

DOCKET NO. FIC 2019-0652	:	STATE OF CONNECTICUT
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ANIKE NIEMEYER ET AL.	:	FREEDOM OF INFORMATION
	:	COMMISSION
	:	
V.	:	
	:	
CHIEF, POLICE DEPARTMENT, TOWN OF	:	MARCH 27, 2020
MADISON ET AL.	:	

RESPONDENTS' MEMORANDUM OF LAW

I. INTRODUCTION

Barbara Beach Hamburg was murdered in Madison, Connecticut on March 3, 2010, and the case remains open and unsolved. Ms. Hamburg's son, Madison Hamburg, is working with Anike Niemeyer and Eastward Pictures to create a documentary regarding his mother. Ms. Niemeyer submitted a request dated October 18, 2019, to the Madison Police Department for various records related to the homicide investigation, specifically:

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 call placed by Barbara Alexandra Hamburg and Conway Beach when Barbara Beach 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.

(Complainants' Exhibit 1). Respondents replied to the request on October 22, 2019, indicating that the investigation is open and ongoing and the records are exempt from disclosure under Conn. Gen. Stat. § 1-210(b)(3). (Complainants' Exhibit 2.) This appeal followed.

(Complainants' Exhibit 3.)

Complainants also requested records related to the murder of Ms. Hamburg from the Office of the Chief Medical Examiner. The Court ordered the records sealed on the grounds that there was a compelling public interest against disclosure of the documents. Specifically, the Court concluded:

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 of 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.**

(Respondents' Exhibit A, emphasis added.)

II. EXEMPTION CLAIMED

Conn. Gen. Stat. § 1-210(b)(3) 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 such records would not be in the public interest because it would result in the disclosure of (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known, (B) the identity of minor witnesses, (C) signed statements of witnesses, (D) information to be used in a prospective law enforcement action if

prejudicial to such action, (E) investigatory techniques not otherwise known to the general public, (F) arrest records of a juvenile, which shall also include any investigatory files, concerning the arrest of such juvenile, compiled for law enforcement purposes, (G) the name and address of the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, voyeurism under section 53a-189a, injury or risk of injury, or impairing of morals under section 53-21 or family violence, as defined in section 46b-38a, or of an attempt thereof, or (H) uncorroborated allegations subject to destruction pursuant to section 1-216.

All records in the investigatory file are exempt under subsection (D).¹ Additionally, signed witness statements are also exempt under subsection (C).

III. FACTS

The Madison Police Department opened an investigation into Ms. Hamburg's murder on March 3, 2010. Like many investigations, the pace of the investigation has varied throughout the years, but at no point was the investigation closed. The Madison Police Department treats this case in all respects as an open case. Indeed, Christopher Sudock, the lead detective on this matter, testified that a week prior to the hearing in this matter, new information was obtained.

Detective Sudock has been a detective with the Madison Police Department for more than 7 years. Previously, he was employed by the Connecticut State Police for 27 years, 20 of which were as a major crimes investigator. Detective Sudock was involved in the investigation into Ms. Hamburg's murder from the very beginning, when he was still employed by the Connecticut State Police. The Connecticut State Police was conducting a joint investigation into the murder with the Madison Police Department. When Detective Sudock came to the Madison Police Department, the Chief informed him that solving the murder was a high priority.

Detective Sudock is currently investigating the murder. Detective-Sergeant Mulhern, Detective DeGoursey, Chief Drumm, Lieutenant Perron, and Captain Race are all involved as

¹ Respondents concede that the recordings of 911 calls in this case do not fall under this exemption. Therefore, they have been released to Complainants.

well, and sometimes patrolmen ask questions or come in with information. Detective Sudock testified that he still has the responsibility to follow leads, review evidence, talk to experts, and look for ways to advance the investigation. There are times when the information does not flow quickly and may be “stale,” but then something comes up and there is something to investigate again. Although the case is not necessarily looked at every day or week, it is examined at least once per month. Even when no new information is coming in, the evidence continues to be analyzed, often with the application of new forensic technology. Detective Sudock has worked on the case in 2019 and 2020 and testified that he had received new information one week prior to the hearing in this matter.

The case has been reviewed by cold case units on multiple occasions, but this does not mean that the investigation is closed. It simply means that another set of eyes looks at the case to suggest alternative avenues of investigation. Again, even though the case was treated as “cold” at various times, that does not mean the case is “closed.” Madison Police Department never stopped working on the case and new information continues to be developed. Likewise, even when police communicated with Mr. Hamburg that the case was stuck, or words to that effect, this does not mean that the investigation was not open or that there was no hope of new information.

The investigative file contains information to be used in a prospective law enforcement action where the disclosure of the information would be prejudicial to such action. The investigative file contains hundreds of pieces of physical evidence, multiple written statements, numerous search warrants with key information, 23 casebooks, thousands of pages of documents, and hundreds (if not more) photographs. Although the media captured some crime scene processing early on in the investigation, Detective Sudock testified that “very little

information” in terms of investigative findings and lab results have become public knowledge. Much of the information contained in these records is information that would only be known to the perpetrator. Detective Sudock testified that information that seems insignificant now may prove to be important later.

Although Mr. Hamburg has previously been given some information, no member of the public, including Ms. Hamburg’s family members, has ever been given all or even most of the information available. Detective Sudock testified that there is information contained in the investigative file that only the perpetrator of this crime would know and if that information were to be presented to the public, it would allow for perpetrators to create alibis. They could also use that information to influence or intimidate witnesses. Detective Sudock testified that there is information that has not been revealed in this case that is critical to a potential prosecution.

Turning to the specific requests:

1. “All investigatory records, including all files, reports, notes, transcripts, correspondence, warrant applications and affidavits and audiovisual recordings in electronic format.” Detective Sudock testified that disclosure of this information would be prejudicial to a potential law enforcement action. The information that is unknown to a perpetrator would allow him or her to create alibis, potentially hinder witness prosecution, and intimidate witnesses. He believes it would make it “extremely more difficult” to make an arrest and prosecute the case.
2. “All witness statements, in electronic format.” There are witness statements other than the ones Mr. Hamburg said he has. These witness statements are exempted from disclosure under Conn. Gen. Stat. § 1-210(b)(3)(C) by its explicit terms and § 1-

210(b)(3)(D) because disclosure would be prejudicial to a law enforcement action for the reasons given above.

3. "All interrogation recordings and all transcripts thereof, in tape or electronic format."
There are no such records.
4. "The 911 call placed by Barbara Alexandra Hamburg and Conway Beach when Barbara Beach Hamburg's body was discovered on March 3rd 2010, in tape or electronic format." This information has now been disclosed.
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. Detective Sudock testified that § 1-210(b)(3)(D) applies because disclosure would be prejudicial to a law enforcement action for the reasons given above.

The risk of harm to a potential prosecution is stronger in this case, as Mr. Hamburg testified he intends to use the information obtained in a documentary. While the identity of the requester is not relevant in determining the applicability of an exemption to the Freedom of Information Act, the fact that the information would be broadly disseminated if disclosed demonstrates that the likelihood of the perpetrator gaining access to the information and a potential prosecution being hindered is much more than speculative.

A Court has already examined this issue and concluded, "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." Detective Sudock agrees with the Court's statement.

IV. LEGAL ANALYSIS

The Freedom of Information Commission has frequently applied Conn. Gen. Stat. § 1-210(b)(3) to exempt records in an open criminal investigation, particularly those involving murders, provided the respondents offered evidence of how the disclosure of the records would prejudice a potential law enforcement action. It does not matter that the murder occurred years ago and remains unsolved.

For example, in *Graeber et al. v. Chief, Police Department, City of New Haven et al.*, Docket #FIC 2016-0865 (Sept. 27, 2017), records were requested relating to a murder that occurred in 1998. The FOIC found that the murder remained unsolved, that no one had been arrested for the murder, but the investigation was active. The FOIC found that a prospective law enforcement action was a reasonable possibility. The witnesses testified that disclosure of the records would prejudice a prospective prosecution of the killer because disclosure would make it difficult to verify and would weaken the integrity of the investigation and the control of the investigation. There was testimony that the passage of time had not reduced the sensitivity of the information contained in the records. The witnesses testified that nothing in the files should be disclosed to the public because seemingly innocuous evidence could become critical to corroborate or refute new leads as they arise. Even though some information had been made public, the records contained greater detail. The records were found to be exempt from disclosure under § 1-210(b)(3)(D).

Similarly, in *Strauss v. Chief, Police Department, Town of Westport et al.*, Docket #FIC 2010-487 (May 25, 2011), the FOIC determined that records pertaining to a homicide that occurred more than 20 years prior were subject to the exemption. The case had become an active investigation in the 2 years prior to the FOIC's decision and through DNA testing and other

forensic advances, as well as recent witness statements, the respondents believed they had probable cause for an arrest and were in the final stages of investigation to strengthen their case in order to help ensure a conviction. It was found that the records requested by the complainants included information to be used in a prospective homicide prosecution and that disclosure of such information would be prejudicial to such prosecution by revealing to the suspect prior to his or her arrest details of the investigation and some of the key evidence that the respondents had acquired.

In *Lopez v. Chief, Police Department, City of Bridgeport et al.*, Docket #FIC 2015-398 (Feb. 24, 2016), the FOIC found that the exemption was met where there was oral testimony that the homicide cases remained active and that detectives reviewed the evidence gathered as time permitted and as new evidence was discovered. The detective testified that disclosure of records of the investigations, including the nature of the evidence, could put the respondents at a considerable disadvantage in solving the homicides. This was sufficient to support the exemption.

In *Hoda v. Chief, Police Department, City of New Haven*, Docket #FIC 2007-143 (Jan. 23, 2008), the FOIC held the exemption applied because disclosure of investigative records would prejudice the arrest and conviction of the murderer. Specifically, it was found that release of the records could allow the perpetrator of the crime to discern the nature of the respondent's investigation, whether such person is suspected, the evidence gathered, the witness statements, and the avenue of inquiry. Such knowledge could allow the perpetrator or others to fashion alibis, threaten or harm witnesses, and generally frustrate the pending investigation.

In *Rouen et al. v. Chief, Police Department, Town of Groton*, Docket # FIC 2006-064 (Jan. 24, 2007), the FOIC found that records pertaining to an open investigation were exempt

because they would disclose facts not otherwise known to the public which facts could be used by the police department to draw out the perpetrator. It was found that disclosure of the information contained in the requested records would result in giving the perpetrator information that could motivate him or her to do or say something he or she otherwise would not do or say and compromise the police department's ability to identify him or her as a suspect. It was concluded that the respondent met his burden of proof by identifying the specific manner in which disclosure of the records would be prejudicial to a prospective law enforcement action.

In *Cotton et al. v. Chief, Police Department, City of Meriden*, Docket #FIC 2006-020 (Aug. 9, 2006), police cruiser video footage was exempt because it would be used in an excessive force action; the disclosure would be prejudicial because of the potential for influencing witness testimony. Independent recollections of witnesses could be tainted if witnesses have an opportunity to view the videotape. Through the power of suggestion, witnesses could believe they remember events that they did not see. Moreover, if third parties viewed the videotape, these third parties could attempt to persuade witnesses that they saw something different from what they previously thought they saw.

In *Yates et al. v. Chief, Police Department, Town of Westport*, Docket #FIC 2005-084 (Dec. 14, 2005), the FOIC found records relating to a pending law enforcement action to be exempt based on the respondent's specific examples of potential prejudice. Given that the criminal defendant was charged with shooting another person in the abdomen with a deadly weapon, the prospective law enforcement actions would be prejudiced if persons were actually harmed, or were fearful for their safety, as a result of disclosure of the requested records.

The standards applied in these cases are amply met here. There was credible testimony to support that although the murder occurred approximately a decade ago and remains unsolved, the

investigation is still active. Detective Sudock clearly and specifically explained how disclosure of the records would prejudice a prospective prosecution of the killer because disclosure would make it difficult to verify and would weaken the integrity of the investigation and the control of the investigation because information would become public that currently is only known to the perpetrator. Here as well, nothing in the files should be disclosed to the public because seemingly innocuous evidence could become critical to corroborate or refute new leads as they arise. The fact that the public already has some information does not mean that the public has access to the details.

Finally, Detective Sudock's testimony was specific enough to demonstrate that all documents in the investigatory file are subject to the exemption, especially because it is not currently known which details will become crucial. In *Libow v. Chief, Police Department, City of New Haven*, Docket #FIC 2003-171 (Apr. 28, 2004), the FOIC found that meeting the standard for the exemption does not require a document-by-document, line-by-line analysis in every case. If such an approach were taken, then the respondent could also be required, on the first day of its investigation, to prove to the FOIC how all evidence collected and all information gleaned from witnesses would actually be used in a law enforcement action, and how disclosure of that information would be prejudicial to such action. Such a burden would put the police in the position of essentially proving the viability of their criminal case to the FOIC before they had concluded their investigation, or even before they had identified a suspect. In reaching the conclusion that disclosure of most of records would either prejudice a prospective law enforcement action or endanger the safety of informants or witnesses, the FOIC, in the absence of evidence to the contrary, gave substantial weight to the testimony of the Senior Assistant State's Attorney, who had substantial prosecutorial experience and who had been the principal

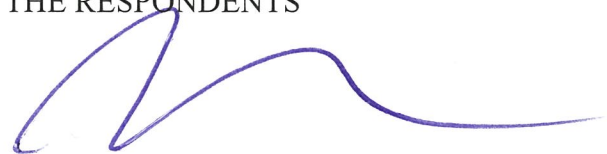
investigator of the homicide. He was familiar with the full scope of the investigation and all of the records sought by the complainants. Likewise, here, the FOIC should give substantial weight to the testimony of Detective Sudock, who has approximately 35 years of experience in investigating crimes and who has been investigating the murder of Barbara Hamburg from the very beginning.

The FOIC requires that to meet this exemption, respondents put forth “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.” *Estate of Joseph Mazzotta v. Chief, Police Dep’t, City of Middletown et al.*, #FIC 2012-033 (Nov. 4, 2012) (citing *Dep’t of Pub. Safety v. FOIC*, 51 Conn. App. 100, 104-105 (1998)). Respondents have clearly met this burden.

V. **CONCLUSION**

The records requested by Complainants are exempt from disclosure under Conn. Gen. Stat. § 1-210(b)(3)(D) and, in the case of signed witness statements, also § 1-210(b)(3)(C). To preserve the ability of the killer ultimately being brought to justice, the FOIC should not order disclosure of the records.

THE RESPONDENTS



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CERTIFICATION

This is to certify that on this 27th day of March, 2020, a copy of this brief has been sent electronically to the Freedom of Information Commission at foi@ct.gov and to Complainants at david.schulz@yale.edu.

A handwritten signature in blue ink, consisting of a large, stylized initial 'F' followed by a series of loops and a long horizontal stroke extending to the right.

Floyd J. Dugas, Esq.