

DOCKET NO. FIC 2019-0652	:	STATE OF CONNECTICUT
	:	
ANIKE NIEMEYER ET AL.	:	FREEDOM OF INFORMATION
	:	COMMISSION
	:	
V.	:	
	:	
CHIEF, POLICE DEPARTMENT, TOWN OF	:	APRIL 13, 2020
MADISON ET AL.	:	

RESPONDENTS' REPLY BRIEF

I. RESPONDENTS DID NOT FAIL TO CONDUCT A DILIGENT SEARCH FOR OR REVIEW OF THE REQUESTED RECORDS.

In its Post Hearing Brief, Complainants contend that Respondents did not perform a diligent search for records in response to the request for records in this case. This argument is entirely misplaced. All of the cases Complainants cite pertain to situations where the complainants claimed (and in some cases proved) that the records were responsive and no exemption was applicable, yet the respondents failed to provide the records. This is not the case here. This is not a situation where Respondents claimed to have provided all responsive records but failed to search a key person's office or email system. Respondents have the records and is capable of providing all of them, but for the fact that an exemption applies.

Complainants invent out of whole cloth the notion that the obligation to search for records also encompasses an obligation to review each record to determine whether exemptions apply. ("This duty [to conduct a diligent search] 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.") The only case cited to support this proposition is *Stedronsky v. Caruso*, No. FIC 2014-251 (Mar. 11, 2015). The only reference in that case to a review for exemptions is contained in Paragraph 17, "It is found that, as of the date

of the January 21, 2015 hearing in this matter, approximately one hundred e-mails had been reviewed for applicable exemptions but none of those had been provided to the complainant, again without explanation.” Nowhere does the FOIC establish that the duty to search encompasses a duty to review every record for exemptions; that case simply mentioned that a review for exemptions had been conducted, yet emails were not produced and no explanation was provided. In this case, the records have not been produced and an explanation, in the form of an exemption from the mandatory disclosure requirements of FOIA, has been provided. As discussed further below, that exemption was supported by testimony by Detective Sudock, who testified how disclosure of the records would prejudice a potential law enforcement action.

Complainants contend that the records were not disclosed because there is a department policy regarding the release of records in open investigations. However, Detective Sudock was not familiar with the specifics of the policy and was not the individual who denied access to the records, so this testimony does not establish that the records were not considered in light of the specific case and the requirements of the exemption. In fact, with respect to every item withheld except for the 911 recordings (which were subsequently released to Complainants), Detective Sudock testified he believed that disclosure would prejudice a prospective law enforcement action.

Respondents have not failed to conduct a “diligent search” within the meaning of FOIA.

II. RESPONDENTS ESTABLISHED THAT CONN. GEN. STAT. § 1-210(b)(3) EXEMPTS THE RECORDS IN QUESTION.

As noted in Respondents’ initial brief, 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. Some of the cases cited by the Respondent similarly had occurred years in the past and were unsolved. Some degree of speculation is also accepted in these cases.

Application of the exemption contained in Conn. Gen. Stat. § 1-210(b)(3) does not require police departments to be clairvoyant. Where an investigation remains open, investigators will not have all the facts available to them to develop a clear picture as to exactly what a potential prosecution would look like. The FOIC has approved the exemption where it found that a prospective law enforcement action in an unsolved murder was a reasonable possibility, even in a homicide nearly two decades old. *Graeber et al. v. Chief, Police Department, City of New Haven et al.*, Docket #FIC 2016-0865 (Sept. 27, 2017).

Indeed, a prospective law enforcement action is a reasonable possibility here because detectives continue to investigate the murder and while new leads have not always been plentiful, they exist. Detective Sudock testified that new information had recently become available, just prior to the hearing. His prior statements that there was no new information to go on did not mean that the case was closed or impossible to solve, just that there was nothing remaining to investigate *at that time*. With new information available at various times during the investigation, including recently, it is clear that this murder still has the potential to be solved and a prosecution is a reasonable possibility.

Detective Sudock offered ample testimony as to how disclosure of investigation records in this matter would be prejudicial to a prospective law enforcement action. His testimony was substantially similar to testimony the FOIC has accepted as sufficient to support the exemption in *Graeber et al. v. Chief, Police Department, City of New Haven et al.*, Docket #FIC 2016-0865

(Sept. 27, 2017); *Lopez v. Chief, Police Department, City of Bridgeport et al.*, Docket #FIC 2015-398 (Feb. 24, 2016); *Strauss v. Chief, Police Department, Town of Westport et al.*, Docket #FIC 2010-487 (May 25, 2011); *Hoda v. Chief, Police Department, City of New Haven*, Docket #FIC 2007-143 (Jan. 23, 2008); *Rouen et al. v. Chief, Police Department, Town of Groton*, Docket # FIC 2006-064 (Jan. 24, 2007); and *Cotton et al. v. Chief, Police Department, City of Meriden*, Docket #FIC 2006-020 (Aug. 9, 2006).

Complainants rely heavily on *Sedensky v. FOIC*, No. HHBCV136022849S, 2013 WL 6698055 (Conn Super. Ct. Nov. 26, 2013) for their contention that it is insufficient for a police department to apply the exemption when it does not know until later how the individual pieces of evidence will be used and its suggestion that there can be no degree of speculation in applying the exemption. *Sedensky* is totally inapposite to these facts. *Sedensky* involved an attempt to seek records related to the Sandy Hook massacre. Since the shooter was deceased and there was no information to suggest that there was anybody else who could potentially be subjected to criminal prosecution, there was no credible evidence to support that there was a potential criminal investigation. *Id.* at *15.

This case is not the Sandy Hook case, where the killer is known to be deceased. This case is much more analogous to the six cases cited above where the identity of the potential criminal defendant was not known, but where the identity could become known and the killer could potentially be prosecuted. In those cases, the FOIC did not require the police departments to know, prior to the conclusions of their investigations, who would be prosecuted or exactly what information would be used and in exactly what way in order to justify the exemption from disclosure.

On this basis, 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. As noted in Respondents' initial brief, 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. This also explains why Complainants are mistaken in their contention that each document must be reviewed by Respondents to determine that the exemption applies in this case. As this Commission correctly observed in *Libow*, 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 in *Libow*, 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.

III. RESPONDENTS DID NOT FAIL TO CONDUCT A DILIGENT SEARCH FOR OR REVIEW OF THE REQUESTED RECORDS.

Complainants contend that Respondents did not perform a diligent search for records in response to the request for records in this case. This argument is entirely misplaced. All of the cases Complainants cite pertain to situations where the complainants claimed (and in some cases proved) that the records were responsive and no exemption was applicable, yet the respondents failed to provide the records. This is not the case here. This is not a situation where Respondents claimed to have provided all responsive records but failed to search a key person's office or email system. Respondents have the records and is capable of providing all of them, but for the fact that an exemption applies.

Complainants invent out of whole cloth the notion that the obligation to search for records also encompasses an obligation to review each record to determine whether exemptions apply. ("This duty [to conduct a diligent search] 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.") The only case cited to support this proposition is *Stedronsky v. Caruso*, No. FIC 2014-251 (Mar. 11, 2015). The only reference in that case to a review for exemptions is contained in Paragraph 17, "It is found that, as of the date of the January 21, 2015 hearing in this matter, approximately one hundred e-mails had been reviewed for applicable exemptions but none of those had been provided to the complainant, again without explanation." Nowhere does the FOIC establish that the duty to search encompasses a duty to review for exemptions; that case simply mentioned that a review for exemptions had been conducted, yet emails were not produced and no explanation was provided. In this case, the records have not been produced and an explanation, in the form of an exemption from the mandatory disclosure requirements of FOIA, has been provided. As discussed further

below, that exemption was supported by testimony by Detective Sudock, who explained how disclosure of the records would prejudice a potential law enforcement action.

Complainants contend that the records were not disclosed because there is a department policy regarding the release of records in open investigations. However, Detective Sudock was not familiar with the specifics of the policy and was not the individual who denied access to the records, so this testimony does not establish that the records were not considered in light of the specific case and the requirements of the exemption. In fact, with respect to every item withheld except for the 911 recordings (which were subsequently released to Complainants), Detective Sudock believed that disclosure would prejudice a prospective law enforcement action.

Respondents have not failed to conduct a “diligent search” within the meaning of FOIA.

IV. RESPONDENTS ESTABLISHED THAT CONN. GEN. STAT. § 1-210(b)(3) EXEMPTS THE RECORDS IN QUESTION.

As noted in Respondents’ initial brief, 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. Some degree of speculation is also accepted in these cases.

Application of the exemption contained in Conn. Gen. Stat. § 1-210(b)(3) does not require police departments to be clairvoyant. Where an investigation remains open, investigators will not have all the facts available to them to develop a clear picture as to exactly what a potential prosecution would look like. The FOIC has approved the exemption where it found that a prospective law enforcement action in an unsolved murder was a reasonable possibility,

even in a homicide nearly two decades old. *Graeber et al. v. Chief, Police Department, City of New Haven et al.*, Docket #FIC 2016-0865 (Sept. 27, 2017).

Indeed, a prospective law enforcement action is a reasonable possibility here because detectives continue to investigate the murder and while new leads have not always been plentiful, they exist. Detective Sudock testified that new information had recently become available, just prior to the hearing. His prior statements that there was no new information to go on did not mean that the case was closed or impossible to solve, just that there was nothing remaining to investigate *at that time*. With new information available at various times during the investigation, including recently, it is clear that this murder still has the potential to be solved and a prosecution is a reasonable possibility.

Detective Sudock offered ample testimony as to how disclosure of investigation records in this matter would be prejudicial to a prospective law enforcement action. His testimony was substantially similar to testimony the FOIC has accepted as sufficient to support the exemption in *Graeber et al. v. Chief, Police Department, City of New Haven et al.*, Docket #FIC 2016-0865 (Sept. 27, 2017); *Lopez v. Chief, Police Department, City of Bridgeport et al.*, Docket #FIC 2015-398 (Feb. 24, 2016); *Strauss v. Chief, Police Department, Town of Westport et al.*, Docket #FIC 2010-487 (May 25, 2011); *Hoda v. Chief, Police Department, City of New Haven*, Docket #FIC 2007-143 (Jan. 23, 2008); *Rouen et al. v. Chief, Police Department, Town of Groton*, Docket # FIC 2006-064 (Jan. 24, 2007); and *Cotton et al. v. Chief, Police Department, City of Meriden*, Docket #FIC 2006-020 (Aug. 9, 2006).

Complainants rely heavily on *Sedensky v. FOIC*, No. HHBCV136022849S, 2013 WL 6698055 (Conn Super. Ct. Nov. 26, 2013) for their contention that it is insufficient for a police department to apply the exemption when it does not know until later how the individual pieces of

evidence will be used and its suggestion that there can be no degree of speculation in applying the exemption. *Sedensky* is totally inapposite to these facts. *Sedensky* involved an attempt to seek records related to the Sandy Hook massacre. Since the shooter was deceased and there was no information to suggest that there was anybody else who could potentially be subjected to criminal prosecution, there was no credible evidence to support that there was a potential criminal investigation. *Id.* at *15.

This case is not the Sandy Hook case, where the killer is known to be deceased. This case is much more analogous to the six cases cited above where the identity of the potential criminal defendant was not known, but where the identity could become known and the killer could potentially be prosecuted. In those cases, the FOIC did not require the police departments to know, prior to the conclusions of their investigations, who would be prosecuted or exactly what information would be used and in exactly what way in order to justify the exemption from disclosure.

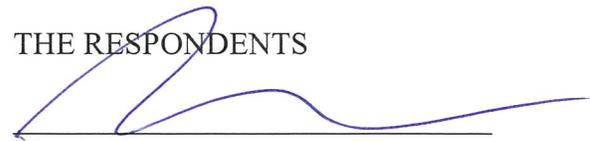
On this basis, Detective Sudock's testimony was specific enough to demonstrate that all documents in the investigatory file are subject to the exemption, especially because it is not currently known which details will become crucial. As noted in Respondents' initial brief, in *Libow v. Chief, Police 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. This also explains why Complainants are mistaken in their contention that each document must be reviewed by Respondents to determine that the exemption applies in this case. As this Commission correctly observed in *Libow*, 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 in *Libow*, 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.

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.

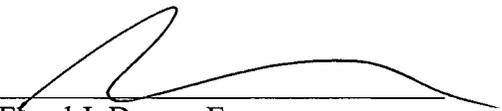
THE RESPONDENTS



Floyd J. Dugas, Esq.
Berchem Moses PC
75 Broad Street
Milford, CT 06460
Tel. (203) 783-1200
fdugas@berchemmoses.com

CERTIFICATION

This is to certify that on this 13th day of April, 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.



Floyd J. Dugas, Esq.