

BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

Honorable Paul J. Baisley

Motion pursuant to CPLR §602 denied; defendants failed to establish that the convenience of the parties or any witnesses or the interest of justice would warrant consolidating or joining the actions for trial and placing venue of the actions in Suffolk County.

In *Sabrina Bencivenga and Michael Mulligan v. Onexim Sports and Entertainment Holding, USA, Inc., Brooklyn Sports & Entertainment, Brooklyn Events Center, LLC and AEG Management Brooklyn, LLC*, Index No.: 610277/2017, decided on July 2, 2018, the court denied defendants' motion pursuant to CPLR §602 consolidating or joining for trial this action with the related Supreme Court, Kings County actions and transferring venue of all the actions to Supreme Court, Suffolk County.

In denying the application, the court noted that the pleadings submitted herein indicated that the first action was the instant action, commenced in Suffolk County but the claims of

all four actions arose from an incident which occurred in Barclays Center in Kings County. The court noted that at least two of the plaintiffs resided in Kings County. As such, the court found that the defendants failed to establish that the convenience of the parties or any witnesses or the interest of justice would warrant consolidating or joining the actions for trial and placing venue of the actions in Suffolk County. Thus, while the actions involved common issues of law and fact, the court found that joining the actions for trial was not warranted.

Honorable Martha L. Luft

Article 78 petition dismissed; application for preliminary injunction denied; temporary restraining order granted on January 9, 2018 vacated; relief from the TPVA order by way of an appeal, not an Article 78.

In *In the Matter of an Application of Scott Lockwood v. Suffolk County Traffic and Parking Violations Agency, Alan Wolinsky, Paul Margiotta, Justin*



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Smiloff, and John Does 1-100, Index No.: 107/2018, decided on June 3, 2018, the court dismissed the petition, denied the application for a preliminary injunction, and vacated the temporary restraining order granted on Jan. 9, 2018 (Rouse, J.).

The matter was a request to vacate a Traffic and Parking Violations Agency's ("TPVA") Order, which required the petitioner to obtain prior permission from a judicial hearing officer in order to be able to make motions in the SCTPVA. According to the record, petitioner made numerous motions raising identical challenges to the jurisdiction of the SCTPVA. The earlier motions were denied and appeals brought were dismissed by the Appellate Division. The court imposed a sanction requiring prior authorization for the petitioner to make motions.

In dismissing the petition, the court reasoned that the petitioner should have sought relief from the TPVA order by way of an appeal, not an Article 78 since it may not be used to seek review of issues that could have been raised on direct

appeal. Moreover, the court concluded that the relief sought was only available to correct an error of fact but was not available to correct errors of law.

Motion to dismiss granted; petition filed one day beyond the statute of limitations.

In *In the Matter of the Application of Zhi Ming Shi v. Michael Kane, chairperson, Thomas Weinschenk, Burton Koza, John Farrell, Delores Quintyne and John Miller, Duly constituting the members of the Town of Babylon, Zoning Board of Appeals*, Index No.: 250/2018, decided on Aug. 6, 2018, the court granted respondent's motion to dismiss.

The court noted that the action was an Article 78 proceeding to challenge a determination of the Town of Babylon Zoning Board of Appeals ("ZBA"). The ZBA moved to dismiss on the grounds that the petition was barred by the applicable statute of limitations.

In granting the application, the court noted that pursuant to Town Law §267-c(1), the statute of limitations for challenging a zoning board determination was 30 days from the filing of the de-

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CIVIL RIGHTS/ADMINISTRATIVE

Focus on FOIL: Court of Appeals Endorses CIA FOIA Exemption for the NYPD

By Cory Morris

The Court of Appeals approved the New York City Police Department's ("NYPD") citation of counterterrorism to neither acknowledge or deny whether records exist in response to a Freedom of Information Law ("FOIL") demand. "In a 4-3 [2018] decision, the majority ruled that the NYPD was within its rights to give a nonresponse when it received Freedom of Information Law requests from two Islamic men who wanted records tied to possible police surveillance."¹ The narrow majority of the court created an exemption to even the acknowledgment of records where previously there was no such exemption contemplated by the Legislature. The records requested were not reviewed by a court and the NYPD neither confirmed nor denied the existence of responsive records relating to the requestors themselves.

New York's FOIL statute declares that "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government." The statute is based on the policy that "the public is vested with an inher-

ent right to know and that official secrecy is anathema to our form of government."² Public Officers Law, Section 84 states that "Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality."

Although FOIL is a civil right subject to exemptions created by the Legislature, the Court of Appeals created a new acknowledgement-type exemption in *Matter of Abdur-Rashid v. New York City Police Dept.* ("Abdur-Rashid") that was first utilized by the Central Intelligence Agency ("CIA") in response to a Freedom of Information Act request. "The ruling gives the NYPD a Cold War-era tool to shield information from the public determined to be sensitive, disappointing some lawyers and others who said the court's decision would hurt efforts to hold the police accountable."³ In footnote two, the majority in *Abdur-Rashid* noted that the agency (the NYPD) has the burden of proving that the records fall within claimed exemptions, however, the decision precludes knowledge whether such records even exist. The use of an acknowledgment-exemption creates an Orwellian category of inquiry unto itself, (no doubt created and



Cory Morris

reserved for such unique occasions as the salvage of a Soviet Submarine), and carries an endorsement of a war on terror that seems to have no clear start or logical end point.

The decision is at odds with four decades of caselaw. "The Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy." Over the years, FOIL evolved even in the aftermath of the creation of the Glomar exemption recognized under FOIL's federal counterpart.⁴ Ordinarily, an agency's records "are presumptively open to public inspection, without regard to need or purpose of the applicant." Prior to the new exemption, an agency faced with a FOIL request must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search. Here, the Court of Appeals provided what the Legislature did not — even after several amendments to FOIL throughout the 1970s — that it need

not review the records to accept an agency exemption which can be made on the basis of an affidavit like the one produced by the NYPD:

Just as requiring the CIA to state whether it possesses documents relating to the Hughes Glomar explorer would reveal whether or not it was connected to that vessel, compelling the NYPD to state whether or not it possesses "investigative or surveillance" records would reveal substantive information concerning an individual's involvement with the NYPD investigation.⁵

Yes, the majority analogized the NYPD to the CIA. "The NYPD's response, although styled as a motion to dismiss the petition in each case, did not assert a procedural objection but defended the FOIL responses on the merits." The new state exemption in FOIL will likely follow its federal equivalent in the Freedom of Information Act, the Glomar response. "[T]he Glomar response, an ambiguous non-answer that defense and intelligence officials have used for years to hide their deepest secrets."⁶ Contrast this with "the Freedom of Information Law [which] has been interpreted as requiring government agencies either to produce requested records — except for

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FOIA Exemption for the NYPD (Continued from page 4)

those that can be legally withheld — or to certify that the records being asked for do not exist.” This unprecedented approval of a Glomar response by a state agency will no doubt invite litigation over its use and application.

The Court of Appeals in *Abdur-Rashid* upheld the Appellate Division (First Department) reasoning that an NYPD affidavit was sufficient insofar as it described the “ongoing and wide-ranging counterterrorism efforts, acknowledging that the agency was actively engaged in covert surveillance and other intelligence gathering in its effort to preempt acts of terrorism in New York City, which remains a prime target in the wake of the World Trade Center attacks.” Three short years after the first World Trade Center attack, the New York Court of Appeals decided *Gould v. NYC Police Dept.*, 675 NE 2d 808 (1996), a case requiring the same NYPD to make a “particularized showing that a statutory exemption applies to justify nondisclosure of the requested documents.” The deviation here, 17 years after the second World Trade Center attack, seems to foster secrecy in anything asserted to be under the guise of counterterrorism.

In *Abdur-Rashid*, a detailed affidavit replaced an *in camera* review of “sensitive or confidential materials when the court deems such a procedure appropriate or necessary in a particular case to test the legitimacy of a claim of confidentiality.”⁷ Usually, “an agency may refuse to

confirm or deny the existence of records (i.e., assert a Glomar response) if the FOIA exemption would itself preclude the acknowledgment of such documents... When employing a Glomar response, an agency must “tether” its refusal to respond to one of the nine FOIA exemptions.”⁸ Such response, historically, was justified in “unusual circumstances, and only by a particularly persuasive affidavit.”⁹ The use of a Glomar response under FOIL will evade review at the initial request response and administrative appeal stage and, provided a court is persuaded, in the case of initial judicial intervention.

The Legislature should act to correct this decision. “For years, the GLOMAR reply only applied to the CIA and national security matters. But since 9/11, the NYPD has taken on much more of a global, counterterrorism mission . . . The FBI was reportedly not involved in this terrorism case, and the defendant was charged by the Manhattan District Attorney.”¹⁰ Accordingly, if any agency decides to take on a global, counterterrorism mission, it does so subject to all the other laws applicable to its legitimate operations.

For records requestors, the idea that this level of secrecy is needed, to not provide records *in camera* to a judge, is contrary to longstanding law and must be fought as an aberration. For municipalities, use of Glomar should be reserved for decisions tethered to a FOIL

exemption and accompanied by a detailed affidavit stating why such an acknowledgment of such records can be tied to, *inter alia*, national security.

Note: Cory Morris is a civil rights attorney, holding a master's Degree in General Psychology and currently the Principal Attorney at the Law Offices of Cory H. Morris. He can be reached at <http://www.corymorris.com>

¹ Jason Grant, *High Court Allows NYPD to Evade Acknowledging Whether They Have Information About Muslim Surveillance*, New York Law Journal (March 29, 2018), <https://www.law.com/newyork-lawjournal/2018/03/29/ny-high-court-allows-nypd-to-evade-giving-foil-requested-information-about-muslim-surveillance/>.

² Public Officers Law, Section 6.

³ *Matter of Fink v. Lefkowitz*, 47 NY2d 567, 571 (1979).

⁴ Zolan Kanno-Youngs, *NYPD Can Use Cold War-era Response for Records Request*, Judge Rules, Wall

Street Journal (March 29, 2018), <https://www.wsj.com/articles/nypd-can-use-cold-war-era-response-for-records-request-judge-rules-1522366481>.

⁵ *Matter of Alderson v. New York State Coll. of Agric. & Life Sciences at Cornell Univ.*, 4 N.Y.3d 225, 230, 792 N.Y.S.2d 370, 825 N.E.2d 585 (2005) (internal quotation marks and citation omitted).

⁶ See *Phillippi v. CIA*, 546 F.2d 1009, (D.C. Cir. 1976).

⁷ *Matter of Abdur-Rashid v. New York City Police Dept.*, 2018 N.Y. Slip Op 2206, 13 (2018) (external quotation marks omitted and emphasis added).

⁸ Alan Feuer, *Activists Sue Police Dept. Over ‘Can’t Confirm or Deny’ Tactic*, New York Times (June 14, 2017), <https://www.nytimes.com/2017/06/14/nyregion/nypd-secrecy-glomar-response.html>.

⁹ *Abdur-Rashid*, 2018 N.Y. Slip Op 2206, 22; see *Matter of New York Times Co. v. City of N.Y. Fire Dept.*, 4 NY3d 477, 490 (2005).

¹⁰ *Florez v. CIA*, No. 14-Cv-1002 (SHS), 2015 U.S. Dist. LEXIS 20009, at *11 (S.D.N.Y. Feb. 19, 2015)

¹¹ *Florez v. CIA*, 829 F.3d 178, 184-85 (2d Cir. 2016); see also *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996); *Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009).

¹² Matt Katz, *The NYPD Will Neither Confirm, Nor Deny, the Stories Behind This Story*, WNYC (September 19, 2017), <https://www.wnyc.org/story/nypd-will-neither-confirm-nor-deny-stories-behind-story/>.

Among Us (Continued from page 7)

Freedoms Park, Roosevelt Island, N.Y.

To the family of **Edward J. Gutleber** on the recent passing of his brother, John Gutleber. John was president and CEO of Castagna Realty Company and died suddenly from complications of pneumonia. Donations in John's name may be made to The Viscardi Center, Tilles Center for the Performing Arts and Long Island Association.

New Members...

The Suffolk County Bar extends a warm welcome to its newest members: **Natalie M. Donaldson, Evan P. Hallal, Edward G. Heilig, Paul M. O'Brien, Ellen Sundheimer, James J. Symancyk and Tina Marone-Tew.**

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the law: **Jonathan Gonzalez, Lillian Mosley, William D. Ramos and Collin M. Smith.**