue.”¹³⁸ Seen as particularly onerous, such review is disfavored.¹³⁹

In camera review is most commonly used when affidavits explaining exemption justification are decided to be insufficient¹⁴⁰ or lacking in detail.¹⁴¹ In *Quiñon v. FBI*, the D.C. Circuit took notice of affidavits that were merely declaratory and deficient in reasoning: “[W]here an agency's affidavits merely state in conclusory terms that documents are exempt from disclosure, an *in camera* review is necessary.”¹⁴² Notably, *in camera* inspection has been used when considering information claimed to already be in the public domain.¹⁴³

Both Vaughn Indices and *in camera* review are critical elements of the FOIA appeals process. They afford the appellant an essential opportunity to question agency exemption use and allow the court to arbitrate federal non-disclosure efforts. The Glomar response, by withdrawing the necessary elements

¹³⁵ *Loving v. Dep't of Defense*, 550 F.3d 32, 41 (D.C. Cir. 2008).

¹³⁶ *See Jones v. FBI*, 41 F.3d 238, 243 (6th Cir. 1994).

¹³⁷ *See Quiñon v. FBI*, 86 F.3d 1222, 1228 (D.C. Cir. 1996).

¹³⁸ 41 F.3d at 242-43.

¹³⁹ *See Armstrong v. Executive Office of the President*, 97 F.3d 575, 580-81 (D.C. Cir. 1996).

¹⁴⁰ *See Rein v. U.S. Patent & Trademark Office*, 55 F.3d 353, 377 (4th Cir. 2009).

¹⁴¹ *See Spirko v. U.S. Postal Service*, 147 F.3d 992, 997 (D.C. Cir. 1998).

¹⁴² 86 F.3d at 1229.

¹⁴³ *See Tigie v. Dep't of Justice*, 312 F.3d 70, 82 (2d Cir. 2002); *Mehl v. EPA*, 797 F. Supp. 2d 43, 46 (D.D.C. 1992).

for such discourse, circumvents the appeals process in a manner beyond statutory consideration.

OFFICIAL ACKNOWLEDGEMENT AND WAIVER OF EXEMPTION PROTECTION

As the efforts to acquire the mail covers records and the *Florez* case make apparent, appeals of a Glomar response can meet curious ends. In both instances, the records sought were in public circulation, yet the government would neither confirm nor deny their existence. Cases like these, where a widely documented federal program is essentially disavowed or the information on a diplomat three-decades removed from relevance, not only point to over-classification, and also demonstrate the extreme difficulty in overcoming a Glomar response. To challenge a Glomar response is to attempt to hit an invisible target. Instead of appealing the merits of disclosure, requesters are forced to demonstrate whether the public is already aware of potentially responsive records, a peculiar cause as the request itself is a type of public recognition. Two common law standards have emerged as methods for compelling disclosure when confronted with a Glomar response claim: official acknowledgement and waiver of exemption.

Federal courts have heard a number of cases considering waiver of exemption protection in non-Glomer FOIA appeals, where an exemption claim is deemed moot after the sought information was determined to have found its

way into public discourse.¹⁴⁴ The D.C. Circuit has ruled that a plaintiff holds “the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld.”¹⁴⁵ Such an inversion of responsibility, with the requester required to provide justification for disclosure, is counter to the central premise of the FOIA. The threshold has also proved to be difficult to meet with ubiquitous press coverage often not compelling disclosure.¹⁴⁶ Demonstrating that requested information matches information that is already in public circulation has proved difficult, with one court stating the sought-after records must be equally as specific as the circulating information and also must be published by an “official and documented” source to be considered “officially acknowledged” and require disclosure.¹⁴⁷ Congressional reports¹⁴⁸ and a U.S. ambassador’s testimony before Congress¹⁴⁹ failed to satisfy the official acknowledgement standard. The Second Circuit Court directly addressed official acknowledgment in *Wilner*, finding, “[A]n agency may invoke the Glomar doctrine to a FOIA request regarding a publically revealed matter. . . . [An agency] only loses its ability to provide a Glomar response when the existence or

¹⁴⁴ See, e.g., *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55 (D.C. Cir. 2003); *Frugone v. CIA*, 169 F.3d 772 (D.C. Cir. 1999); *Azmy v. Dep’t of Defense*, 562 F. Supp. 2d 590 (S.D.N.Y. 2008); *Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 584 F. Supp. 2d 65, 71 (D.D.C. 2008); *Wheeler v. CIA*, 271 F. Supp. 2d 132, 140 (D.D.C. 2003).

¹⁴⁵ *Afshar v. Dep’t of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

¹⁴⁶ See *Azmy*, 562 F. Supp. 2d, at 598-99; *Elec. Frontier Found. v. Dep’t of Justice*, 532 F. Supp. 2d 22, 24 (D.D.C. 2008).

¹⁴⁷ *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990).

¹⁴⁸ *Id.* at 765-66.

¹⁴⁹ *Pub. Citizen v. Dep’t of State*, 11 F.3d 198 (D.C. Cir. 1993).

nonexistence of the particular records covered by the Glomar response has been officially or publically disclosed.”¹⁵⁰

Meeting the official acknowledgement threshold becomes more complicated when a FOIA request is given a Glomar response. It would seem simpler as “in the context of a Glomar response, the public domain exception is triggered when ‘the prior disclosure establishes the existence (or not) of records responsive to the FOIA request,’ regardless whether the contents of the records have been disclosed.”¹⁵¹ Demonstrating official acknowledgement of the existence of the sought records has proved a difficult mark to hit. Were an appellant to trigger official acknowledgement, it would only result in a non-Glomer response, opening the door to a traditional FOIA exemption appeal.

In an illustrative 2013 case, the D.C. Circuit Court overruled the CIA’s use of a Glomar response when the American Civil Liberties Union sought agency information on drones.¹⁵² The court recognized the use of the Glomar response in “limited circumstances,” but only when the agency can demonstrate “harm cognizable under an FOIA exception.”¹⁵³ Significantly, the court considered “official acknowledgement” in a FOIA appeal brought by the ACLU regarding CIA use of drones. In Chief Judge Merrick Garland’s majority opinion, President Barack Obama and Chief of Homeland Security and Counterterrorism John

¹⁵⁰ 592 F.3d 60, 70 (2nd Cir. 2009)

¹⁵¹ *Marino v. DEA*, 685 F.3d 1076, 1081 (D.C.Cir.2012) (quoting *Wolf v. CIA*, 473 F.3d 370, 379 (D.C. Cir. 2007)).

¹⁵² *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013).

¹⁵³ *Id.* at 426 (quoting *Roth v. Dep’t of Justice*, 642 F.3d 1161, 1178 (D.C. Cir. 2011)).

Brennan’s public addresses were cited as official acknowledgment of federal government interest in drone use. The court said non-avowal of a CIA intelligence interest in drone technology “strains credulity.”¹⁵⁴ The specificity of Brennan’s remarks along with then-CIA Director Leon Panetta publically asserting that remote drone strikes in Pakistan were “the only game in town” were seen as decisive in determining official acknowledgment.¹⁵⁵

Judge Garland observed:

The Glomar doctrine is in large measure a judicial construct, an interpretation of FOIA exemptions that flows from their purpose rather than their express language. In this case, the CIA 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.¹⁵⁶

The D.C. Circuit remanded the case, ruling the Glomar response improper and asking the lower court to determine whether traditional denials under Exemption 1 and 3 claims were appropriate for non-disclosure.¹⁵⁷

LEGISLATIVE PROPOSALS AND DISCUSSION

¹⁵⁴ *Id.* at 430.

¹⁵⁵ Remarks of Leon Panetta, Director of CIA, at the Pacific Council on International Policy, May 18, 2009, *available at* <https://www.cia.gov/news-information/speeches-testimony/directors-remarks-at-pacific-council.html>.

¹⁵⁶ *ACLU v. CIA*, 710 F.3d, at 431.

¹⁵⁷ *Id.* at 434

The 114th Congress considered the increased popularity of the Glomar response and the growing range of exemptions tethered to the reply and passed an amendment that would prohibit efforts to “withhold information requested. . . merely because disclosure of the information may be embarrassing to the agency or because of speculative or abstract concerns.”¹⁵⁸ The Senate report on the possible changes explained an agency may withhold information only if it reasonably foresees a *specific identifiable harm* to an interest protected by an exemption, or if disclosure is prohibited by law, commonly referred to as the “presumption of openness.”¹⁵⁹

The amendments look to address methods of abstraction like the Glomar response. Both in the letter and the spirit of the law, the post-submission discussion between the agency and requester is seen as critical in resolving concerns by either party. Twice in the FOIA statute, requester amenability is explicitly called for.¹⁶⁰ Obstinance in working with the agency is noted as a consideration in the appeals process.¹⁶¹ Often the requester will need to supply further specifications on what is being sought or the agency may steer the individual to the appropriate agency or department or better clarify the functions

¹⁵⁸ FOIA Improvement Act of 2015, S. 337, 114th Cong.

¹⁵⁹ S. REP. NO. 114-4, at 8 (2015).

¹⁶⁰ 5 U.S.C. § 552(a)(6)(B)(ii) & 5 U.S.C. § 552(a)(6)(C)(iii) (2012).

¹⁶¹ 5 U.S.C. § 552(a)(6)(B)(ii) (2012) (“Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor.”).

of the legislation.¹⁶² Communication between individual and agency provides an important step in allowing the requester to better understand the FOIA system and the agency better able to serve the requester. This back-and-forth is an informal but important piece in achieving satisfactory ends.

It is hard to overstate the value of this discourse, as those most invested in the FOIA system understand the inherent give-and-take of the process. In the everyday gathering of records, stubbornness and hostility are uncommon paths and administrative appeals and federal court cases pursued as a last resort or as a grand gesture of disappointment with the system (as these rarely yield results). The Glomar response forecloses this vital element, and by extending this interplay, and not entirely dismissing it, the FOIA system as a whole is more likely to find agreeable ends for all parties involved. Neither confirming nor denying existence of the records moves the discourse outside of access to public records law, marking agency closure of the request. It is a denial, full stop; and exists as dead end to all avenues other than appeal and litigation. The Glomar response undermines access to public records in a number of ways, not least by obstructing civil efforts to work with the department or agency.

Another of the issues is an inherent failure of logic in the Glomar response, as identified by Nathan Freed Wessler:

¹⁶² 5 U.S.C. § 552(a)(6)(A)(I) (2012).

Were the government to invoke the Glomar response only when it had responsive records that it wished to conceal, while giving a traditional “no records” when it had no such responsive records, then requestors would come to see the Glomar response as nothing more than a functional government admission that records existed but were being covered up.¹⁶³

This becomes especially suspicious when there exists some public knowledge of the records being sought. Thus, the validity of the continued use of the Glomar response is contingent upon agency ability, not in utilizing the answer consistently, but in applying it with randomness (that is, to keep the public guessing). This surely is not an advisable path for federal governance.

As patterned use of the deflection method would invalidate it, the procedure rests on abdicating oversight. At present, the appeals system as facilitated in federal courts has provided the sustained deference necessary with few cases seeing substantial review.

While the Glomar response is problematic, it has a legitimate purpose in the FOIA scheme. To maintain its use, extending the request process (for example, as courts allow for extensive *voir dire* in court cases fraught with publicity concerns), particularly in refining requester language and expectations, may be an acceptable path forward. In allowing for communication and

¹⁶³ Nathan Freed Wessler, *[We] Can Neither Confirm Nor Deny the Existence of Nonexistence of Records Responsive to Your Request”: Reforming the Glomar Response under FOIA*, 85 N.Y. U. L. REV. 1381, 1396 (2010).

refinement of what is or is not potentially available, administrative appeals are apt to be more fruitful and could lead to fewer appeals in the federal court system. Hostile and contentious requests are legitimate regardless of tone, and agency reply should be systematic and oblivious to the voice of a request. The FOIA process, however, is a human process and acknowledgement of the interpersonal nature of the mechanism is necessary, and especially so when expanding discourse between requester and agency, an opportunity foreclosed upon with the Glomar response.

Danae Aitchison has called for further refinement of the FOIA, suggesting amending it in three ways: (1) Congress should require rare use of Glomar and only under limited circumstances; (2) Congress should provide courts with power to coerce compliance from agencies that fail to produce detailed, case-specific public affidavits; and (3) Congress should establish the review of *in camera* affidavits only as a last resort.¹⁶⁴ Implementing these changes would allow for the continued, responsible use of the Glomar response while allowing for a fuller public record.

Contemporary national security concerns have shifted the powers of the tripartite federal government. In routinely deferring to agency national security claims, the court has effectively diminished its role and unbalanced the tuning of federal governance. By placing a thumb on the scale and allowing “substantial

¹⁶⁴ Aitchison, *supra* note 52, at 251.

weight”¹⁶⁵ to agency affidavits so long as they hold “reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.”¹⁶⁶ When considering agency arguments, a court determines whether the position is “logical or plausible.”¹⁶⁷

As seen in the original Glomar Explorer mission, the official stance of ignorance only led to further suspicion and added fuel to the media spectacle. Civil liberty lawyers have taken advantage of the public backlash Glomar responses have often engendered. Jonathan Manes, previously of the ACLU and now Abrams Clinical Fellow at Yale’s Information Society Project, cited Glomar responses as the first step in “transparency campaigns.”¹⁶⁸ The FOIA denial is considered a catalyst or an anchor for advocacy. The thorough stonewalling of the Glomar response only increases citizen interest. Manes called the FOIA appeals process a platform for public attention, with each step another news peg.¹⁶⁹ Through the entirety of media events like NSA surveillance revelations, official government messaging is meticulously developed to avoid triggering FOIA obligations for further disclosure, allowing the state to shape public understanding with little accountability. The absurdity of asserting in court that

¹⁶⁵ Wilner v. NSA, 592 F.3d 60, 68 (2nd Cir. 2009).

¹⁶⁶ Larson v. Dep’t of State, 565 F.3d 857, 862 (D.C. Cir. 2009).

¹⁶⁷ *Id.*

¹⁶⁸ Jonathan Manes, How National Security Information Flows to the Public: The Case of Targeted Killings, speech at the Rob Kling Center for Social Informatics Colloquium, Mar. 27, 2015.

¹⁶⁹ *Id.*

secrecy is essential, while speaking about the issues in public (via official or unattributed channels) results in a dissonance that enflames public curiosity and rancor. The established exemptions and appeal process offer considerable latitude for classified information, especially so of national security concerns. In utilizing abstraction and obfuscation, agencies only provide oxygen for campaigns by civil liberties organizations.

The Department of Justice and the Office of Information Policy regularly create guides for federal agency reference in managing the FOIA. Since 1986, the section detailing use of the Glomar response has called such a reply extraordinary and cautioned against utilization.¹⁷⁰ The increasing pervasiveness of the Glomar response and other evasive measures threaten the appeals process and the very heart of the FOIA itself. By heeding the OIP's early warning and returning to the statutory regime, a cornerstone of democracy will remain solid in providing the public its right to know.

CONCLUSION

A primary strength of the FOIA is its appeals process. Unlike many international access statutes, it provides an answerable independent federal court system, one finely calibrated by nearly five decades of hearing FOIA concerns. The Glomar response provides a loophole in this structure, undermining the

¹⁷⁰ *OIP Guidance: Privacy "Glomarization,"* DEP'T OF JUSTICE, Jan. 1, 1986, <http://www.justice.gov/oip/blog/foia-update-oip-guidance-privacy-glomarization>.

very purpose of the law and its well-honed judicial review process. Expansion of the Glomar response threatens to unravel the fabric of access to government records. Its haphazard, illogical implementation would surely meet an equally quixotic judicial interpretation in the varied state and local courtrooms across the United States. While imperfect, the FOIA, and its many similar state and local statutes, help build a trust in government. Without a dependable method for acquiring the records necessary for ensuring accountable, transparent government, it would seem to follow that the threat of skepticism or even cynicism would metastasize.

The very existence of the Glomar response is not the problem. It serves a reasoned purpose in the present FOIA regime. This purpose, however, is to be narrowly defined and the reply utilized only in exceedingly rare instances where confirmation of records' existence poses a foreseeable harm to national security. Distributing this responsibility to states and smaller civic entities is inviting abuse of power. The familiar exemption structure that ably served FOIA for decades remains in place. A limited use of the Glomar response is acceptable, but to consent to recent efforts to expand use of the Glomar response into non-federal, non-national security concerns would be a grave mistake, one certain to send out ripples of discontent until rectified.

The primary issue with the Glomar response is its unreliable implementation among federal departments and agencies, and, as a result, it is frequently contested in federal court. Even among the landmark cases defining

Glomar response use, there is little consensus. In affirming the Glomar response claim, the *Hunt* court expressed reticence in the practice. In both *Wolf* and *ACLU v. NSA*, the courts found the agencies to have overreached.

The results of *North Jersey Media*, *Abdur-Rashid*, *Hashmi* and *BGA* are also mixed, but what the cases – and the Indiana amendment – represent is anything but ambiguous. They provide evidence of increasing implementation of the Glomar response. In the two New York cases, surveillance techniques were at stake. *North Jersey Media* presented an instance of the Glomar response as a shield for civilian privacy. The Illinois decision turned on the opening of a police database. *North Jersey Media* and *BGA* demonstrate the Glomar response at its most tenuous and unnecessary. Statutory exemptions would have sufficed in both situations, providing time-honored methods for non-disclosure. *Abdur-Rashid* and *Hashmi* only qualify for federally approved Glomar response under the premise that all Muslims are suspects. To affirm state-level Glomar response claims like these is to abandon oversight of surveillance programs broadly. The four state cases examined herein demonstrate the zealous and often dubious use of an extraordinary national security tool developed for extraordinary situations. A federally maintained Glomar response may have a time and a place, but utilization at the state and local levels is a bridge too far.

This study has traced the disconcerting recent expansion of Glomar response claims into non-federal, non-national security exemptions. While there exists a significant amount of research on the Glomar response (and nearly all of

it critical of the practice¹⁷¹), none has documented the creep of the Glomar response into state statutes and courthouses. In documenting the surge of state interest, the study has explored the difficulty in appealing a Glomar response. Official acknowledgement and waiver of exemption are mercurial thresholds, difficult to satisfy. Challenging a Glomar response is an arduous task, and defeating a claim only places the requester back at the beginning of the labyrinth, appealing the exemption itself. State and local recognition of the Glomar response poses a serious threat to grassroots access both in multiplying the number of Glomar response claims and presenting a maze of court interpretations and rationales. It is imperative that the access community, and those who rely on readily available government information, remain alert to this threat, as expanded recognition and use threaten to turn the already trying access system into a dizzying funhouse of proving the very existence of records that cannot be seen.

¹⁷¹ See *supra* note 23.