STATE OF CONNECTICUT
FREEDOM OF INFORMATION COMMISSION

Anike Niemeyer,	)	April 13, 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 REPLY BRIEF

PRELIMINARY STATEMENT

Respondents have failed to meet their evidentiary burden to show that the actual records requested will be used in, and would prejudice, a specific law enforcement action. Instead, Respondents argue for the extraordinary proposition that any record in an open investigation is exempt and can be withheld, regardless of its nature, its content, its source, or its relevance to solving the crime. Neither the cases that Respondents cite, nor more recent controlling precedents, support this claim.

The Commission should reject Respondents' argument not just on precedential grounds, but also out of prudence. Endorsing such an argument would permit agencies to withhold entire investigatory files on their own say so, no matter how long it has been since a case ran cold. The public would never be able to access these public records or assess the actions of law enforcement agencies unless and until the agency decides for some reason to close an unsolved investigation—a decision rarely made, if ever. The Connecticut Freedom of Information Act is

premised on a strong presumption in favor of disclosure and Respondents have failed to meet their statutory burdens; the Commission should therefore require them to disclose the requested records.

ARGUMENT

I. RESPONENTS' STATUS AS POLICE DOES NOT PERMIT THEM TO WITHHOLD ALL INVESTIGATORY FILES WITHOUT ANY SHOWING THAT DISCLOSURE OF SPECIFIC RECORDS WOULD PREJUDICE A PROSPECTIVE LAW ENFORCEMENT ACTION

Law enforcement agencies are not permitted to issue blanket denials refusing to disclose records; rather, certain documents may be exempted from disclosure only if the law enforcement agency makes "an evidentiary showing that the *actual information sought* is going to be used in a law enforcement action and 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) (emphasis added). Having failed to make this showing, Respondents are forced to argue that Detective Sudock's broad assertion of prejudice is enough to exempt "all documents in the investigatory file." Resp'ts' Brief 10. The statute places a different and important evidentiary burden on the MPD; the Commission should hold them to that burden.

Respondents cite *Libow v. Chief, Police Department, City of New Haven*, No. FIC 2003-171 (Apr. 28, 2004) for the proposition that they do not need to prove that any specific requested records are exempt, but rather that their status as police should permit them to issue a blanket denial of the investigatory file as a whole. Respondents rely on this distinguishable seventeen-year-old Commission opinion without addressing more recent holdings of the Connecticut courts that expressly require agencies to prove that "each" record will "be used" in a prospective action, and that "disclosing the [records] would be prejudicial." *Sedensky v. Freedom of Info. Comm'n*, No. HHBCV136022849S, 2013 WL 6698055, at *15 (Conn. Super. Ct. Nov. 26, 2013); *see also*

Nastro v. Freedom of Info. Comm'n, No. CV084016200S, 2008 WL 3852748 at *3 (Conn. Super. Ct. July 23, 2008) (finding "broad, conclusory argument[s]" insufficient because the law enforcement exemption requires "an evidentiary showing that the actual information sought is going to be used in a law enforcement action" and that the disclosure "would be prejudicial to that action") (internal quotation marks and citations omitted). The courts have squarely rejected Respondents' view of their burden.

Even absent these judicial holdings, Respondents' reliance on *Libow* is misplaced for four reasons. First, the respondents in *Libow* provided substantially more specific testimony than MPD has—in *Libow* the respondents sought to prove the "exemption of requested records category-by-category," while MPD seeks a blanket exemption for its entire, undefined "investigative file." *Libow*, No. FIC 2003-171. The *Libow* respondents presented evidence about specific prejudice for eight separate categories of records; MPD's only testimony about the potential impact of disclosing a specific category of records was Detective Sudock's answer that producing "crime scene recordings" would be "prejudicial to a prospective law enforcement action" with no further explanation.[1] Recording at 01:08:40–01:09:05.

Second, *Libow* never involved a complete denial of the requested records. In response to the request at issue there, the *Libow* respondents "made significant disclosures" of "500 or more pages" before the hearing. *Libow*, No. FIC 2003-171. Contrarily, MPD released no records in response to Ms. Niemeyer's request before the hearing, and even now has disclosed only one record—the 911 call.

[1] Respondents did provide testimony that one specific record—the 911 call—would *not* prejudice any future law enforcement action. Recording at 01:34:07–01:34:47. Initially, respondents improperly withheld this record, which demonstrates the importance of requiring *specific* testimony as to how the law enforcement exemption applies to the requested records. Respondents claims that they must not be asked to prove how releasing specific records would be prejudicial because "it is not currently known which details will become crucial," Resp. Post-Hearing Brief 10; however, Detective Sudock was able to clearly identify the 911 call as a record that, if released, would not prejudice any prospective action.

Third, the Commission determined that the denial in *Libow* was considerably overbroad, rejecting respondents' claims of prejudice for many records. The Commission ordered respondents to produce 400 pages of withheld records, finding "no reasonable basis" for withholding them under the law enforcement exemption. *Id.* All-in-all, the *Libow* respondents ultimately disclosed almost one-third of the investigatory file. MPD's claim that *Libow* justifies a blanket denial of "all documents in the investigatory file," Resp'ts' Brief at 10, misunderstands the facts of that holding.

Finally, the Commission in *Libow* was able to determine that hundreds of records were improperly withheld only because respondents submitted all 2,572 pages of requested records for in camera review. *Libow*, No. FIC 2003-171. The Commission's finding that "there [was] no reasonable basis for the belief that disclosure of certain of the records could prejudice a prospective law enforcement action" was based on its own review of the file. *Id.* Such an in camera review, at a minimum, is required here where MPD has already conceded that it had no reasonable basis to withhold at least one record and has never clearly identified how many records it is withholding in what categories. *See* Recording at 01:34:07–01:34:47.

At bottom, it would be contrary to settled law and to the very purpose of the Freedom of Information Act for the Commission to accept Respondents' invitation to accept blindly Detective Sudock's conclusory assertions, rather than require MPD to justify their withholding of specific records. *See* Resp'ts' Brief at 11. Though the Commission in *Libow* relied, in part, on the "experience" of a witness, that testimony was only used to guide the Commission's own in camera review. Regardless of Detective Sudock's impressive tenure as a law enforcement officer, the statute does not allow a police department to assert that records are exempt because they "say so." *Sedensky*, 2013 WL 6698055, at *15 (finding that "nothing required the

Commission . . . to give deference to the plaintiff's testimony" that "the relevance and prejudicial effect of individual pieces of evidence . . . may not be known until later in the investigation," because that argument "would eliminate the well-established rule that the burden to prove the applicability of an exemption rests on the agency asserting it"). Detective Sudock's self-described "opinion" is insufficient to satisfy the requirements of the Freedom of Information law. *See* Recording at 01:49:04–01:49:40.

Respondents' brief bemoans the "burden" the law places on them, Resp'ts' Brief at 10, but this is not an issue for the Commission. The legislature itself has determined the standards that MPD must meet, and the burden of doing so is no justification for withholding records. *See, e.g.*, *Wildin v. FOIC*, 56 Conn. App. 683, 686-87 (1999) (finding that the burden caused by a request seeking a large number of documents does not provide a defense to complying with the request); *Maurer v. Office of Corp. Counsel*, 2013 WL 5289790 (Conn. Super. 2013) (requiring disclosure even where the city claimed it would have to manually pull every personnel and medical file of all of its employees); *Rubinowitz v. Greenwich Emergency Medical Service*, No. FIC 1987-188 (Feb. 24, 1988) (finding that the statute requires an agency to respond to a broad request for specific records even if the search is burdensome).

Respondents have patently failed to meet their burden to establish that the withheld records are properly exempt and should be required to disclose them.

II. RESPONDENTS IMPROPERLY CONTEND THAT THEIR DESIGNATION OF THE INVESTIGATION AS "OPEN" JUSTIFIES THEIR BLANKET DENIAL

Respondents rely heavily on the investigation's "open" status to justify their blanket denial. They emphasize that the investigation "is still active" and therefore "nothing in the files should be disclosed" because it is not always known "which details will become crucial." Resp'ts' Brief at 9-10. This justification for non-disclosure has no basis in either the

Commission's decisions or judicial precedent applying the law enforcement exemptions. Moreover, accepting this rationale here would create perverse incentives for future FOIA respondents and subvert the legislature's policy decisions about what documents are to be publicly available.

Connecticut courts and this Commission have long held that an investigation's status is not determinative in an inquiry into the propriety of withholdings under the law enforcement exemption in Conn. Gen. Stat. §1-210(b)(3). In *Dep't of Pub. Safety, Div. of State Police v. Freedom of Info. Comm'n*, the Appellate Court rejected an agency's denial to disclose case files on the basis that "the office of the state's attorney had not yet closed the case," underscoring that "[t]he statute . . . does not require that an investigation be closed before disclosure is required." 51 Conn. App. 100, 105 (1998). Since this ruling, the Commission to our knowledge has never allowed a respondent to use the technical "open" status of an investigation as a shield against the disclosure of entire investigative files.

In *Wood v. Chief, Police Dep't, Town of Enfield*, for example, the Commission noted:

> Although secrecy about [police] investigations might theoretically aid those investigations by keeping all involved persons in the dark, *Department of Public Safety* . . . makes it clear that police departments may not draw a curtain of secrecy around all investigations until the investigations are closed, absent some evidence that the records are *in fact* to be used in a prospective law enforcement action, and that the disclosure of the records would be prejudicial to such an action.

No. FIC 2008-523 (July 22, 2009) (citing *Dep't of Pub. Safety*, 51 Conn. App. at 105) (emphasis in original). In *Wood*, the Commission held in favor of complainants after determining that "[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." No. FIC 2008-523. The

same outcome is required here. MPD has failed to show anything besides the investigation's "open" status and the mere "potential" for a hypothetical law enforcement action.

As the Commission suggested in *Wood*, deciding instead to accept Respondents' argument would effectively permit law enforcement agencies to withhold all records in any unsolved case, drawing an unchallengeable "curtain of secrecy" around any investigation declared to be "open." Such a ruling would incentivize police departments to keep cases open long after they run cold and would leave the public's access to information that is vital to law enforcement oversight entirely at the discretion of law enforcement agencies. In enacting the law enforcement exemption, the legislature prohibited just this.

III. RESPONDENTS' CITED AUTHORITY IS ENTIRELY INAPPOSITE

In addition to *Libow*, Respondents rely on seven other Commission decisions to support their argument that FOIA exempts entirely the investigatory files "in an open criminal investigation, particularly those involving murders" so long as "respondents offer[] evidence" that disclosure of the investigatory file would be prejudicial. Resp'ts' Brief at 7. None of the cited opinions stand for this flatly incorrect proposition and, as noted above, Respondents have in any event failed to offer sufficient evidence that disclosure of "the actual information sought . . . would be prejudicial" to any specific law enforcement action. *Dep't of Pub. Safety v. Freedom of Info. Comm'n*, 51 Conn. App. 100, 105 (1998).

Indeed, each of the Commission decisions relied upon by MPD is readily distinguishable from the current case. Many involve active investigations into fresh crimes, not cold case investigations receiving at most sporadic attention. In the majority of cases, the Commission made its decision to permit non-disclosure only after in camera review or after ordering respondents to produce a detailed redaction log. And most importantly, in MPD's cited cases the Commission found the records properly withheld only after respondents presented a realistic

possibility of a future law enforcement action and sufficiently proved how releasing particular responsive records would be prejudicial to that action. The MPD has done neither.

1. In *Graeber v. Chief, Police Dep't, City of New Haven*, No. FIC 2016-0865 (Sept. 27, 2017), the Commission found that records pertaining to the Suzanne Jovin murder file were exempt from disclosure only after an in camera review of all responsive records in the New Haven Police Department's possession and after the Department put forward testimony from a lieutenant in the Records Division, who described the search performed, as well as an Assistant State's Attorney, who was still working "at least 8 hours per week on the case." *Id.* Here, MPD presented no testimony detailing its search and review of the requested records and refused to say how many hours per week, month, or even per year its detectives devote to the Barbara Hamburg murder investigation. *See, e.g.*, Recording at 01:10:00–01:10:12 ("[T]his case periodically gets worked on throughout the course of the year, sometimes more often than others and sometimes there are long periods of time without any work being done."). Based on the sparse testimony of MPD's only witness, Detective Sudock, the Commission simply cannot conclude that the "investigation is not dormant" or that "a prospective law enforcement action is a reasonable possibility." *Graeber*, No. FIC 2016-0865. Nor can the Commission conclude that Respondents "provided sufficient evidence to demonstrate that disclosure of the requested records would result in" prejudice "to a prospective prosecution" in the Hamburg investigation. *Id.*

2. In *Strauss v. Chief, Police Dep't, Town of Westport*, No. FIC 2010-487 (May 25, 2011), respondents presented substantial and detailed evidence that a future law enforcement action was a reasonable possibility. In its opinion, the Commission stressed that the Westport Police Department "believe[s] that they have probable cause for the arrest of the perpetrator and

are in the final stages of investigation to strengthen their case in order to help ensure a conviction." *Id.* As established by Detective Sudock's testimony, MPD does not anticipate a similarly imminent arrest, or any specific future law enforcement action for that matter. *See* Recording at 01:49:04–01:49:11 ("I could go on speculating, but I don't know at this point in time.").

3. In *Lopez v. Chief, Police Dep't, City of Bridgeport*, No. FIC 2015-398 (Feb. 24, 2016), the Commission concluded that the requested records were exempt from disclosure only after first finding that respondents violated the FOIA. *Id.* In its earlier opinion, the Commission ordered respondents to submit an affidavit by "the person or persons who performed the search, detailing the scope of the search and its results." *Lopez v. Chief, Police Dep't, City of Bridgeport*, No. FIC 2014-402 (Apr. 22, 2015). It also compelled respondents to complete and provide to complainants a full redaction log of all responsive records, which "shall include a general description of each record withheld and the exemption relied upon." *Id.* Because the Madison Police Department has similarly failed to satisfy the requirements of the FOIA to show that it conducted a diligent search, the Commission should, at a minimum, order Respondents to provide an affidavit and redaction log before denying Complainants access to responsive records.

4. In *Hoda v. Chief, Police Dep't, City of New Haven*, No. FIC 2007-143 (Jan. 23, 2008), the Commission also ruled in favor of respondents only after an in camera review of the records. Moreover, the requested records dealt with a murder investigation that, at the time of the Commission's decision, remained active: the murder was less than two years old, and respondents were "actively pursuing . . . a suspect." *Id.* Despite the vigorous nature of the investigation in that case, the Commission nevertheless held the records exempt only after its own "careful review of the in camera records," which allowed it to conclude that the release of

documents would prejudice a defined and reasonably foreseeable law enforcement action: the arrest and conviction of the victim's murderer. *Id.*

5. In *Rouen v. Chief, Police Dep't, Town of Groton*, No. FIC 2006-064 (Jan. 24, 2007), the Commission again found the records exempt from disclosure only after an in camera review, despite the fact that the murder investigation was active and ongoing, having begun just two years prior. It held that "the respondent met his burden of proof by identifying the specific manner in which disclosure of the in-camera records would be prejudicial to a prospective law enforcement action." *Id.* In *Rouen*, respondents offered testimony that indicated that they "were still developing suspects and anticipated making more arrests." *Id.* The Barbara Hamburg murder investigation, by contrast, has run cold. It is over ten years old and MPD has failed to offer specific evidence of how the disclosure of the actual requested records would prejudice a specific prospective law enforcement action, instead relying on vague generalizations.

6. In *Cotton v. Chief, Police Dep't, City of Meriden*, No. FIC 2006-020 (Aug. 9, 2006), too, the underlying police investigation was fresh—less than a year old. In *Cotton*, complainants requested copies of videotapes related to a police officer's use of force and his subsequent termination. Respondents presented testimony that the State's Attorney was actively investigating the incident and may still need to interview additional witnesses. Even then, the Commission did not find in favor of respondents outright. It reviewed the records in camera and subsequently found that not all of the records were in fact exempt from disclosure. For those that were, though, the Commission found that respondents had identified a specific manner in which the disclosure of the specific portions of the videotape would be prejudicial to an actual law enforcement action, relying on "the potential for influencing witness testimony" and noting that "[i]ndependent recollections of witnesses could be tainted if witnesses have an opportunity to

view the videotape." *Id.* Here, after ten years of investigating and hundreds of interviews by MPD, there are simply no such concerns in this matter.

7. Finally, in *Yates v. Chief, Police Dep't, Town of Westport*, No. FIC 2005-084 (Dec. 14, 2005), the criminal conduct underlying the relevant police investigation occurred just a year prior to the Commission's decision. The Commission found the records exempt from disclosure after hearing testimony about the two criminal cases that were pending in Norwalk Superior Court at the time and about how specific records, if disclosed, would harm these specific law enforcement actions. The photographs contained in the burglary and shooting investigatory files, for example, "could be incorrectly interpreted and . . . more testing may be needed to supplement the laboratory reports currently in the file." *Id.* Unlike in *Yates*, there is currently no pending criminal case relating to Barbara Hamburg's murder and MPD has failed to provide similarly specific testimony about how the release of any records would be prejudicial.

In sum, Respondents' authorities are all factually dissimilar to this case and do not refute their burden under the Freedom of Information Act to show that (1) the requested records are to be used in a prospective law enforcement action, and (2) their disclosure would be prejudicial to such an action. *Dep't of Pub. Safety*, 51 Conn. App. 100; see also *Nastro*, 2008 WL 3852748 (requiring specific evidence); *Sedensky*, 2013 WL 6698055.

IV. RESPONDENTS' RELIANCE ON THE AUTOPSY SEALING ORDER IS IMPROPER

Respondents point to an inapplicable Connecticut Superior Court sealing order to support their withholding of the entire investigatory file. *See* Resp'ts' Brief at 6. In reference to an asserted prejudice to a prospective law enforcement action, Respondents incorrectly contend that a "[c]ourt has already examined this issue," *id*., and found it was "of paramount importance that any new information not be colored by information that is made publicly available." *Id*. (quoting

Order to Seal Pursuant to § 19a-411 (Conn. Super. Ct. Nov. 5, 2019) [hereinafter Exhibit A]). The sealing order, however, was issued a month after MPD had already denied Complainant's request, and it only prevents public agencies from disclosing the deceased's autopsy report. *See* Exhibit A. It does not show that a court "has already examined" the issue before the Commission, nor does it pass judgment on the need to keep confidential any document other than the autopsy report.

Moreover, the court issued its ruling under Conn. Gen. Stat. § 19a-411, which creates an exemption to the FOIA separate from that of § 1-210(b)(3). Under the § 19a-411 standard, courts have the discretion to limit the disclosure of autopsy reports compiled by the Medical Examiner "to the extent that there is a showing by the Chief Medical Examiner or state's attorney of compelling public interest against disclosure of any particular document or documents." Conn. Gen. Stat. § 19a-411(c). Such a finding by the Superior Court regarding the autopsy report has no bearing on whether Respondents have met their burden under § 1-210(b)(3) to show that the disclosure of the specific requested records in the investigatory file would prejudice an identifiable prospective law enforcement action.

V. RESPONDENTS WRONGLY CLAIM THAT ALL WITNESS STATEMENTS ARE CATEGORICALLY EXEMPT FROM DISCLOSURE

Respondents misstate the law when they assert in their "Facts" section that "witness statements are exempted from disclosure under Conn. Gen. Stat. § 1-210(b)(3)(C) by its explicit terms." Resp'ts' Brief at 5. That exemption only applies to "*signed* statements of witnesses." Conn. Gen. Stat. § 1-210(b)(3)(C) (emphasis added); *see Vivo v. Freedom of Info. Comm'n,* No. HHBCV054005471S, 2006 WL 3042687, at *3 (Conn. Super. Ct. Oct. 16, 2006) (holding that only "*[s]igned* witness statements are categorically exempt from disclosure under the state statute." (emphasis added)).

Though the burden to invoke this exemption is more straightforward, it is not any less mandatory. Connecticut courts only allow withholding under Section 1-210(b)(3)(C) when an agency has provided factual testimony that the records withheld under that provision are actually signed. *See Sedensky v. Freedom of Info. Comm'n*, No. HHBCV136022849S, 2013 WL 6698055, at *14 (Conn. Super. Ct. Nov. 26, 2013) ("The statutory exemption contains no language that would suggest that the applicability of the exemption turns, not on whether the statement is actually signed, but on an overall determination of its reliability as a piece of evidence regardless of whether the statement is signed."). Respondents made no assertion at the hearing that the withheld witness statements are signed. This was their only opportunity to introduce such factual testimony and they failed to do so. Rather, respondents' witness only testified that there are witness statements in the file and that he erroneously believed that all "witness statements of law enforcement agencies are not disclosable under 1-210(b)(3)(C)." Recording at 01:07:10–01:01:07:44. Respondents have thus failed even to meet this most basic evidentiary burden to withhold any responsive witness statements.

CONCLUSION

For the reasons set forth above and in Complainants' Post-Hearing Brief, the Commission should find that Respondents failed to meet their burden to withhold the requested records under Section 1-210(b)(3)(D) and require Respondents promptly to disclose them. At minimum, the Commission should find Respondents' search and review insufficient and their denial overbroad, and the Commission should conduct an in camera review of the withheld records.

Dated: April 13, 2020

David A. Schulz
Francesca L. Procaccini
Sara Sampoli (law student)
Jacob van Leer (law student)
MEDIA FREEDOM AND
INFORMATION ACCESS CLINIC
ABRAMS INSTITUTE
Yale Law School[2]
P.O. Box 208215
New Haven, CT 06520
Tel: 203-436-5827

Counsel for Complainant

[2] 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

RE: BARBARA HAMBURG : SUPERIOR COURT, PART A

ME case number: 10-03207 : JUDICIAL DISTRICT OF NEW HAVEN

: NOVEMBER 5, 2019

Request to Seal Pursuant to C.G.S. § 19a-411

On October 24, 2019, the Office of the Chief Medical Examiner received a request from Anike Niemeyer of Eastward Pictures, LLC for documentation regarding the autopsy of Barbara Beach Hamburg, who was murdered in Madison, Connecticut on March 3, 2010. The request specifically asked for "all records, reports, and photographs from the medical examination of Barbara Beach Hamburg, including but not limited to property reports, receipts for items found on the deceased, and autopsy photographs." The request was prompted by the victim's son, Madison Hamburg, who is producing a documentary film about his mother's death.

Pursuant to statute, the Office of the Chief Medical Examiner has indicated that it will comply with the request unless they receive a court order sealing those records. Section 19a-411 of the Connecticut General Statutes provides that a "judge may limit such disclosure to the extent that there is a showing by ... the state's attorney of compelling public interest against disclosure of any particular document or document."

The State's Attorney for the Judicial District of New Haven asserts that such a public interest exists in this case. The murder of Barbara Hamburg remains unsolved but is still being actively pursued by the Madison Police Department. The case has also been the subject of review by the Cold Case Unit from the Chief State's Attorney's Office. The murder of Barbara Hamburg occurred on the morning on March 3, 2010, outside of her residence in the town of Madison. Her body was located later that morning and, to date, no eyewitnesses to the crime have ever been located or come forward. To the extent this case will be solved, it will likely be based on information provided by the perpetrator of the crime to those that he or she has spoken to about the crime. Thus, it is of paramount importance that any new information not be colored by information that is made publicly available. That is to say that the credibility of any new information will be amplified if it is information that would only be known by the killer, as opposed to information that could be gathered from watching a film.

Therefore, the State's Attorney for the Judicial District of New Haven requests, pursuant to section 19a-411, that the court order the records sealed until such time as the criminal investigation is closed.

Patrick Griffin, State's Attorney
Judicial District of New Haven

Order

It is hereby the order of the court that the autopsy records relating to Barbara Beach Hamburg be sealed pursuant to statute.

Date: 11/5/2019

Judge of the Superior Court