

**STATE OF CONNECTICUT
FREEDOM OF INFORMATION COMMISSION**

Anike Niemeyer,)	
)	March 27, 2020
)	
Complainant,)	Docket # FIC 2019-0652
)	
against)	
)	
Chief, Police Department, Town of)	
Madison; Police Department, Town)	
of Madison; and Town of Madison,)	
)	
Respondents.)	

COMPLAINANT’S POST-HEARING BRIEF

PRELIMINARY STATEMENT

Barbara Hamburg was murdered more than a decade ago. Despite dedicated efforts over several years, an intense investigation by the Madison Police Department reached a dead end long ago. Scores of individuals were interviewed and every available lead has long since run cold. Numerous cold case reviews over the years have failed to identify any new investigatory avenues. Even so, the Madison Police Department never closed its investigation. Indeed, as far as the record reflects, it has never closed any unsolved murder investigation. Respondents are now impermissibly relying on the technical “open” status of the investigation as the sole basis for refusing to disclose any records pertaining to the Hamburg murder—without any showing that their release would prejudice a future law enforcement proceeding, and without even reviewing the records to determine if the information they contain is already public.

In search of information regarding the circumstances of his mother’s tragic death, Madison Hamburg submitted a request for records to the Madison Police Department through his

associate, Anike Niemeyer, and Eastward Pictures. In response to this request, the Madison Police Department turn a blind eye to their disclosure obligation under the Connecticut Freedom of Information Act (“FOIA”) and ignore their burden to prove both that the specific withheld records will be used in a prospective law enforcement action and that their disclosure would be prejudicial to that action. Instead, Respondents essentially ask the Commission to find that the law enforcement exemption permits them to blanketly withhold—even years after the fact—any record relating to an unsolved crime that they do not want to make public. FOIA grants law enforcement agencies no such sweeping discretion to impose secrecy over their past actions.

The Commission should hold Respondents to their statutory burdens. Respondents failed to produce a witness with any knowledge of their search for responsive records, the review of those records, or the process by which the decision was made that *all* the requested records could be withheld. Other than vague and generalized speculation, Respondents were unable to identify any prospective law enforcement action where the requested records would be used, let alone to establish that disclosure of any specific record would prejudice that proceeding. Respondents’ identification of potential threats to hypothetical law enforcement actions from the release of investigatory files fails to meet their specific statutory burden.

SUMMARY OF THE RECORD

The Freedom of Information request submitted by Anike Niemeyer seeks records relating to the investigation by the Madison Police Department (“MPD”) into the unsolved murder of Barbara Hamburg. *See* Feb. 19, 2020 hearing recording [hereinafter “Recording”], at 00:02:17-00:02:32. Ms. Niemeyer submitted her request on behalf of Barbara Hamburg’s son, Madison Hamburg, who is seeking information about his mother’s death and the police’s long-cold investigation into her murder.

It has been more than a decade since Barbara Hamburg was found murdered at her home on March 3, 2010. *Id.* at 00:08:22-00:08:30. Following the murder, the Madison Police Department engaged in an extensive, years-long inquiry into the circumstances surrounding Ms. Hamburg’s death. *See, e.g., id.* at 01:21:05-01:21:37. It pursued every lead and interviewed every potential source of credible information, but the investigation ran cold years ago. *See, e.g., id.* at 01:22:07-01:22:36. MPD never issued an arrest warrant or named a suspect. *Id.* at 00:15:08-00:15:55. In the end, despite “hundreds and hundreds of interviews,” lead investigator Detective Christopher Sudock testified to the Commission that MPD has “nothing” to investigate. *Id.* 01:23:08-01:23:21. This conclusion appears to be shared by the State’s Cold Case Unit, which reviewed the case more than three years ago but found no overlooked leads and identified no new individuals to interview. *Id.* at 01:21:05-01:21:37.

In order to gain information about Barbara Hamburg’s murder and the now-cold MPD investigation, Anike Niemeyer and Eastward Pictures asked Respondents to disclose five categories of records:

- 1) All investigatory records, including all files, reports, notes, transcripts, correspondence, warrant applications and affidavits, and audiovisual recordings, in electronic format;
- 2) All witness statements, in electronic format;
- 3) All interrogation recordings and all transcripts thereof, in tape or electronic format;
- 4) The 911 telephone call placed by Barbara Alexandra Hamburg and Conway Beach when Barbara Hamburg’s body was discovered on March 3rd, 2010, in tape or electronic format; and
- 5) All crime scene recordings, including photographs and videos, taken at the scene of the murder at 44 Middle Beach Road West, Madison, CT 06443, in electronic format.

Letter from Anike Niemeyer to Valerie Soule, Records Div., Madison Police Dep’t (Oct. 18, 2019) (Complainant’s #1).

The document request was sent by certified mail on October 18, 2019. *Id.* Just four days later, on October 22, 2019, Respondents issued a blanket rejection and refused to produce any of the requested records, citing only the law enforcement exemptions in Conn. Gen. Stat. § 1-210(b)(3) as the basis for their refusal. *See* Letter from Valerie Soule, Records Div., Madison Police Dep't, to Anike Niemeyer (Oct. 22, 2019) (Complainant's #2). Ms. Niemeyer promptly appealed the MPD's wholesale nondisclosure to the Commission on October 28, 2019. *See* Email from Anike Niemeyer to FOI@ct.gov (Oct. 28, 2019, 11:32 EST) (Complainant's #3).

A hearing on the MPD's refusal to disclose was held before Commissioner Matthew Streeter on February 19, 2020. To justify their position, Respondents relied solely upon the testimony of a single witness: MPD Detective Christopher Sudock. Detective Sudock's testimony established—or failed to establish—a number of facts relevant to Ms. Niemeyer's appeal.

1. Detective Sudock was not involved in responding to Ms. Niemeyer's FOIA request and "did not personally make the decision not to disclose the requested records." Recording at 01:35:35-01:135:43. He was unable to tell the Commission who responded to the request, what steps MPD took to search for the responsive documents, or who—if anyone—reviewed the requested records in order to decide if they could properly be withheld prior to the issuance of a denial. *Id.* at 01:31:17-01:33:11.

2. Detective Sudock could not explain why *all* of the requested documents were withheld, testifying that he had "no idea on that." *Id.* at 01:35:47-01:36:06. In fact, he acknowledged that the blanket withholding was unjustifiable, testifying that the 911 call records sought in category four of Ms. Niemeyer's request could be disclosed without any possible harm to law enforcement. *Id.* at 01:34:07-01:34:47.

3. Detective Sudock could not identify any specific law enforcement action that would be adversely affected by release of the requested records, offering instead only generalized speculations about things that might occur in any active investigation. Asked directly by counsel to the Commission to name a specific prospective action in MPD’s Hamburg investigation that would be prejudiced by disclosure of the requested records, the witness offered no actual prospective actions—only hypothetical ones—and admitted he could only “go on with speculating.” *Id.* at 01:48:07-1:49:14. Detective Sudock’s testimony made clear that MPD’s immediate and blanket refusal to disclose the records was not based on a reasoned consideration of the impact of disclosure, but rather on a general belief that *any* information in the file of an unsolved crime “should remain with the police department, and not be public.” *Id.* at 01:49:22-01:49:32.

After the hearing, on February 29, 2020, MPD produced the 911 call records to Ms. Niemeyer. In the accompanying letter, Captain Joseph A. Race of the Madison Police Department stated that MPD had now “reviewed the 911 telephone call” and “[a]fter consideration . . . concluded that such should be released . . . pursuant to [the] October 18, 2019 Freedom of Information Request.” Letter from Joseph A. Race, Captain, Madison Police Dep’t, to Anike Niemeyer (Feb. 29, 2020) (Exhibit A).

ARGUMENT

I. **RESPONDENTS FAILED TO DEMONSTRATE ANY DILIGENT SEARCH FOR, OR REVIEW OF, THE REQUESTED RECORDS**

The Connecticut Freedom of Information Act imposes a duty on public agencies to conduct a “diligent search” for records responsive to a public request for documents. *See, e.g., Mastrony v. Chief, Police Dep’t, City of Bridgeport*, No. FIC 2015-130 (Oct. 28, 2015); *see also* Conn. Gen. Stat. § 1-211(a). This duty obligates agencies to determine not just how many

records are responsive to a complainant's request, but to review these documents to determine whether any exemptions properly apply. *See Stedronsky v. Caruso*, No. FIC 2014-251 (Mar. 11, 2015). In this case, the Madison Police Department issued a blanket denial within days of Ms. Niemeyer's request, and failed to provide the Commission with any evidence establishing what the MPD had done to search for and review the requested documents before refusing to disclose any of them. Respondents have plainly failed to show that they satisfied their statutory duties.

A. The Connecticut FOIA Requires Agencies To Conduct A Thorough, Good Faith Search For And Review Of Potentially Responsive Records

The diligent search requirement mandates that public agencies do more than issue a pro forma response to a request for records. To meet this burden, agencies must conduct a thorough, good faith search, and then review responsive documents to determine whether any claimed exemption properly applies. Incomplete or dilatory searches fail to meet agencies' obligation to "in good faith diligently search [their] records." *Sinchak v. Chief, Police Dep't, City of Waterbury*, No. FIC 2005-293 (June 14, 2006). Further, as the Commission has made clear, agencies must show both that they made "very good effort[s]" to provide complainants with their requested records, *Longmoor v. Freedom of Info. Comm'n*, No. CV000604569S, 2001 WL 752698, at *1 (Conn. Super. Ct. June 11, 2001), and that they withheld records only after a review to determine that exemptions properly apply. *See Stedronsky v. Caruso*, No. FIC 2014-251 (March 11, 2015) (finding that respondents had not met their obligation to conduct a diligent search after concluding that they failed to complete a review of the records located).

The burden rests with Respondents to demonstrate that they conducted a reasonably diligent search and review. When respondents have failed to show the performance of diligent searches, as here, the Commission has ordered them to conduct them. *See Mastrony v. Chief, Police Dep't, City of Bridgeport*, No. FIC 2015-130 (Oct. 28, 2015); *Stedronsky v. Caruso*, No.

FIC 2014-251 (Mar. 11, 2015); *Aronow v. Univ. of Conn. Health Ctr.*, No. FIC 2013-744 (Oct. 22, 2014). The Commission has also ordered respondents to provide explanations about their searches, for example by submitting affidavits detailing “the scope, duration, and results” of searches when they have failed to provide sufficient “detail” about their performance. *Hunt v. Glover*, No. FIC 1996-612 (Sept. 10, 1997); *see also Newton Bd. Of Educ. v. Freedom of Info. Comm’n*, No. CV9605558171, 1997 WL 625438, at *1 (Conn. Super. Ct. Oct. 3, 1997) (affirming the FOIC’s order for “an affidavit that describes in detail the steps taken to search for the records, including the locations searched, the time spent searching, and the personnel who undertook the search”). The Commission has also ordered respondents to provide redaction logs including “a general description of each record withheld and the exemption relied upon” when they have failed to meet the diligent search requirement—something particularly needed here. *Lopez v. Chief, Police Dep’t, City of Bridgeport*, No. FIC 2014-402 (Apr. 22, 2015).

B. The Madison Police Department Did Not Show That It Conducted A Diligent Search Or Review Before Denying Complainant’s Request In Full

The Madison Police Department failed to meet its burden to demonstrate that it conducted a thorough, good faith search for and review of the requested documents. Instead, in both their initial response letter and at the February 19, 2020 hearing, Respondents did no more than demonstrate that their response to Ms. Niemeyer’s request was entirely pro forma.

In MPD’s response letter, dated four days after Ms. Niemeyer mailed her request on October 18, 2019, Respondents issued a blanket refusal to release *any* records. Complainant’s #2. The five-sentence response fails to indicate whether a search had been conducted or how many responsive records were located for any of the categories of records requested. It does not indicate whether, or why, the one claimed exemption, § 1-210 (b)(3), properly applies to *every* document requested. Instead, it offers only that “[t]he investigation continues to be open and

ongoing,” as a basis for the blanket denial, and conclusively asserts that MPD will “not be releasing any part of this case report.” *Id.* As demonstrated in Part II(a), *infra*, simply asserting that an investigation remains open is insufficient to justify a refusal to disclose records under the § 1-210(b)(3)(D) exemption.

Respondents’ testimony before the Commission confirmed that they failed to meet their burden to conduct a diligent search for and review of the records requested by Ms. Niemeyer. Respondents’ only witness could not state what steps MPD took in response to the request, how many responsive records were identified, or how a determination was made that the records were all exempt. Recording at 01:31:17-01:33:11. When asked who was responsible for responding to Ms. Niemeyer’s request, Detective Sudock said he would “have to look at the letters,” *id.* at 01:32:36-01:32:45, and confirmed that he did not “make the decision not to disclose the requested records.” *Id.* at 01:35:35-01:35:42. While Detective Sudock reviewed the documents in the Hamburg murder file the week before his February 2020 testimony, this was long *after* the MPD refused to release any of them in October 2019—and even then Detective Sudock was “not sure” which documents that he reviewed would have been “responsive” to the FOIA request. *Id.* at 01:33:32-01:33:51. By his own admission, Detective Sudock did not review every document in the file and did not review any documents in some of the categories specifically requested by Ms. Niemeyer, including the request for the 911 call. *Id.* at 01:34:07-01:34:18.

In fact, Detective Sudock’s testimony suggests that *no one* actually conducted the required search and review. Detective Sudock testified that the Hamburg investigatory file contained “twenty-three case books” with “thousands of pages of documents.” *Id.* at 01:11:42-01:11:54. A diligent search and review of a file this size would have required significant time and attention. The Commission and the courts have consistently held that agencies must meet

their FOIA duties even for “burdensome” or “time-consuming” requests. *See, e.g., Apostle Immigrant Servs. v. Gallo*, No. FIC 2009-665 (Apr. 28, 2010); *Maurer v. Office of Corp. Counsel*, No. HHBCV126017045S, 2013 WL 5289790, at *5-6 (Conn. Super. Ct. Aug. 23, 2013); *Wildin v. Freedom of Info. Comm’n*, 56 Conn. App. 683, 687 (2000); *Rubinowitz v. Greenwich Emer. Servs.*, No. FIC 1987-188 (Feb. 24, 1988). Yet, it is impossible to conclude that MPD was able to search for, review, and individually assess the application of the law enforcement exemption to the requested records within the Hamburg file in the brief four-day window between Complainant’s request and the Department’s final response.

Detective Sudock—the only witness offered by MPD—failed to establish that Respondents conducted a diligent search and review in response to Complainant’s request. The incomplete post-response review Detective Sudock conducted did not remedy this initial failure, for even his review failed to satisfy Respondents’ duties to determine both (1) how many responsive records exist and (2) how many can be properly withheld, in whole or in part, under a FOIA exemption. Respondents failed to carry their burden to affirmatively demonstrate a diligent search and review.

Worse, the record reflects that Ms. Niemeyer’s request was denied as a matter of policy and not by a reasoned application of the FOIA exemptions. Detective Sudock testified that there was an MPD policy not to release records related to “open” investigations. Recording at 01:36:49-01:37:16. Relying on such an informal policy in lieu of a statutorily-mandated particularized review of requested records clearly violates an agency’s duty under FOIA to diligently search, identify, and review responsive records. This is especially so here, where MPD claimed an exemption for *every* responsive document—a claim even its own witness found insupportable. *See id.* at 01:08:15-01:08:41. At a minimum, the Commission should require the

Madison Police Department to conduct a thorough search, review the responsive documents to determine whether the claimed exemption actually applies, submit an affidavit detailing its search and review process, and produce a log of withheld records providing sufficient detail to allow further objection by Complainant if needed.

II. RESPONDENTS FAILED TO JUSTIFY THEIR BLANKET WITHHOLDING OF ALL RECORDS UNDER THE LAW ENFORCEMENT EXEMPTION

Under the Connecticut Freedom of Information Act, the Madison Police Department bears the burden of establishing that the claimed exemption applies to the records responsive to Ms. Niemeyer's request. *See, e.g., City of New Haven v. Freedom of Info. Comm'n*, 205 Conn. 767, 775 (1988) ("The burden of establishing the applicability of an exemption clearly rests upon the party claiming the exemption."). This burden is a high one: the exemptions are to be "narrowly construed," *id.*, and the claimant cannot satisfy the burden without "present[ing] the commission with an informed factual basis for its decision." *Wilson v. Freedom of Info. Comm'n*, 181 Conn. 324, 341 (1980). The Madison Police Department has entirely failed to establish the factual basis required to invoke FOIA's law enforcement exemption for each record requested by Ms. Niemeyer.

The Connecticut FOIA creates a strong presumption in favor of disclosure. *See id.* at 328. Disclosure is only avoidable if a responsive document falls under one or more enumerated exemptions. Conn. Gen. Stat. § 1-210(b). While the Commission has recognized the "difficult job of balancing the public's right to know against the need to maintain the integrity of [an agency's] investigations," *Mitchell v. Chief, Police Dep't, City of New Haven*, No. FIC 2001-131 (Feb. 13, 2002), FOIA's disclosure presumption reflects the legislature's "overarching policy" to make public records public. *Rocque v. Freedom of Info. Comm'n*, 255 Conn. 651, 660 (2001). As such, the burden imposed on an agency to claim a FOIA exemption is, "by design," a

“difficult” one to meet. *Altimari v. Dep’t of Emergency Servs. & Pub. Prot.*, No. FIC 2017-0623 (Sept. 26, 2018); *see also Wood v. Bd. of Pardons & Paroles*, No. FIC 2012-668 (Sept. 11, 2013).

In this case, MPD’s sole justification for refusing Ms. Niemeyer’s entire request is that the records sought are exempt under FOIA’s law enforcement exemption, General Statutes § 1-210(b)(3)(D). This provision exempts from disclosure

records of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of said records would not be in the public interest because it would result in the disclosure of . . . information to be used in a prospective law enforcement action if prejudicial to such action.

Conn. Gen. Stat. § 1-210(b)(3)(D). To withhold records under this exemption, therefore, a law enforcement agency must make “an evidentiary showing (1) that the records are to be used in a prospective law enforcement action and (2) that the disclosure of the records would be prejudicial to such an action.” *Dep’t of Pub. Safety, Div. of State Police v. Freedom of Info. Comm’n*, 720 A.2d 268, 271 (Conn. App. 1998). In so doing, an agency must “provide more than conclusory language, generalized allegations or mere arguments of counsel.” *City of New Haven v. Freedom of Info. Comm’n*, 205 Conn. 767, 776 (1988). “Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested.” *Id.* The agency must meet this burden for every record it claims is exempt from disclosure.

When respondents fail to offer sufficient evidence of prejudice to a specific law enforcement action, they must promptly disclose the withheld records. *See, e.g., Sedensky v. Freedom of Info. Comm’n*, No. HHBCV136022849S, 2013 WL 6698055, at *15 (Conn. Super. Ct. Nov. 26, 2013); *Hartford v. Freedom of Info. Comm’n*, 201 Conn. 421 (1986); *Romitti v.*

Comm'r, No. FIC 2015-606 (Mar. 23, 2016); *Goren v. Nasto*, No. FIC 2007-165 (Nov. 28, 2007).

Here, Respondents have made neither of the showings required to withhold records under the law enforcement exemption by failing to identify any specific, prospective law enforcement action that would be prejudiced by disclosure of the requested records. Instead, Respondents offered an impermissibly overbroad claim that the exemption blanketly applies to all requested records. This response utterly fails to justify the complete withholding of all records under the law enforcement exemption. As such, Respondents are required to disclose the requested records.

A. Respondents Made No Evidentiary Showing That Any of The Requested Records Are to Be Used in a Prospective Law Enforcement Action

To invoke the law enforcement exemption, an agency must present the Commission with “specific evidence of a prospective law enforcement action, evidence that the records are in fact to be used in such prospective law enforcement action, and evidence that disclosure of the records would be prejudicial to such action.” *Wood v. Chief, Police Dep’t, Town of Enfield.*, Docket No. FIC 2008-523 (July 22, 2009). This requires “an evidentiary showing that the actual information sought *is going to be used* in a law enforcement action.” *Dep’t of Pub. Safety, Div. of State Police v. Freedom of Info. Comm’n*, 51 Conn. App. 100, 105 (1998) (emphasis added). Respondents completely failed to meet this burden.

Detective Sudock testified broadly that disclosure of “all investigatory records . . . would be prejudicial to *any* potential future law enforcement action,” but provided no evidence that any of the requested records or category of records at issue will actually be used in a future law enforcement action. Recording at 01:05:25-01:06:13. When specifically asked by counsel for the Commission to identify a prospective law enforcement action that would be prejudiced by the

release of the requested records, Detective Sudock further speculated about hypothetical uses of investigative files, but ultimately acknowledged that he could not identify an actual prospective law enforcement action where the Hamburg files would be used: “I could go on with speculating, but I don’t know at this point in time.” *Id.* at 01:49:04-01:49:11. His speculation about “hypothetical situations” is entirely insufficient. *Gura v. Chief, Police Dep’t, City of New Haven*, Docket No. FIC 2001-147 (2002); *see also Wood v. Chief, Police Dep’t, Town of Enfield*, Docket No. FIC 2008-523 (July 22, 2009) (finding “that the respondents’ speculation concerning a ‘potential’ prospective law enforcement action . . . fail[s] to satisfy the respondents’ burden of proof under” the exemption).

Respondents have provided *no* evidence that any of the requested categories of records, including witness statements and interrogation transcripts, would actually be used in any future law enforcement proceeding. The only specific testimony elicited by Respondents about the potential impact from disclosure of records requested by Ms. Niemeyer was Detective Sudock’s answer that disclosure of “crime scene recordings” would be “prejudicial to a prospective law enforcement action.” Recording at 01:08:40-01:09:05. But even this assertion, again, was made without identifying any specific future law enforcement action where the records would be used. This is patently insufficient. To establish that disclosure would prejudice a prospective law enforcement action, MPD was required to produce specific evidence. *See Nastro v. Freedom of Info. Comm’n*, CV084016200S, 2008 WL 3852748, at *3 (Conn. Super. Ct. July 23, 2008) (law enforcement exemption does not apply where agency makes inadequate showing that a prospective law enforcement action would be compromised). Respondents have failed to do this.

Any testimony Detective Sudock offered that could possibly be construed as identifying a possible law enforcement action that would be compromised by disclosure is wholly inadequate.

For example, Detective Sudock's conjectures that forensic technology for testing DNA evidence is constantly improving is immaterial to the Hamburg case where, as he admitted to previously revealing, the MPD has no unidentified DNA in this case. Recording at 01:24:20-01:24:28. Respondents' vague statement about a recent witness interview equally has no bearing on whether specific requested records will be used in any prospective law enforcement action. Detective Sudock stated that MPD "had information in this investigation" in the week before the February hearing, *id* at 01:13:40-01:13:48, which he later clarified to be a reference to a witness interview. *Id.* at 01:30:53-01:30:58. However, Detective Sudock refused to say anything about the nature of the interview, including whether it was with a new witness or simply a conveniently timed re-interview of a previously questioned witness. Respondents presented no evidence that this interview will result in a prospective law enforcement action, nor does the fact of a recent interview remotely establish that specific requested records will be used in any hypothetical action.

Testimony about potential technology improvements or interviews that may or may not be used in a hypothetical future action are insufficient to satisfy Respondents' burden under Section 1-210(b)(3)(D). As is Detective Sudock's speculation that disclosing the requested records "would make it more difficult to make an arrest and then also to prosecute the case." Recording at 01:06:50-01:07:06. This Commission has squarely ruled that the potential of a future development in an otherwise dormant investigation does not justify a refusal to disclose records from that investigation under Section 1-210(b)(3). In *Mazzotta v. Chief, Police Dep't, City of Middletown*, No. FIC 2012-033 (Nov. 14, 2012), the Commission ruled:

At the hearing in this matter, the respondents contended that although the investigation into the nine-year old homicide is dormant, the case is considered a cold case which could, at some future date, lead to an arrest in the matter. However, § 1-210(b)(3)(C), G.S., requires an evidentiary

showing that the records at issue are to be used in a prospective law enforcement action, and that the disclosure of the records would be prejudicial to such action.

Id.

This murder has been unsolved for over a decade, and the investigation long ago reached a dead end. The record confirms that “several” cold case reviews over several years failed to identify any new individuals to interview or “turn up any new investigative avenues.” Recording at 01:19:19-1:21:36. Not a single eyewitness has come forward in the decade since the murder occurred. *Id.* at 01:27:57-01:28:17. The lead detective on the case testified to admitting that he has no unidentified DNA, and no new place to turn for evidence sufficient to make an arrest. He testified to informing the murder victim’s son—an individual outside of the investigation—that despite “hundreds and hundreds of interviews,” MPD had no new investigatory leads: “nobody’s made a phone call here or written an anonymous letter, anything. We’ve got nothing.” *Id.* at 01:23:06-01:23:02.

Allowing respondents to withhold records based on nothing more than the hypothetical potential of a future arrest someday would effectively permit agencies to withhold all investigatory records in any open case. Such a ruling would directly contradict the longstanding rule that an investigation need not be closed before disclosure is required. *Dep’t of Pub. Safety, Div. of State Police v. Freedom of Info. Comm’n*, 720 A.2d 268, 271 (Conn. App. 1998); *see also Wood v. Chief, Police Dep’t, Town of Enfield*, No. FIC 2008-523 (July 22, 2009) (requiring disclosure where “[t]he respondents offered no evidence that the requested records were in fact to be used in a prospective law enforcement action, other than to assert that the investigation was still ‘open,’ . . . and that there was the “potential” for a law enforcement action”).

B. Respondents Fail to Establish How Disclosure of Any Particular Record or Category of Records Requested Would Prejudice a Prospective Law Enforcement Action

Even if Respondents had met their initial evidentiary burden to show that all the requested records will be used in a prospective law enforcement action, that would not be enough to justify withholding the records under Section 210(b)(3)(D). Respondents are also required to prove that the disclosure of the requested records would be prejudicial to the prospective law enforcement action. They did not do this either.

In addition to demonstrating that “the actual information sought is going to be used in a law enforcement action,” “there must be an evidentiary showing . . . that the disclosure of that information would be prejudicial to that action.” *Dep’t of Pub. Safety, Div. of State Police v. Freedom of Info. Comm’n*, 51 Conn. App. 100, 105 (1998); *see also Hartford v. Freedom of Info. Comm’n*, 201 Conn. 421, 434 (1986) (plaintiffs failed to meet burden of proving FOIA exemption by alleging records were exempt from disclosure “in broad, conclusory terms” and that disclosing record “*might*” have negative effects on police operation). Courts require a showing that “each” withheld record would be prejudicial to a prospective law enforcement action. *See, e.g., Sedensky v. Freedom of Info. Comm’n*, No. HHBCV136022849S, 2013 WL 6698055, at *15 (Conn. Super. Ct. Nov. 26, 2013) (agreeing that plaintiff failed to meet his burden because he “never attempted to prove either that each of the 911 tapes would be used in prosecuting that action or that disclosing the audio recordings would be prejudicial”).

While unable to identify a single, non-hypothetical prospective law enforcement action where specific records would be used, Detective Sudock also did not explain how the release of specific records would prejudice specific actions in which they will be used. He testified that, as a general matter, the release of information about the case would prejudice “any potential future

law enforcement action” because it would allow the perpetrator to create alibis and use the information to influence or intimidate witnesses. Recording at 01:05:25-01:07:06. This broad assertion of prejudice is insufficient. Testimony that the release of records generally would prejudice hypothetical actions does not satisfy MPD’s burden to establish that disclosure of specific records will prejudice specific law enforcement actions.

The Commission must not defer to Respondents’ opinion that the records should be exempt from disclosure merely because the MPD believes they should not be made public.

Connecticut courts have repeatedly rejected such claims for deference, writing in one such case:

The plaintiff also argues that the Commission failed to defer to (and accept) his testimony on “the practical realities of criminal investigations,” which, according to the plaintiff, demonstrated that the relevance and prejudicial effect of individual pieces of evidence . . . may not be known until later in the investigation. Nothing required the Commission, as the finder of fact, to give deference to the plaintiff’s testimony. Indeed, this argument, which at its heart, is an assertion that the records are exempt because “I say so,” would eliminate the well-established rule that the burden to prove the applicability of an exemption rests on the agency asserting it.

Sedensky v. Freedom of Info. Comm’n, No. HHBCV136022849S, 2013 WL 6698055, at *15 (Conn. Super. Ct. Nov. 26, 2013). As in *Sedensky*, Detective Sudock here suggests that, despite not “know[ing] at this point in time” how records will be used or what actions they will prejudice, the Commission should allow their withholding. Recording at 01:49:04-01:49:11. He concludes his “speculat[ion]” by stating that all the information, “in my opinion, should remain with the police department and not be public.” *Id* at 01:49:04-01:49:40. His opinion, however, is contrary to law.

The statute does not allow the police department to assert that records are exempt because “they say so.” *Sedensky*, 2013 WL 6698055, at *15. In light of Respondents’ failure to show that the records are to be used in a prospective law enforcement action, and that the disclosure of

the records would be prejudicial to such an action, the Commission should refuse to defer to Respondents' "opinion" that the requested records should "not be public" and order the records released. Recording at 01:49:26-01:49:40.

C. The Madison Police Department's Blanket Refusal to Produce Any Records Is Impermissibly Overbroad

Even if the law enforcement exemption were to properly apply to some of the requested records, Respondents' blanket denial to produce *any* documents is unjustifiably overbroad. As noted above, parties claiming the (b)(3)(D) law enforcement exemption bear the burden of showing, by way of specific evidence, that the release of each withheld document would prejudice an ongoing investigation. *See, e.g., Wood v. Chief, Police Dep't, Town of Enfield*, No. FIC 2008-523 (July 22, 2009). For this reason, the Commission looks unfavorably on blanket claims of exemption to disclosure. *See Mitchell v. Chief, Police Dep't, City of New Haven*, No. FIC 2001-131 (Feb. 13, 2002). The record demonstrates conclusively that the Madison Police Department improperly withheld at least some responsive documents—by Respondents' own admission, at least one withheld document plainly falls outside of the law enforcement exemption, and others are already publicly available. This evidence makes clear that there are untold requested documents that fall outside of any claimed exemption, and that MPD's blanket denial was overbroad.

First, the Madison Police Department's denial was overbroad for failing to show that each responsive document is subject to the law enforcement exemption, and instead relying on broad rationalizations to justify withholding the case file as a whole. At the February 19 hearing, Detective Sudock did not contend that each document Complainant requested would be used as part of a prospective law enforcement action, nor did he show how each document would prejudice such an action. Rather, he simply opined that there are "[a] myriad of things that could

happen if *all the information in this case* was public and public knowledge. . . . It would make it more difficult to make an arrest and then also to prosecute the case.” Recording at 01:06:43-01:07:06 (emphasis added). His speculation was not only non-specific; it was overbroad.

Respondents also offered testimony affirmatively demonstrating that they withheld at least one record that plainly fell outside of the asserted exemption. Detective Sudock admitted that the 911 call, a record explicitly requested by Complainant, would not prejudice any prospective action if released to the public. When asked if, “in [his] professional judgement,” the disclosure of the 911 call placed by Barbara Hamburg’s sister would “potentially be prejudicial to a perspective law enforcement action,” Detective Sudock testified that he “[did not] believe there’s information in there that would hamper prosecution if it was disclosed,” *id.* at 01:08:22-01:08:41, despite asserting that the materials in Complainant’s request “should not be turned over,” *id.* at 01:33:59-01:34:03. In light of this testimony, the MPD released the 911 call recording to Complainant after the hearing. Exhibit A. The evidence put forward by the MPD clearly and forcefully demonstrates that its blanket refusal to produce any documents was—even by its own admission—an overbroad use of the law enforcement exemption.

Second, Respondents’ blanket refusal to produce documents is clearly overbroad because it improperly withholds documents already available to the public. By statute, agencies may only exempt documents from public disclosure when they are “not otherwise available to the public.” Conn. Gen. Stat. § 1-210(b)(3)(D); *see also Gura v. Chief, Police Dep’t, City of New Haven*, No. FIC 2001-147 (2002). The MPD has failed to show that all of the records claimed under the exemption are unavailable to the public within the meaning of the statute. *See Mitchell v. Chief, Police Dep’t, City of New Haven*, No. FIC 2001-131 (Feb. 13, 2002). To the contrary, the record presents clear evidence that a number of responsive documents have already been

made publicly available. Detective Sudock confirmed that certain documents in the MPD's investigatory file, including the witness statements of Conway Beach Williams and Jane Cochak and supplemental reports for interviews with Conway Beach Williams and Richard Beach, had been released to members of the public and could be shared with others and made widely available. *See* Recording at 01:38:12-01:42:03. In addition, Complainant introduced another responsive document, the autopsy report, which was twice released to members of the public. Again, nothing prevents these individuals from making the contents of the autopsy report, including the cause of death, available to a wider public audience. Recording at 00:48:08-00:48:42. Because numerous responsive documents are "otherwise available to the public," the MPD erred in withholding them from disclosure under § 1-210(b)(3)(D).

These documents are unlikely to be the only ones that Respondents improperly withheld. The evidence demonstrates that Respondents failed to carry their burden, instead opting to take a kitchen-sink approach to exemption (b)(3)(D). Having failed to properly invoke the law enforcement exemption, the MPD is required to disclose the requested documents. At minimum, the Commission should order Respondents to present these documents for in camera review, if not mandate their immediate disclosure. *See, e.g., Wilson v. Freedom of Info. Comm'n*, 181 Conn. 324, 340 (1980) ("Unless the character of the documents in question is conceded by the parties, an in camera inspection of the particular documents by the commission may be essential to the proper resolution of a dispute under the act."); *Mitchell v. Chief, Police Dep't, City of New Haven*, No. FIC 2001-131 (Feb. 13, 2002).

CONCLUSION

The Commission should find that Respondents have failed to meet their burden to claim the Section 1-210(b)(3)(D) law enforcement exemption and should require Respondents to promptly disclose the withheld records. At minimum, the Commission should find that Respondents failed to perform a diligent search and that Respondents' denial was overbroad, and the Commission should conduct an in camera review of the withheld records.

Dated: March 27, 2020

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¹ This brief has been prepared by a clinic associated with the Abrams Institute for Freedom of Expression and the Information Society Project at Yale Law School, but does not purport to represent the school's institutional views, if any.

EXHIBIT A



TOWN OF MADISON
CONNECTICUT

DEPARTMENT OF POLICE SERVICES



COMMISSIONERS

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JOHN "JACK" DRUMM
FBINA Session #229

Anike Niemeyer
Eastward Pictures, LLC
26 Broadway
Suite 1301
New York, NY 10004

February 29, 2020

Re: March 3, 2010 – 911 Telephone Call Recording

Dear Ms. Niemeyer:

Following the Connecticut Freedom of Information Commission hearing on February 19, 2020, we reviewed the 911 telephone call placed by Barbara Alexandra Hamburg and Conway Beach associated with this matter. After consideration, we concluded that such should be released to you pursuant to your October 18, 2019 Freedom of Information Request.

A recorded copy of the 911 telephone call recordings has been delivered to Ms. Niemeyer via hand delivery on February 29, 2020.

Regards,

Captain Joseph A. Race #703
Madison Police Department
9 Campus Drive
Madison, Connecticut 06443

cc: Chief John "Jack" Drumm, Floyd Dugas, esq., David Schulz, CT Freedom of Information Commission