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# NATIONAL SECURITY vs. CIVIL LIBERTIES

The Delicate Balance of Security and Liberty in the Trump Era

Discrimination, National Security and the Trump Travel Ban

Sanctuary Cities

Homophobia and National Security

The Reporter's Privilege

Biometrics Implementation

# The Noncommittal Glomar Response

## Depriving the Public of the Right to Know Whether Public Records Exist

**by CJ Griffin**

*As we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.*

DONALD RUMSFELD[1]

The U.S. Supreme Court has stated that the purpose of the Freedom of Information Act (FOIA)[2] "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."[3] The New Jersey Supreme Court, in discussing the New Jersey Open Public Records Act (OPRA),[4] has proclaimed that "our government works best when its activities are well-known to the public it serves."[5] Yet, when public records that invoke national security concerns are at issue, courts have often given deference to the government and, at times, have permitted the utmost levels of secrecy.

In most cases, when a government agency responds to a public records request, it must either produce the requested records or cite a lawful basis for denying access to the records.[6] Where national security is concerned, however, federal courts have permitted agencies to refuse to acknowledge whether or not the requested records even exist. This 'neither confirm, nor deny' response is called a Glomar response, and its use has become widespread, providing the government an extra cloak of secrecy that was not written into public records laws.

This article addresses the development of the Glomar response in FOIA cases, how it is applied, how a records requestor can overcome it, and how New Jersey courts have recently adopted its use under OPRA.

### Neither Confirm, Nor Deny First Appears

The first known use of the Glomar response was in *Phillippi v. CIA*, a case involving the Central Intelligence Agency's (CIA) response to a FOIA request that sought records pertaining to the Hughes Glomar Explorer, an oceanic vessel that was publicly identified as a research ship owned by a private company.[7] According to news reports, the real owner of the ship was the CIA.[8] After these news reports were issued, the CIA scrambled to suppress additional news coverage about it.[9]

Wanting to learn more about the CIA's alleged attempt to suppress news stories about the Glomar Explorer, a reporter filed a request under the FOIA seeking "all records relating to the [CIA's] attempts to persuade any media personnel not to... make public the events relating to the activities of the Glomar Explorer."[10] The CIA denied the FOIA request, stating "that, in the interest of national security, involvement by the U.S. Government in the activities which are the subject matter of your request can neither be confirmed nor denied."[11]

While the *Phillippi* court did not actually decide whether or not FOIA permitted a "neither confirm, nor deny" response because the requestor did not challenge its use, the court noted that the request was "[i]n effect...as if appellant had requested and been refused permission to see a document which says either 'Yes, we have records related to contacts with the media concerning the Glomar Explorer' or 'No, we do not have any such records.'"[12]

The *Phillippi* court's explanation adequately described why courts have permitted the Glomar response. As one court put it, "[i]n certain cases, merely acknowledging the existence of a responsive record would itself cause harm cognizable under [a] FOIA exception."[13]

Since 1976, the Glomar response has become "well settled as a proper response to a FOIA request."[14] While initially it was an extreme measure permitted solely to protect national security, over time courts have permitted its use to protect the privacy of individuals,[15] to protect the identity of confidential informants,[16] and to shield disciplinary records of government employees from disclosure.[17]

Many courts and commentators[18] have criticized the widespread use of the Glomar response, with one court stating that "[t]he danger of Glomar responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods."[19]

## Application of the Glomar Response

To justify a Glomar response, an agency must demonstrate that an ordinary response "would cause harm cognizable under a FOIA exemption."[20] An agency must "tether" its neither confirm, nor deny response to one of FOIA's statutory exemptions, and its usage will be permitted only "if the FOIA exemption would itself preclude the acknowledgment of such documents."[21] In other words, the "existence or nonexistence of a record" must be "a fact exempt from disclosure" based upon the FOIA exemption that is cited.[22]

To prove its response was lawful, an agency must actually prove that its claimed exemption applies.[23] In a national security context, this means the agency must prove that one of two exemptions applies.

The first is FOIA Exemption 1, which exempts information that has been deemed classified by an executive order.[24] Importantly, this does not exempt information that is merely 'classifiable,' but rather only exempts information the agency has actually properly reviewed and marked "classified."[25] Because each president since President Harry Truman has issued a new executive order pertaining to national security issues,[26] the scope of Exemption 1 changes from administration to administration. Courts apply the executive order that was in effect when "the classifying official acted,"[27] though courts have discretion to permit an agency to re-examine its classification in light of a new order that is issued during the FOIA litigation.[28]

The second applicable national security exemption is FOIA Exemption 3, which protects information that is exempted from access by other statutes.[29] Numerous courts have found that certain provisions of the National Security Act of 1947[30] justify non-disclosure under FOIA Exemption 3.[31] In this regard, courts have accepted Glomar responses relating to records such as those that would confirm whether or not a particular person was a former undercover CIA agent,[32] memorandums regarding authorized interrogation methods against top-level Al Qaeda members,[33] and records relating to warrantless electronic surveillance or physical searches of persons.[34] Numerous other statutes have provided a basis for a Glomar response invoking Exemption 3.[35]

## Defeating a Glomar Response

A requestor seeking to challenge a Glomar response will in many ways face an uphill battle due to the secrecy of the proceedings and the Judiciary's deference to the government. While ordinary FOIA cases will often call for the production of a *Vaughn*[36] index, which lists all responsive records and the agency's claimed basis for non-disclosure, and an *in camera* review of records by the court to determine that the claimed exemption applies,[37] these procedures are unavailable in a Glomar case because the creation of a *Vaughn* index or production of records *in camera* would require acknowledging their existence.

Accordingly, in a Glomar response case courts generally require an agency to submit as much information as possible justifying the claimed FOIA exemption in a public certification, but then permit *in camera, ex parte* certifications to the court to explain in detail why the agency can neither confirm, nor deny the existence of the records.[38] Courts afford these secret certifications "substantial weight,"[39] and they are rarely rejected.[40] Not having access to the information provided to the court puts the requestor at a disadvantage in the litigation.

So long as the court accepts the agency's proof that the Glomar response was justified, a requestor primarily has

only one method[41] available to further challenge the response. The requestor can try to prove the agency 'waived' its right to use the Glomar response. "An agency is precluded from making a Glomar response if the existence or nonexistence of the specific records sought by the FOIA request has been the subject of an official public acknowledgment."[42] In *ACLU v. CIA*, the United States Court of Appeals for the D.C. Circuit found the CIA's Glomar response was "untenable" where the ACLU had sought records regarding the CIA's drone program because the CIA director, the president, and the president's counterterrorism advisor had given public speeches in which they acknowledged the United States was using drones abroad to target members of al-Qaida.[43]

## New Jersey Adopts the Glomar Response

In 2016, the New Jersey Appellate Division ruled in *North Jersey Media Group Inc, v. Bergen County Prosecutor's Office*[44] that OPRA permits a Glomar response in certain circumstances,[45] becoming one of the first states to do so.[46] For the most part, the Appellate Division followed federal precedent with regard to the procedures for use of a Glomar response, although it did limit its scope by stating it would not be available for every OPRA exemption, such as the criminal investigatory records exemption,[47] the ongoing investigation exemption,[48] and the privacy exemption.[49]

Although security issues were not at stake in *North Jersey Media Group*, OPRA does have two security-related exemptions. OPRA exempts:

- emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein[50]
- security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software.[51]

Additionally, Governor James McGreevey's Executive Order No. 21, which was in response to the Sept. 11, 2001, terrorists attacks and is still in effect, exempts from disclosure records that "would substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism."[52]

It is not difficult to foresee that New Jersey courts might accept a Glomar response for certain records exempted by these security decisions in light of the Appellate Division's decision in *North Jersey Media Group*. The New Jersey Supreme Court's recent decision in *Gilleran v. Township of Bloomfield*[53] suggests that any such holding would be upheld.

In *Gilleran*, the requestor sought footage from a security camera outside Bloomfield's municipal building.[54] The agency acknowledged the existence of the footage, but claimed it was exempt pursuant to OPRA's security-related exemptions.[55] While both the trial court and Appellate Division found the agency failed to meet its burden of proving the footage would be exempt,[56] the Supreme Court reversed, and held that "information that reveals the capabilities and vulnerabilities of surveillance cameras that are part of a public facility's security system is precisely the type of information that the exceptions meant to keep confidential in furtherance of public safety."[57]

Specifically, the Court held that "the scope of the camera's surveillance area (the width, depth, and clarity of the images, as well as when it operates, i.e. intermittently and, if so, at what intervals and are they regular) is the information that the Township seeks to protect."[58] Given this language, it seems likely the Court would have ruled similarly if Bloomfield had denied the requestor by stating it would neither confirm, nor deny the existence of video footage, since acknowledging the existence of footage for a specific timeframe would acknowledge when it operates or if it operates.

New Jersey's adoption of the Glomar response has left transparency advocates and media organizations disappointed.[59] Because certification was not sought in *North Jersey Media Group*, the Supreme Court has not yet weighed in on whether a Glomar response is permissible under OPRA, or defined its scope. Only time will tell whether use of a Glomar response will become as widespread in New Jersey as it is at the federal level. ⚖

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## ENDNOTES

1. Donald H. Rumsfeld, Sec'y of Def., Dep't of Defense News Briefing (Feb. 12, 2002), available at www.defenselink.mil/transcripts/transcript. aspx?transcriptid=2636; *See also* David A. Graham, Rumsfeld's Knowns and Unknowns: The Intellectual History of a Quip, The Atlantic (March 27, 2014).
2. 5 U.S.C. §552.
3. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).
4. N.J.S.A. 47:1A-1, *et seq.*
5. *Burnett v. Cty. of Bergen*, 198 N.J. 408, 414 (2009).
6. *See*, *e.g.*, N.J.S.A. 47:1A-5(g) ("A custodian shall promptly...provide a copy of a government record. If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor."); 5 U.S.C. 552 (providing that federal agencies must grant the request, deny the request and cite an exemption, or tell the requestor that there are no responsive records).
7. *See Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

8. *Id.* at 1011.

9. *Military Audit Project v. Casey*, 656 F.2d 724, 728-29 (D.C. Cir. 1981) (describing the events in *Phillippi*).

10. *Phillippi*, *supra*, 546 F.2d at 1011 n.1.

11. *Ibid.*

12. *Id.* at 1012.

13. *People for the Ethical Treatment of Animals v. Nat'l Inst. of Health*, 745 F.3d 535, 540 (D.C. Cir. 2014) (internal citations and quotation marks omitted).

14. *Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009), *cert. denied*, 562 U.S. 828 (2010).

15. *See, e.g.*, *Baez v. Dep't of Justice*, 647 F.2d 1328, 1338 (D.C. Cir. 1980) ("There can be no clearer example of an unwarranted invasion of personal privacy than to release to the public that another individual was the subject of an FBI investigation.").

16. *See* 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) (*citing Benavides v. DEA*, 968 F.2d 1243, 1246 (D.C. Cir. 1992)).

17. *See, e.g., Smith v. FBI*, 663 F. Supp. 2d 1 (D.D.C. 2009). *See also* 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) (citing to several cases where courts permitted Glomar responses for records pertaining to alleged employee wrongdoing).

18. *See, e.g.,* Wessler, note 17; Gotanda, note 18; Margaret B. Kwoka, The Procedural Exceptionalism of National Security Secrecy, 97 *B.U.L. Rev*. 103, 142 (2017); A. Jay Wagner, Controlling Discourse, Foreclosing Recourse: The Creep of the Glomar Response, 21 *Comm. L. & Pol'y* 539 (2016).

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

20. *Wilner, supra*, 592 F.3d at 68.

21. *Ibid.*

22. *Id.* at 70.

23. *Ibid.*

24. 5 U.S.C. §552(b)(1).

25. *Ibid. See also Schoenman v. FBI*, 575 F. Supp. 2d 136, 151-52 (D.D.C. 2008) ("To show that it has properly withheld information under FOIA Exemption 1, the [agency] must show both that the information was classified pursuant to the proper procedures, and that the withheld information substantively falls within the scope of [an executive order].").

26. *See* Exemption 1, Department of Justice Guide to the Freedom of Information Act, at 1 (2013), available at www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption1.pdf.

27. *Id.* at 3 (*citing Lesar v. DOJ*, 636 F.2d 472, 480 (D.C. Cir. 1980).

28. *See, e.g, Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1388 (8th Cir. 1985) (permitting agency to re-evaluate classification status under executive order issued during the lawsuit).

29. 5 U.S.C. §552(b)(3).

30. 50 U.S.C. §403-1(i).

31. *See CIA v. Sims*, 471 U.S. 159, 167 (1985) (holding CIA did not have to disclose names of those who performed research on a project to counter brainwashing and interrogation techniques by the Chinese and Soviets).

32. *Frugone v. CIA*, 169 F.3d 772, 774-75 (D.C. Cir. 1999).

33. *ACLU v. DOD*, 389 F. Supp. 2d 547, 565 (S.D.N.Y. 2005).

34. *Wilner, supra*, 592 F.3d 60.

35. *See, e.g.,* 50 U.S.C.§403g (information regarding CIA personnel); 10 U.S.C. § 424 (names of defense intelligence agencies); 10 U.S.C. § 130b (personal identifying information of certain Department of Defense and Coast Guard employees); 42 U.S.C. §2162(a) (data about atomic weapons); 35 U.S.C. §122 (patent applications); 5 U.S.C.§7114(b)(4) (labor training materials); 8 U.S.C. § 3521(b)(1)(g) (participants in Witness Security Program).

36. *See Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973).

37. *See Wessler, supre* note 17 at 1391-95 for discussion on FOIA procedure.

38. *Ibid.*

39. *Wilner, supra*, 592 F.3d at 68.

40. *Wessler, supre* note 17 at 1393.

41. Courts do state that the Glomar response should not be permitted where an agency acts in bad faith or seeks to hide violations of law, but scant case law exists. *Ibid.*

42. *Wilner, supra*, 592 F.3d at 60 ("[W]hen an agency has officially acknowledged otherwise exempt information through prior disclosure, the agency has waived its right to claim an exemption with respect to that information.").

43. 710 F.3d 422, 430-32 (D.C. Cir. 2013) ("Brennan and Panetta did not say that the CIA possesses responsive documents, what they did say makes it neither "logical" nor "plausible" to maintain that the Agency does not have any documents relating to drones.").

44. 447 N.J. Super. 182 (App. Div. 2016).

45. The court specifically held that a Glomar response was appropriate where N.J.S.A. 47:1A-9 created an exemption for any prior grant of confidentiality established by judicial case law and the agency was able to point to decisions by New Jersey courts that provided a "high degree of confidentiality for records regarding a person who has not been arrested or charged."

46. Indiana's records statute permits use of a Glomar response. Ind. Code Ann. § 5–14–3–4.4(a)(2). It appears that courts in only one other state, New York, have permitted a Glomar-like response. *See Abdur-Rashid v. New York City Police Dep't*, 37 N.Y.S.3d 64, 65 (N.Y. App. Div. 2016), *leave to appeal granted*, 47 N.Y.S.3d 223 (N.Y. 2016).

47. N.J.S.A. 47:1A-1.1.

48. N.J.S.A. 47:1A-3(a).

49. N.J.S.A. 47:1A-1.

50. *Ibid.*

51. *Ibid.*

52. In response to the executive order, the Department of Law and Public Safety promulgated a regulation to exempt specific records which place the state at risk of terrorism or other harm. *See* N.J.A.C. 13:1E-3.2.

53. 227 N.J. 159 (2016).

54. *Id.* at 163.

55. *Ibid.*

56. Under OPRA, a public agency bears the burden of proof. N.J.S.A. 47:1A-6.

57. *Id.* at 174.

58. *Id.* at 175.

59. *See, e.g,* Salvador Rizzo, State Appeals Court Says N.J. May Deny Access to Public Records, *The Record* (Aug. 31, 2016).