SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT:	**HON. ARLENE P. BLUTH** *Justice*	**PART**	**IAS MOTION 32**
		INDEX NO.	100690/2017
		MOTION DATE	
		MOTION SEQ. NO.	001

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MILLIONS MARCH NYC, an unincorporated association; and VIENNA RYE, ARMINTA JEFFRYS, and NABIL HASSEIN, in their individual capacities as representatives of Millions March NYC,

Petitioners,

- v -

NEW YORK CITY POLICY DEPARTMENT,

Respondent.

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DECISION AND ORDER

The following papers, numbered 3, were read on this application to/for Art 78

Notice of Motion/ Petition/ OSC - Affidavits - Exhibits	No(s)	1
Answering Affidavits - Exhibits	No(s)	2
Replying	No(s)	3

For the reasons set forth below, the Court finds that the use of a Glomar response with respect to records requested by protestors is impermissible and that branch of the petition is remanded so that respondent can make a non-Glomar response. Petitioners are also entitled to unredacted copies of documents with respect to Request 3(a).

Background

This matter arises out of petitioners' Freedom of Information Law ("FOIL") request for records relating to respondent's policies affecting protestors. Petitioners seek records for *inter alia* how respondent monitors protestors' social media activity and cell phones and the extent to which respondent utilizes technology to interfere with protestors' efforts to communicate (such

as draining cell phone batteries). Respondent initially denied petitioners' FOIL request with respect to Request Nos. 1-3 and turned over relevant documents with respect to Request No. 4. In denying Request Nos. 1-3, respondent neither confirmed nor denied the existence of the records sought by petitioners. This reply is commonly referred to as a Glomar response, which permits an agency to cite security concerns as the basis for the denial of a public records request and allows the agencies to withhold whether any responsive records exist.

This Court granted respondent's motion to stay this proceeding pending the Court of Appeals' determination in *Abdur-Rashid v New York City Police Dept.* After the Court of Appeals issued its decision, the parties submitted amended papers. At oral argument, the parties informed the Court that the only remaining requests to be explored were Requests Nos. 1 and 3. Request No. 2 is no longer an issue. Since the instant proceeding was commenced, respondent has turned over documents in response to Request Nos. 2 and 3.

Request No. 1—The Glomar Response

Glomar responses arose in the context of the Freedom of Information Act ("FOIA"), the federal equivalent of FOIL. It was first recognized in two cases seeking information about a CIA ship called the Hughes Glomar Explorer (*Wilner v National Sec. Agency*, 592 F3d 60 [2d Cir 2009]). The use of the Glomar response is well established in federal courts (*id.* at 68). "An agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a[ ] FOIA exception" (*id.*).

The Court of Appeals, in *Abdur-Rashid*, recognized that a Glomar response was permissible in certain circumstances under New York's FOIL (*Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 76 NYS3d 460 [2018]). "[T]here are indeed occasions when, due in large part to the precise manner in which the FOIL request is structured, an interpretation of the

statute that compels a law enforcement agency to reveal that responsive records exist with respect to a specific individual or organization would, in effect, force the agency to disclose substantive information that is protected under FOIL's law enforcement and public safety exemptions" (*id.* at 231). "[W]hen there is a FOIL request as to whether a specific individual or organization is being investigated or surveilled, the agency—in order to avoid tipping its hand—must be permitted to provide a Glomar-type response" (*id.*).

"It is the rare case where, due to the surrounding circumstances and the manner in which a FOIL request is structured, to acknowledge that any response records exist would, itself, reveal information tethered to a narrow exemption under FOIL. But when a FOIL request seeks to ascertain if a specific person or organization is under investigation by the NYPD Intelligence Bureau, such a response is entirely consistent with the purpose and structure of our statute. To recognize that those unusual circumstances coalesce here does not create a broad judicial exemption as the dissent erroneously claims" (*id.* at 233).

"We caution that we have no occasion in this case to consider whether a Glomar-type response is available under FOIL in any circumstance other than that presented here where the request involves an ongoing criminal investigation, nor do we adopt wholesale the approach taken by the federal courts" (*id.* at 237).

As an initial matter, the Court must determine whether respondent's Glomar response to Request No. 1 is permissible.

Petitioner's Request No. 1 sought:

> "Records relating to the NYPD's use of technology to engage in targeted or blanketed interference with the use of cell phones or cell phone applications by protestors (excluding intercept of contests of communications, but including interference with battery life and cell phone reception), specifically

a. Records identifying and describing the software or technology that the NYPD uses to engage in such interference;
b. Policies or guidelines relating to the NYPD's engagement in such interference; and
c. Records describing the occasions in which the NYPD has engaged in such interference" (petition, exh A).

"[T]he strongest safeguard against misuse of a FOIL exemption is the factual showing requirement. An agency denying a FOIL request must establish a bona fide, factual basis for the exemptions claimed and any evidence that undermines that showing is material to the court's assessment of the adequacy of the agency's submission" (*Abdur-Rashid*, 31 NY3d at 237). Here, that requires the Court to examine the affidavit of John Miller, Deputy Commissioner for Intelligence and Counterterrorism for the New York City Police Department (NYSCEF Doc. No. 13).

This affidavit warns that if respondent were to reveal whether or not it had records responsive to petitioner's request, it would "potentially provide persons intent on committing a crime or an act of terrorism with critical intelligence to both successfully carry out such crime or attack and successfully evade detection because they would have the specific knowledge of the tools the NYPD may access in preventing attacks" (*id.* ¶ 11). Miller details the stories of seven individuals who have been arrested, charged or convicted for terrorism-related attacks in New York City in the past decade (*id.* ¶ 16).

Although this affidavit provides ample reasons why a FOIL request for counter-terrorism information might merit a Glomar response, it does not provide any explanation for how it applies to this case. This proceeding concerns respondent's alleged efforts to interfere with the cell phones of protestors and Miller fails to address why a Glomar response should be available in the context of protestors. Miller does not claim that these protestors were affiliated with the terrorists he lists in his affidavit, that these protestors engaged in behavior that might be

connected to terrorism or that there might be terrorists hidden among the protestors. In fact, Miller does not allege that these protestors engaged in any terrorism-related behavior whatsoever.

Miller also assures the Court that the NYPD must follow the U.S. Constitution and that "Investigations by the NYPD that may involve 'political activity' may only be carried out by the Intelligence bureau under the specific guidance of the Handschu Guidelines, a consent decree entered into by the NYPD and plaintiffs and overseen by a district court judge in the Southern District of New York" (*id.* ¶ 5). "Whether or not the NYPD has access to technology that could interfere in a targeted ot [sic] blanket way broadly with the cellular calling and or social media communications of demonstrators such activity for the purpose of interfering with constitutionally protected activities, such as lawful protest, would be strictly prohibited by the NYPD's rules, the Handschu Guideline, as well as existing law" (*id.*).

This paragraph further confuses the issue. Miller appears to insinuate that deliberately using technology to interfere with protestors' cellphones would violate the law. If that were the case then, of course, respondent should be able to deny that any records exist because respondent, *according to respondent*, cannot interfere with a lawful protest. Revealing that the NYPD follows the law would not provide aid or comfort to terrorists. Of course, if respondent is using technology on protestors and, by its own account, violating the law, then it cannot hide exposure of that fact through a Glomar response.

Other possibilities exist as well—it could be that in using the technology, respondent happens to interfere with protestors' cell phones although that is not the intended purpose. Again, however, respondent could simply respond that responsive records exist and cite an applicable FOIL exemption. If a legitimate reason were provided (the Court does not endeavor to suggest

what that would be), then respondent would not have to reveal those documents, but it would still satisfy the purpose of FOIL. That would, theoretically, make information about the existence of surveillance information public but it would not detail what those technologies are or how they are used (assuming, of course, that respondent could sufficiently explain why an exemption denying disclosure is applicable).

This Court recognizes that respondent does not have to disclose how it conducts criminal investigations. But this is not about a criminal investigation or a counterintelligence operation. It arises from reports of protestors who claim that their cellphones are suddenly unable to function while in the middle of a protest. That possibility, that respondent is interfering with protestors' ability to communicate with each other, is a serious concern ripe for the use of FOIL.

Ultimately, respondent wants petitioners and this Court to simply trust respondent that it is not violating the law by interfering with a constitutionally-protected protest. But that notion is anathema to FOIL. FOIL is intended to shed sunlight on government actions. The very notion of a Glomar response (declining to confirm or deny the existence of records) contradicts the purpose of disclosure under FOIL. But it serves an important policy principle—there is certain information which, if released, could increase national security risks. This Court must endeavor to strike a balance between that legitimate concern and the possibility that law enforcement will see Glomar as a way to circumvent FOIL.

This case is unlike *Abdur-Rashid*, where requestors sought records about whether they were under criminal investigation by the NYPD. The underlying rationale of that case is clear. There is no need to provide records to someone who has done nothing wrong; that person, in an ideal world, would have nothing to worry about. However, someone who is engaged in criminal behavior would benefit by knowing that the NYPD is investigating him and seek to

avoid detection. That concern is not present here; petitioners simply want records (if such records exist) about what respondent does to their cell phones while they protest. The lack of a criminal component compels this Court to reject respondent's use of a Glomar response and require respondent to provide a FOIL response that confirms or denies whether responsive records exist.

Request No. 3- Trade Secret

Request No. 3 sought:

"3. Records relating to the NYPD's monitoring of social media accounts of protestors and protest groups, regardless of privacy settings, specifically:
a. Records identifying and describing any software or technology (including for example Geofeedia, MediaSonar, XI Social Discovery, or similar products) that the NYPD uses to engage in such monitoring;
b. Policies or guidelines relating to the NYPD's engagement in such monitoring; and
c. Records reflecting the NYPD's monitoring of the following social media accounts of the Requestors: i. Facebook accounts of: 1. Millions March NYC 2. Vienna Rye 3. Cleo Jeffryes ii. Twitter accounts of: 1. @millionsmarch 2. @nabilhassein 3. @armintasade iii. Instagram accounts of: 1. @millionsmarchnyc 2. @vrye 3. @armie_sade" (NYSCEF Doc. No. 5 at 5).

Petitioners insist that respondent failed to justify the redaction of pricing information, product descriptions and policy documents. Petitioners acknowledge that respondent provided about 90 pages of contract and agreements with respect to Request 3(a), but redacted the names of Dataminr and New York City personnel and removed all references to cost, money or product names. Petitioners insist that they do not object to the redaction of names and contact information but insist that the lone FOIL exemption cited by respondent is inapplicable. Petitioners question whether the redacted information constitutes a "trade secret" under FOIL.

In opposition, respondent claims that the information petitioner seek constitutes a trade secret and is exempt from disclosure under FOIL. Respondent attaches the affidavit of Gary Hacker, who claims that disclosure of the redacted information would cause substantial harm to

Dataminr's competitive position. Hacker claims that competitors would discover the capabilities of Dataminr's products.

Pursuant to Public Officers Law Section 87(2)(d), an agency can withhold or redact records that are "trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise. . ."

As an initial matter, the Court finds that respondent has waived its right to cite to this exemption because this exemption was not cited in its initial administrative denial or in any communication until well after this proceeding was commenced (*see Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 74-75, 64 NYS3d 635 [2017]). In *Madeiros*, the Court of Appeals rejected an agency's use of an exemption that was not cited in its administrative denial. Here, respondent declined to release documents in February 2017 with respect to Request No. 3 and cited to numerous exemptions but did not cite to the trade secrets exemption (petition, exh G). There is also no evidence that respondent made a contemporaneous claim that the records constituted trade secrets (*see id.* at 74). Instead, over a year after petitioner commenced this proceeding, respondent finally turned over redacted documents and cited (for the first time) the trade secrets exemption. That is contrary to the purpose and spirit of FOIL.

Respondent had an opportunity to cite all applicable exemptions in their initial administrative determination dated February 3, 2017. In fact, it cited *five* exemptions that it claimed justified withholding all documents for this request. While the Court recognizes that respondent may have made an error in failing to produce redacted documents citing the trade secret exemption initially, respondents do not admit to any mistake. Instead, they just produced redacted documents and cited a new exemption 15 months after the instant proceeding was

commenced. Without any justification offered by respondent, the Court finds the new exemption based on trade secrets is simply too late. Therefore, because the trade secret exemption was not cited until August 10, 2018, the Court finds that respondent waived its right to cite that exemption and it must turn over unredacted copies of the requested documents for Request No. 3. Respondents may, however, keep redactions of the names and contact information of Dataminr's personnel and city employees.

Even if the Court were to consider the trade secret exemption on the merits, the Court finds that respondent did not meet its burden to justify the redactions. No definition of trade secret is provided in the statute although New York courts generally utilize the definition in the Restatement of Torts. It defines a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it" (Restatement [First] of Torts Section 757, comment b).

Respondent points out that records can satisfy this exemption whether they are a trade secret *or* whether disclosure of the information would cause substantial injury to the competitive position of the company. The Court agrees that this two-pronged analysis is used to determine whether information falls under this exemption (*see Verizon New York Inc. v New York State Public Serv. Commission*, 46 Misc3d 858, 991 NYS2d 841 [Sup Ct, Albany County 2014] [reviewing the legislative history of the trade secrets exemption]).

According to Mr. Hacker (Senior Vice President for Dataminr, Inc.), Dataminr is "a world leader in Artificial Intelligence and Machine Learning innovation" and it "alerts its customers to high-impact events and critical breaking information before such events or information make the news" (NYSCEF Doc. No. 14, ¶ 2). Hacker warns that "disclosure of

company-specific information can result in significant consequences and competitive disadvantage" (*id.* ¶ 4). He further insists that Dataminr and its competitors closely protect information about their technologies and about unit pricing from public disclosure (*id.* ¶ 7).

Hacker contends that disclosure of Dataminr's pricing could allow "competitors to undercut our prices . . . or encourage competitors to offer potential customers incentives they would not otherwise offer" and "could negatively impact the Company's negotiations with prospective customers" (*id.* ¶ 16,17). Hacker adds that the rest of the "redacted information consists of detailed, proprietary company and product information, including the specific product features and services which were to be provided" (*id.* ¶ 19).

The Court finds that Hacker failed to meet his burden to show that the redacted information is a trade secret. Nowhere in his affidavit is there any suggestion that the redactions cover a formula, pattern or compilation of information which would give a competitor the opportunity to gain a competitive advantage. The Court also finds that disclosure of these records would not cause substantial injury to Dataminr.

If the prices and the product features are trade secrets, then every single contract a governmental agency enters into would be exempt from FOIL. Every contract contains information about pricing and, where a product is purchased, the contract presumably also has details about the product. It may lay out what the product is for, what its capabilities are and how it can be used. These are not trade secrets-- if someone purchases an iPhone or any other electronic device, the product generally comes with a manual that explains the product's features and capabilities. While it might provide details about the end-user experience

it does not include the underlying proprietary information. Put another way, it is not a trade secret that iPhones contain fingerprint technology although it may be a trade secret to reveal the technology used to create that feature.

Request 3(b)

In reply, petitioners no longer object to redactions based on the non-routine investigations exemption (NYSCEF Doc. No. 19 n 6).

Attorneys' Fees

Recently, the "Legislature amended the provision which now provides that the court shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access" (*Rauh v de Blasio*, 161 AD3d 120, 126, 75 NYS3d 15 [1st Dept 2018] [internal quotations and citations omitted]). "The language of the statute is mandatory and not precatory, if the statutory requirements are met" (*id.* at 127).

The Court finds that petitioners are entitled to attorneys' fees because they have substantially prevailed. Petitioners submitted a FOIL request containing four separate demands on October 24, 2016 (petition, exh A). Respondent issued a response dated January 10, 2017 in which it declined to produce any records with respect to Request Nos. 1-3 and it provided nine pages of records for the fourth demand (*id.* exh E). During the pendency of this proceeding, respondent disclosed over 100 pages of documents (some with redactions) in response to requests 2 and 3. That is enough to find that petitioners substantially prevailed (*Madeiros*, 30 NY3d 67 at 79 [finding that petitioner substantially prevailed where agency made no initial

disclosures prior to the commencement of an Article 78 proceeding even though the agency later produced redacted documents]).

Respondent failed to articulate a reasonable basis for providing nothing with respect to petitioners' request numbers 2 and 3. The fact that respondent later provided information after this proceeding was commenced is of no moment. Petitioners were forced to bring the instant proceeding in order to get documents and they obtained information for two of the three outstanding requests (respondent produced information relating to the fourth request before this proceeding was commenced). That justifies the imposition of attorneys' fees. The issue of the amount of attorneys' fees is hereby severed and referred to a referee who shall hear and report.

Summary

To be clear, the Court is not requiring that respondent turn over records with respect to Request No. 1. That issue is simply remanded to respondent. Respondent may decline to provide records, but it must confirm or deny whether such records exist. The Court recognizes that respondent, and especially the counterterrorism unit, must be allowed to work without worrying that their technologies, strategies and techniques might be made public. Obviously, those who might wish to do harm could evade detection if they obtain detailed information about the technology that respondent possesses. But that consideration must not creep into every aspect of New Yorkers' lives.

Terrorism-related concerns cannot be used to justify the use of a Glomar response in every FOIL context. The petitioners here are protestors, engaging in First-Amendment protected activity. The only connection between protestors and terrorists appears to be that both groups use cell phones. But terrorists and protestors and, for that matter, New York City residents use cell phones and computers and social media and a variety of other technologies.

A Glomar response cannot be used in every instance in which a terrorist might use the same technology as a protestor or a New York City resident.

While respondent surely possesses some information that is highly sensitive, respondent has responsibilities other than counterterrorism. During protests, respondent ensures the safety of protestors, counterprotestors and the general public. The way in which respondent conducts those duties should be subject to public oversight through FOIL, subject to applicable exemptions. But to allow respondent to provide a Glomar response in this case would effectively eliminate any oversight over respondent's handling of protestors—activities which are not inherently violent or criminal (unlike terrorism). Rather, as respondents themselves recognize, these activities are explicitly protected under the U.S. Constitution and U.S. Supreme Court precedent.

To embrace the use of Glomar response here would shut off all public inquiry and require respondent to hold itself accountable. That notion runs counter to the very purpose of freedom of information statutes. It certainly would not give terrorists the "combination to the safe" to admit or deny that responsive records exist and, if such records exist, to offer a legitimate reason for citing an exemption if one is applicable. But to admit or deny nothing is tantamount to demanding trust based on only assurances. FOIL is not about blind trust—it is about holding government officials accountable. That principle is fundamental to a democratic society and cannot be cast aside so easily.

Accordingly, it is hereby

ADJUDGED that the petition is granted to the extent that (1) Request No. 1 is remanded to respondent, who is directed to issue a FOIL response that confirms or denies the existence of responsive documents and (2) respondent is directed to turn over unredacted materials (except for names and contact information) in response to Request No. 3(a) on or before February 28, 2019, and (3) petitioners are awarded costs and disbursements as awarded by the Clerk upon presentation of proper papers therefor and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the issue of reasonable attorneys' fees is severed and referred to a special referee to hear and report. Counsel for petitioners shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, and any forms necessary upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street. The Clerk is respectfully requested to place this matter on the calendar of the Special Referee's Part upon service of this order.

1.11.19

DATE

Arlene P. Bluth

HON. ARLENE P. BLUTH

CHECK ONE:	[X] CASE DISPOSED		[ ] NON-FINAL DISPOSITION		
	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART	[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER		
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