# SUPREME COURT

# OF THE

# STATE OF CONNECTICUT

---

SUPREME COURT NO. SC 20656

JOHN DRUMM, CHIEF OF POLICE, PLAINTIFF-APPELLANT
TOWN OF MADISON POLICE DEPARTMENT, PLAINTIFF-APPELLANT
TOWN OF MADISON, PLAINTIFF-APPELLANT

vs.

FREEDOM OF INFORMATION COMMISSION OF
THE STATE OF CONNECTICUT, DEFENDANT-APPELLEE

---

BRIEF OF PLAINTIFFS-APPELLANTS
JOHN DRUMM, CHIEF OF POLICE
TOWN OF MADISON POLICE DEPARTMENT
TOWN OF MADISON

---

FLOYD J. DUGAS
BERCHEM MOSES PC
75 BROAD STREET
MILFORD, CT 06460
TELEPHONE (203) 783-1200
FACSIMILE (203) 877-8422
EMAIL: fdugas@berchemmoses.com
JURIS NO. 022801

ATTORNEYS FOR PLAINTIFFS-APPELLANTS
JOHN DRUMM, CHIEF OF POLICE
TOWN OF MADISON POLICE DEPARTMENT TOWN
OF MADISON

## TABLE OF CONTENTS


STATEMENT OF PRINCIPAL ISSUES .......... ii

TABLE OF AUTHORITIES .......... iii

NATURE OF THE PROCEEDINGS AND STATEMENT OF FACTS .......... 1

A. Nature of the Proceedings .......... 1
B. Statement of Facts .......... 1

LEGAL ARGUMENT .......... 11

I. The Trial Court erred in adopting the reasonable possibility test and applying it retroactively in determining that the requested records were not exempt from disclosure under Conn. Gen. Stat. § 1-210(b)(3). .......... 11

A. Standard of Review .......... 11
B. It is fundamentally unfair to Plaintiffs/Appellants for the Trial Court to announce a new standard and then retroactively apply it to the facts of this case to the detriment of Plaintiffs/Appellants .......... 12
C. Even if this Court finds the reasonable possibility standard appropriate Plaintiffs/Appellants met that burden .......... 14
D. The appropriate standard of review should be that a criminal action is "reasonably anticipated." .......... 18

II. The Trial Court erred in upholding the FOIC's finding that there was substantial evidence in the record that a prospective law enforcement action was purely speculative. .......... 22

A. Standard of Review .......... 22
B. Plaintiffs/Appellants presented the unrefuted, credible, and well-founded testimony of Detective Sudock that there was a prospective law enforcement action .......... 23

III. The Trial Court erred in not finding that the FOIC acted arbitrarily and capriciously in violation of Conn. Gen. Stat. § 4-183(j) when, in its decision, it required Plaintiffs/Appellants to provide (a) evidence that an actual law enforcement action was pending, and (b) multiple witnesses to testify about any prospective law enforcement action resulting from the murder investigation. .......... 28

A. Standard of Review .......... 28
B. The Trial Court erred in not finding that the FOIC Decision was arbitrary and capricious in violation of Conn. Gen. Stat. § 4-183(j) when it ignored its own precedent and imposed requirements not mandated by statute .......... 29

CONCLUSION AND RELIEF REQUESTED .......... 35

## STATEMENT OF PRINCIPAL ISSUES

1. Whether the Trial Court erred in adopting the reasonable possibility test and applying it retroactively in determining that the requested records in the instant matter were not exempt from disclosure under Conn. Gen. Stat. § 1-210(b)(3).

2. Whether the Trial Court erred in upholding the Freedom of Information Commission (the "FOIC" or the "Commission") finding that there was substantial evidence in the record that a prospective law enforcement action was purely speculative.

3. Whether the Trial Court erred in not finding that the Commission acted arbitrarily and capriciously in violation of Conn. Gen. Stat. § 4-183(j) when in its decision it required Plaintiffs/Appellants to provide (a) evidence that an actual law enforcement action was pending, and (b) multiple witnesses to testify about any prospective law enforcement action resulting from the murder investigation.

## TABLE OF AUTHORITIES

### Cases

Amodio v. Amodio, 56 Conn. App. 459, 743 A.2d 1135 (2000) .................................. 13, 18

Barfield v. City of Ft. Lauderdale Police Dep't, 639 So. 2d 1012 (Fla. Dist. Ct. App. 1994) .................................................................................. 22

Christopher R. v. Comm'r of Mental Retardation, 277 Conn. 594, 893 A.2d 431 (2006) .... 22

Dep't of Pub. Safety, Div. of State Police v. Freedom of Info. Comm'n, 51 Conn. App. 100, 720 A.2d 268 (1998) ........................................................................ 15

Does v. Foti, 81 So.3d 101 (La. App. 1 Cir. 2011) ............................................................ 20

Dortenzio v. Freedom of Info. Comm'n, 48 Conn. App. 424, 710 A.2d 801 (1998) ............ 29

Fish v. Fish, 285 Conn. 24, 939 A.2d 1040 (2008) ............................................................ 11

Hartford Courant Co. v. Freedom of Information Commission, 261 Conn. 86, 801 A.2d 759 (2002) ................................................................................................ 11

In re Matter Under Investigation, 15 So.3d 972, 991 (La. 2009) ........................................ 19

Lesher v Hynes, 19 NY3d 57, 968 N.E.2d 451 (2012) ...................................................... 21

Loevy & Loevy v. New York City Police Dep't, 33 N.Y.S.3d 185, 139 A.D.3d 598 (N.Y. App. Div. 2016) ......................................................................................... 20, 21

Nelseco Nav. Co. v. Dep't of Liquor Control, 34 Conn. App. 352, 641 A.2d 827 (1994) ........................................................................................................ 29, 33

Newman v. King Cty., 133 Wash.2d 565, 947 P.2d 712 (1997) .................................. 20, 21

Shelton v. Statewide Grievance Comm., 277 Conn. 99, 890 A.2d 104 (2006) .................. 22

Unistar Props., LLC v. Conservation & Inland Wetlands Comm'n of Town of Putnam, 293 Conn. 93, 977 A.2d 127 (2009) ....................................................................... 22

Winsor v. Comm'r of Motor Vehicles, 101 Conn. App. 674, 922 A.2d 330 (2007) ......... 23, 24

### Statutes and Rules

Conn. Gen. Stat. § 1-210(b)(3)(D) ....................................................................... *passim*

Conn. Gen. Stat. § 1-210(b)(3) ........................................................................ *passim*

Conn. Gen. Stat. § 4-183(j) ........................................................................ 11, 28, 29, 34

Connecticut Practice Book § 65-1 ........................................................................ 1

Neb. Rev. Stat. §84-712.05(5) ........................................................................ 18

**FOIC DECISIONS**

Anike Niemeyer v. Chief, Police Department, Town of Madison; Police Department, Town of Madison; and Town of Madison, Docket #FIC #2019-0652 (Aug. 26, 2020)........................................................................1, 2, 7

Cotton et al. v. Chief, Police Department, City of Meriden, Docket #FIC 2006-020 (Aug. 9, 2006)........................................................................7, 31

Graeber et al. v. Chief, Police Department, City of New Haven et al., Docket #FIC 2016-0865 (Sept. 27, 2017)) ........................................................................ *passim*

Hoda v. Chief, Police Department, City of New Haven, Docket #FIC 2007-143 (Jan. 23, 2008) (App. 2 at A-572-574)........................................................................7, 32

Lopez v. Chief, Police Department, City of Bridgeport et al., Docket #FIC 2015-398 (Feb. 24, 2016)........................................................................7, 31, 32

Rouen et al. v. Chief, Police Department, Town of Groton, Docket # FIC 2006-064 (Jan. 24, 2007) ........................................................................7, 30

Strauss v. Chief, Police Department, Town of Westport et al., Docket #FIC 2010-487 (May 25, 2011) ........................................................................7, 30

Yates et al. v. Chief, Police Department, Town of Westport, Docket #FIC 2005-084 (Dec. 14, 2005)........................................................................7, 32

## NATURE OF THE PROCEEDINGS AND STATEMENT OF FACTS

### A. Nature of the Proceedings

This is an appeal by the Town of Madison, the Town of Madison Police Department, and its Chief of Police ("Plaintiffs/Appellants"), from a judgment of the Trial Court (Klau, J.), affirming a decision of the FOIC in the matter of Anike Niemeyer v. Chief, Police Department, Town of Madison; Police Department, Town of Madison; and Town of Madison, FIC #2019-0652 ("FOIC Decision"). In the decision, the FOIC ordered Plaintiffs/Appellants to release records of an open murder investigation to Intervenor Anike Niemeyer.

On December 23, 2020, Plaintiffs/Appellants filed a timely appeal of the FOIC's decision. The appeal was assigned to the Trial Court (Klau, J.). On January 26, 2021, the Trial Court granted Anike Niemeyer's motion to intervene. On April 16, 2021, a remote hearing on the merits was held before the Court. By Memorandum of Decision dated August 13, 2021, the Trial Court affirmed the decision of the FOIC and entered judgment for Defendant.

Plaintiffs/Appellants' appeal to the Appellate Court followed on September 2, 2021. By notice dated December 15, 2021, this appeal was transferred to this Court pursuant to Connecticut Practice Book § 65-1.

### B. Statement of Facts

Barbara Beach Hamburg was murdered in Madison, Connecticut on March 3, 2010, and the case remains open and unsolved. See Administrative Record ("Record") at 002, Appendix (App.") 1 at A-80.[1] The cause of death was blunt force trauma. App. 1 at A-83.

[1] All citations to the administrative record are to the return of record filed by the Commission with the Trial Court, Entry No. 110.00.

Her death was declared a homicide by the State Medical Examiner. Id.; FOIC Decision at 3, App. 1 at A-311. It was investigated by, and continues to be investigated by the Madison Police Department. FOIC Decision at 3, App. 1 at A-311; see also Sudock Testimony, Record at 103: 2-6, App. 1 at A-181. Following the murder, Ms. Hamburg's son, Madison Hamburg, began working with Anike Niemeyer and Eastward Pictures to create a documentary film regarding his mother's death. Record at 002-003, App. 1 at A-80-81; 006-009, App. 1 at A-84-87. The documentary has since aired on HBO. By request dated October 18, 2019, Intervenor Niemeyer submitted a request 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.

Record at 002, App. 1 at A-80

Intervenor Niemeyer intends to use the information sought in the documentary film. Id. at 002-003, App. 1 at A-80-81; 006-009, App. 1 at A-84-87. Plaintiffs/Appellants 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). Id. at 010, App. at A-88.

On or about October 24, 2019, Ms. Niemeyer also requested records related to the murder of Ms. Hamburg from the Office of the Chief Medical Examiner. App. 2 at A-559-560. In ruling on that request, the Court (Clifford, J.) ordered the records sealed on the grounds that there was a compelling public interest against disclosure of the documents. Id. 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.**

Id. at A-559 (emphasis added).

On October 28, 2019, Ms. Niemeyer filed an appeal to the FOIC, appealing the Plaintiffs/Appellants' denial of her Freedom of Information request. Record at 001, App. 1 at A-79. On February 19, 2020, a hearing was held on Ms. Niemeyer's appeal. Id. at 032-141, App. 1 at A-110-219.

During the hearing, Plaintiffs/Appellants' witness, Detective Christopher Sudock, who is the lead detective on the Barbara Beach Hamburg homicide investigation, testified that the Madison Police Department treats the Hamburg case in all respects as an open investigation. Id. at 93, 95-96, 105, App. 1 at A-171, A-173-174, A-183. Of note, prior to joining the Madison Police Department, Detective Sudock was employed by the Connecticut State Police for

twenty-seven (27) years, during twenty (20) of which he was a major crime investigator. Id. at 094, App. 1 at A-172. As a major crime investigator, he investigated serious and complex crimes including murders. Id. In fact, while working for the Connecticut State Police, the major crimes squad of which he was a part "assist[ed] the Madison Police Department with crime scene processing and conducted a joint investigation of the murder of Barbara Hamburg." Id. at 094: 25, 095: 1-4, App 1. at A-172-173. As such, Detective Sudock is the most knowledgeable person regarding the investigation into Barbara Beach Hamburg's murder.

Detective Sudock testified that he was currently investigating the murder and that **one week prior** to the FOIC hearing, new information was obtained:

> Q: *Do you recall that last time you were either analyzing data or looking at a new possible lead in this case*?
>
> A: **Yes. Last week we had information on this investigation. Last week.**

Sudock Testimony, Record at 103: 2-6, App. 1 at A-181 (emphasis added); see also Id. at 118-19, App. 1 at A-196-197. Detective Sudock also testified that he still has the responsibility to follow leads, review evidence, talk to experts, and look for ways to advance the investigation. Id. at 096, App. 1 at A-174.

Detective Sudock testified that although the Hamburg case is not necessarily looked at every day or week, it is examined at least once per month. Id. at 105, App. 1 at A-183. Even when no new information is coming in, the evidence continues to be analyzed, often with the application of new forensic technology. Id. at 101, App. 1 at A-179. The Madison Police Department never stopped working on the case and new information continues to be developed. Id. at 096-097, App. 1 at A-174-175. The investigative file contains information

to be used in a prospective law enforcement action and the disclosure of the information would be prejudicial to such action. Id. at 098, App. 1 at A-176. Detective Sudock testified as follows:

> Q: There are essentially five categories of requests in the October 18, 2009 (sic) information request in this case. The first one requests all investigatory records including notes, reports, transcripts. It goes on and lists some other categories. In your opinion, again without getting into the details of the evidence that you have, do you believe that the **disclosure of that information would be prejudicial to any potential future law enforcement action**?
>
> A: **Yes**

Sudock Testimony, Record at 098: 5-14, App. 1 at 176 (emphasis added). 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. Record at 101-102, App. 1 at A-179-180.

Detective Sudock also testified that information that seems insignificant now may prove to be important later. Id. at 135, App. 1 at 213. Detective Sudock further 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. Id. at 097, App. 1 at A-175. They could also use that information to influence or intimidate witnesses. Id. Detective Sudock also testified that there is information in the file that has not been revealed in this case that is critical to a potential prosecution. Id. In fact, Detective Sudock testified that when he met with members of the Hamburg family, he did not share all the information he had in the case file because

> A: **There's information contained in those files that only the perpetrator of this crime would know, and if that information -- if we presented that information and it got out into the public it allows for suspects, perpetrators to create alibis. They could also use that**

> **information to influence or intimidate witnesses. So there's always information that's not revealed that's critical to prosecuting a case**.

Sudock Testimony, Record at 097: 18-25, App. 1 at A-175 (emphasis added).

Additionally, Detective Sudock testified that disclosure of information requested would be prejudicial to a potential law enforcement action. Id. at 098-099, App. 1 at A-176-177. He believes it would make it "extremely more difficult" to make an arrest and prosecute the case if the information were to be disclosed:

> Q: And you may have already alluded to that, *but in what ways would that impede or be prejudicial to your pursuing a murder conviction*?
>
> A: Again the information contained in there that's unknown to a perpetrator that we know would allow to create alibis, potentially hinder witness prosecution, intimidation of witnesses. There's a myriad of things that could happen if all the information in this case was public and public knowledge, and it would certainly prevent a successful prosecution. It would make it more difficult. I shouldn't say prevent, **it would make it extremely more difficult to make an arrest and also to prosecute the case**.

Sudock Testimony, Record at 098: 15-25, 099: 1-2, App. 1 at A-176-177 (emphasis added).

After determining that disclosure of recordings of the 911 calls would not prejudice a prospective law enforcement action, Plaintiffs/Appellants provided Ms. Niemeyer with those records on February 29, 2020 (Request No. 4). Record at 166, App. 1 at A-561.

On March 27, 2020, Plaintiffs/Appellants and Ms. Niemeyer filed post-hearing briefs. Record at 167-201, App. 1 at A-220-254. Plaintiffs/Appellants' post-hearing brief argued that all the records requested by Ms. Niemeyer that had not been disclosed were exempt from disclosure under Conn. Gen. Stat. § 1-210(b)(3). Record at 167-178. App. 1 at A-220-231.

Conn. Gen. Stat. § 1-210(b)(3) exempts from disclosure certain "records of law enforcement agencies not otherwise available to the public which records are 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 . . . (D) information to be used in a prospective law enforcement action if prejudicial to such action." Plaintiffs/Appellants argued that the FOIC 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 prospective law enforcement action. Record at 167-178, App. 1 at A-220-231. It is undisputed that the records in issue are records of a law enforcement agency, not available to the public which were compiled in connection with the investigation of a crime. FOIC Decision at 3, Record at 301, App. 1 at A-311. At issue in this matter are the requirements of subparagraph (D).

In their brief submitted to the FOIC, Plaintiffs/Appellants cited to seven previous Commission decisions, Graeber et al. v. Chief, Police Department, City of New Haven et al., Docket #FIC 2016-0865 (Sept. 27, 2017) (App. 2 at A-565-571); Strauss v. Chief, Police Department, Town of Westport et al., Docket #FIC 2010-487 (May 25, 2011) (App. 2 at A-584-586); Lopez v. Chief, Police Department, City of Bridgeport et al., Docket #FIC 2015-398 (Feb. 24, 2016) (App. 2 at A-575-580); Hoda v. Chief, Police Department, City of New Haven, Docket #FIC 2007-143 (Jan. 23, 2008) (App. 2 at A-572-574); Rouen et al. v. Chief, Police Department, Town of Groton, Docket # FIC 2006-064 (Jan. 24, 2007) (App. 2 at A-581-583); Cotton et al. v. Chief, Police Department, City of Meriden, Docket #FIC 2006-020 (Aug. 9, 2006) (App. 2 at A-562-564); and Yates et al. v. Chief, Police Department, Town of Westport, Docket #FIC 2005-084 (Dec. 14, 2005) (App. 2 at A-587-589), in which the FOIC had found that records related to open investigations and/or pending law enforcement actions were exempt from disclosure. Record at 173-175, App. 1 at A-226-A-229. Through the

testimony of Detective Sudock about the status of the investigation as open and active and through his testimony as to how disclosure of the information contained in the requested records could provide the perpetrator with information needed to impede the prosecution of the crime, Plaintiffs/Appellants clearly 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. Id. The testimony by Detective Sudock was substantially similar and in at least one case (Graeber) virtually identical to testimony that the FOIC had previously found to be sufficient to support the exemption.

On April 13, 2020, Plaintiffs/Appellants filed a reply brief in response to Ms. Niemeyer's post-hearing brief, reinforcing Plaintiffs/Appellants' arguments. App. 1 at A-255-265. Despite Detective Sudock's testimony explaining how the disclosure of the records would prejudice a prospective prosecution and the well-established prior Commission decisions finding that records of open police investigations were properly withheld in such circumstances, on July 28, 2020, the Hearing Officer issued a Proposed Final Decision finding that Plaintiffs/Appellants "violated the FOI Act when they refused to disclose such records." Record at 249, App. 1 at A-291.

On August 14, 2020, Plaintiffs/Appellants filed a Memorandum in Opposition to Proposed Final Decision. Id. at 260-264, App. 1 A-293-296. Plaintiffs/Appellants' Memorandum in Opposition to Proposed Final Decision argued that the Hearing Officer wrongfully required Plaintiffs/Appellants to provide evidence that an actual arrest had been made with actual charges pending in order for the requested records to be exempt from disclosure under Conn. Gen. Stat. § 1-210(b)(3). Id. at 261-262, A-294-295. Plaintiffs/Appellants also argued that the Hearing Officer's conclusion that

Plaintiffs/Appellants failed to prove that the disclosure would be prejudicial was erroneous. Id.

On September 4, 2020, the FOIC transmitted the Final Decision of the Commission to the parties. Id. at 297-306, App. 1 at A-307-316. After receipt of the Final Decision, Plaintiffs/Appellants provided Ms. Niemeyer with additional records responsive to her requests. Plaintiffs/Appellants determined that these additional records were the least likely to impede the investigation and any law enforcement action taken with respect to the murder of Ms. Hamburg. By voluntarily providing these documents, Plaintiffs/Appellants were not in any way showing their concurrence with the FOIC Decision or waiving their appeal rights.

On December 23, 2020, Plaintiffs/Appellants filed a timely appeal of the FOIC's decision. See Docket Entry Nos. 100.30 & 100.31, App. 1 at A-6-43. The appeal was assigned to the Trial Court (Klau, J.). On February 22, 2021, Plaintiffs/Appellants filed their brief in support of their administrative appeal of the final decision rendered by the FOIC ("Appeal Brief"), Docket Entry No. 112.00, App. 1 at A-317-390. Plaintiffs/Appellants' Appeal Brief highlighted with relevant evidence and FOIC decisions that the FOIC Decision requiring Plaintiffs/Appellants to release records of an open murder investigation misapplied well-established Commission case law that found that records related to open criminal investigations and/or pending law enforcement actions were exempt from disclosure under Conn. Gen. Stat. § 1-210(b)(3). Moreover, Plaintiffs/Appellants' Appeal Brief argued that the FOIC Decision is arbitrary, capricious, and clearly erroneous in that the FOIC added a legal requirement that does not exist in either the Statute or the Commission's case law that an actual arrest has to have been made and actual charges need to be pending in order for the records to be exempt from disclosure. Similarly, Plaintiffs/Appellants' Appeal Brief further

argued the FOIC Decision is arbitrary, capricious, and clearly erroneous in that it added a legal requirement that does not exist in either the Freedom of Information Act or the Commission's case law that Plaintiffs/Appellants were required to present multiple witnesses to prove disclosure would be prejudicial.

On March 15, 2021, the FOIC and Intervenor Niemeyer filed their opposition briefs (Docket Entries Nos. 117.00 & 118.00), App. 1 at A-391-503. On March 29, 2021, Plaintiffs/Appellants filed their reply briefs to the FOIC's and Intervenor Niemeyer's opposition briefs. (Docket Entry Nos. 119.00 & 120.00), App. 1 at A-504-525. On April 16, 2021, a remote hearing on the merits was held before was the Court (Klau, J.). By Memorandum of Decision dated August 13, 2021, the Trial Court (Klau, J.) affirmed the decision of the FOIC and entered judgment for Defendant. Memo. of Decision, App. 1 at A-526-550.

In affirming the decision, the Trial Court adopted and retroactively applied a "reasonable possibility" standard in determining that the requested records were not exempt from disclosure under Conn. Gen. Stat. § 1-210(b)(3). Memo. of Decision at 15, App. 1 at A-540. In so doing, however, the Trial Court stated that it was "unclear" whether the FOIC applied a reasonable possibility test, and, if it did apply the standard, the "standard is not time-tested, nor has it been subject to judicial scrutiny. Consequently, it is not entitled to deference." Id. (internal quotations omitted). The Trial Court also incorrectly found that there was substantial evidence in the record that a prospective law enforcement action was purely speculative, despite **unrefuted** testimony to the contrary. Id. at 21, App. 1 at A-546. The Trial Court further found that the previous FOIC decisions cited by Plaintiffs/Appellants "did not dictate a particular result" in this case. Id. at 22, App. 1 at A-547. In making this finding, the Trial Court failed to address Plaintiffs/Appellants' argument that the FOIC acted arbitrarily

and capriciously in violation of Conn. Gen. Stat. § 4-183(j) when, in its decision, it required Plaintiffs/Appellants to provide (a) evidence that an actual law enforcement action was pending, and (b) multiple witnesses to testify about any prospective law enforcement action resulting from the murder investigation.

On September 2, 2021, Plaintiffs/Appellants appealed the Trial Court's decision. App. 1 at A-553-554.

## LEGAL ARGUMENT

### I. The Trial Court erred in adopting the reasonable possibility test and applying it retroactively in determining that the requested records were not exempt from disclosure under Conn. Gen. Stat. § 1-210(b)(3).

#### A. Standard of Review

It is well established that "[t]he ... determination of the proper legal standard in any given case is a question of law subject to our plenary review." Fish v. Fish, 285 Conn. 24, 37 (2008); see also Hartford Courant Co. v. Freedom of Information Commission, 261 Conn. 86, 96–97 (2002) ("Because this issue requires that we decide whether the trial court applied the correct legal standard in determining whether the plaintiff's request for information was reasonable, our review is plenary.").

Here, the Trial Court decided that the reasonable possibility standard is the correct standard for determining whether the information requested is to be used in a prospective law enforcement action in order to be exempt from disclosure under Conn. Gen. Stat. § 1-210 (b)(3)(D). Memo of Decision at 15, App. 1 at A-540. That standard is not set forth in the FOIA statute or any regulation of the FOIC. The Trial Court then retroactively applied the standard in this case, and found that Plaintiffs/Appellants failed to meet this standard.

It is fundamentally unfair to Plaintiffs/Appellants for the Trial Court to adopt a new legal standard and then retroactively apply it to the facts of this case to their detriment. Even if this Court finds the Trial Court's action in announcing and applying the reasonable possibility standard was appropriate, the Trial Court erred in not finding that Plaintiffs/Appellants met the newly adopted standard. Moreover, the more appropriate standard of review should be that a criminal action is "reasonably anticipated," and not the reasonable possibility standard as applied by the Trial Court.

### B. It is fundamentally unfair to Plaintiffs/Appellants for the Trial Court to announce a new standard and then retroactively apply it to the facts of this case to the detriment of Plaintiffs/Appellants

Prior to the Trial Court's decision, to its knowledge no court had addressed the appropriate standard for determining how certain a prospective law enforcement action must be for the law enforcement exemption under Conn. Gen. Stat. § 1-210 (b)(3)(D) to apply. Memo of Decision at 12, App. 1 at A-537. The Trial Court then proceeded to announce a new standard, the reasonable possibility standard, and retroactively apply it to this case. In so doing, the Trial Court admitted that it **knew of only one case in which the FOIC used the reasonable possibility standard** and that it was unclear if the FOIC used it in this case. Id. at 12, 15, and 20, App. 1 at A-537, A-540 and A-545; 23, App. 1 at A-548 ("Lastly, . . . the court has determined that § 1-210(b)(3)(D) requires the FOIC to determine whether a prospective law enforcement action is a reasonable possibility-a legal standard that the FOIC only expressly applied in one previous case . . . ."). The Trial Court further noted that **the reasonable possibility** "**standard is not time-tested, nor has it been subject to judicial scrutiny. Consequently, it is not entitled to deference**." Id. at 15, App. 1 at A-540 (internal quotations omitted).

It is fundamentally unfair to Plaintiffs/Appellants for the Trial Court to announce a new standard and then retroactively apply it to the facts of this case to their detriment. Indeed, Plaintiffs/Appellants in making their arguments before the FOIC and the Trial Court as to why the law enforcement exemption applied to the requested records, relied heavily on prior FOIC decisions and the standards used in those decisions for making their presentation of evidence and arguments as to why the exemption was satisfied. To that end, Plaintiffs/Appellants in their Appeal Brief cited to seven previous FOIC decisions where the Commission found that records related to open investigations and/or pending law enforcement actions were exempt from disclosure in highly similar circumstances. See Section IIIB, infra. The standards applied in those cases were amply met here. Id.

Despite this, the Trial Court decided to announce and retroactively apply a new standard to this case, that it admitted was "not time-tested, nor ha[d] it been subject to judicial scrutiny" (Memo of Decision at 15), which produced a "substantial, inequitable result" for Plaintiffs/Appellants. Amodio v. Amodio, 56 Conn. App. 459, 473 (2000) ("In determining whether a decision should be applied retroactively, consideration must be given to whether a retroactive application would produce a substantial, inequitable result."). Importantly, Plaintiffs/Appellants were not put on notice, either by statute, administrative regulation, or prior court decision, that it would be held to this standard when the complaint was heard before the FOIC.

Had Plaintiffs/Appellants been made aware that the reasonable possibility standard was the standard they had to meet, rather than focusing on FOIC precedent, they would have tailored their presentation of evidence and arguments to meet the standard and the newly announced factors that the Trial Court articulated were relevant in determining whether a

prospective law enforcement action was a reasonable possibility. This point was reinforced by the Trial Court's own words when it stated that "because the court has determined that §1-210(b)(3)(D) requires the FOIC to determine whether a prospective law enforcement action is a reasonable possibility-**a legal standard that the FOIC only expressly applied in one previous case-the previous decisions on which the MPD relies are of dubious precedential value.**" Memo of Decision at 23, App. 1 at A-548 (emphasis added). To disregard decades of FOIC precedent and announce a new after-the-fact standard highlights the fundamental unfairness to Plaintiffs/Appellants and the prejudice they will suffer if the Trial Court's decision is not reversed.

### C. Even if this Court finds the reasonable possibility standard appropriate Plaintiffs/Appellants met that burden

Even if this Court finds the Trial Court's action in announcing and applying the reasonable possibility standard was appropriate, the Trial Court erred in not finding that Plaintiffs/Appellants met the newly adopted standard. In fact, the substantial evidence in the record shows that Plaintiffs/Appellants met several of the factors that the Trial Court articulated were relevant in determining whether a prospective law enforcement action was a reasonable possibility. Specifically, the Trial Court set forth a non-exhaustive list of several factors to consider, including the time elapsed since new evidence was discovered, whether all leads had been exhausted, the amount of time committed to the case, whether there was a suspect, and whether new technology may allow for examination of existing evidence. Memo of Decision at 19-20, App. 1 at A-544-545. The Trial Court then goes on to reiterate that the law enforcement agency need not prove that an actual arrest and prosecution is likely or probably (which was contrary to a requirement imposed in this case in the FOIC's decision). Id. at 20, App. 1 at A-545. However, the agency must present evidence that a law

enforcement action is "more than a theoretical possibility." Id. We know from Dep't of Pub. Safety, Div. of State Police v. Freedom of Info. Comm'n, 51 Conn. App. 100, 103 (1998), at a minimum this requires evidence that an actual crime has been committed. To that end, it is undisputed that a homicide occurred, and Detective Sudock testified that the homicide investigation was an open case that was still being actively investigated as recently as the week before the hearing at the FOIC. Sudock Testimony, Record at 96-97, 103: 2-6, App. 1 at A-174-175, A-181.

> Q: *Do you recall that last time you were either analyzing data or looking at a new possible lead in this case*?
>
> A: **Yes. Last week we had information on this investigation. Last week.**

Sudock Testimony, Record at 103: 2-6, App. 1 at A-181 (emphasis added); see also id. at 118-19, App. 1 at A-196-197. Detective Sudock also testified that that the case gets worked on at least monthly, and that he still has the responsibility to follow leads, review evidence, talk to experts, and look for ways to advance the investigation. Id. at 096; 104-105, App. 1 at A-174; A-182-183. Importantly, he testified that the Madison Police Department had a "**number one suspect**" and stated that the individual had his or her phone off for 24 hours around the time of the murder. Id. at 113: 2-8, App. 1 at A-191 (emphasis added). This is contrary to the determination that a law enforcement action was only speculative.

Further, the one FOIC decision that the Trial Court cited as applying the reasonable possibility standard, Graeber v. Chief, Police Department, City of New Haven, supports a finding that the law enforcement exemption applies in this matter. The facts are virtually identical. In Graeber v. Chief, Police Department, City of New Haven, like here, no arrest had yet been made in a nearly 20-year unsolved murder, yet the FOIC found the exemption

applied. The FOIC stated in its decision, "Graeber is distinguished from the current matter in that the respondents in the current matter did not provide **multiple witnesses** to testify specifically about any prospective law enforcement action or how such action would be prejudiced by the disclosure of the requested records." (emphasis added). Like the current case, the murder at issue in Graeber was "unsolved" and nobody had been arrested, and the investigation remained active. The FOIC wrote in that decision:

> The respondents' witnesses emphasized that, in their opinion, disclosure of the records would prejudice a prospective prosecution of Jovin's killer. In particular, they testified, and it is found, that disclosure could make it difficult to verify and corroborate future witness statements and evidence, to develop new evidence, and would overall weaken the integrity of the investigation and the respondents' control of such investigation. Assistant State's Attorney Pillsbury testified, in particular, that the passage of time has not reduced the sensitivity of the information contained in the records. Both she and the other respondents' witnesses testified that until the perpetrator is identified, nothing in their files should be disclosed to the public because seemingly innocuous evidence could become critical to corroborate or refute new leads as they arise.

Accordingly, it found the records were exempt from disclosure.

The likelihood of a prospective law enforcement action in Graeber was no greater that the instant matter. Indeed, because there is a prime suspect in this matter and only 9-years had passed, arguably a law enforcement action is more likely here than it was in Graeber. As to the prejudice prong, Graeber's concerns for hindering a prospective prosecution were no more specific than the ones articulated in this case. There was no suspect identified and the statements about overall weakening the integrity of the investigation, impacting the ability of corroborating future witness statements and evidence, and the concern for the potential importance of seemingly innocuous evidence are the very same concerns that were articulated by Detective Sudock, but were written off as mere "speculation" by the FOIC because he stated that he could go on speculating after giving specific examples. **The only**

**basis the FOIC articulated for distinguishing Graeber is the number of witnesses and that is an arbitrary basis for distinguishing these cases, particularly because Detective Sudock's testimony was not refuted in these respects**. As the lead investigator on the matter for years, Detective Sudock's testimony was supported by a strong foundation, and it was arbitrary and capricious for the FOIC to disregard it because repetitive testimony was not offered.

Therefore, here as compared to Graeber, there was more evidence in the record that the requested records were to be used in a prospective law enforcement action, Indeed, here, unlike in Graeber, the Madison Police Department **has** identified a suspect and while there is not enough evidence at this moment in time to charge that individual, and Detective Sudock testified that if sufficient additional information is obtained, the Police Department would arrest that individual and pursue a murder prosecution. See Sudock Testimony, Record at 98: 5-25, 99: 1-2, 113: 2-8, 136: 1-25, 137: 1-7, App. 1 at A-176-177, A-191, A-214-215. Therefore, if the reasonable possibility standard was sufficient to exempt the records from disclosure in Graeber, it certainly was met here, and the Trial Court erred in not holding as such. An arrest and prosecution was more than a "theoretical possibility" and was not "purely speculative."

As the Connecticut Appellate Court has stated:

> **The issue of retroactivity of decisional law is a question of policy to be decided by a state's Supreme Court, and may be decided by the policy considerations of whether litigants could be deemed to have relied on past precedent or whether the "new" resolution of an "old" issue was foreshadowed, or whether equity, given the particular facts, requires a prospective application only**. See *id*.; *Jacque v. Steenberg Homes, Inc.,* 209 Wis.2d 605, 622–25, 563 N.W.2d 154 (1997); *Beavers v. Johnson Controls World Services, Inc.,* 118 N.M. 391, 395–98, 881 P.2d 1376 (1994); 5 Am.Jur.2d, Appellate Review § 790 (1995). **In determining whether a decision should be applied retroactively, consideration must be given to**

> **whether a retroactive application would produce a substantial, inequitable result**. See *Ostrowski v. Avery,* 243 Conn. 355, 377–78 n. 18, 703 A.2d 117 (1997).

Amodio, 56 Conn. App. at 472-73 (emphasis added). Here, it is undisputed that Plaintiffs/Appellants relied on past FOIC precedent, that the reasonable possibility standard was not foreshadowed as the FOIC had not used it regularly, and that if the standard was to be applied retroactively to this case it would produce a "substantial, inequitable result" for Plaintiffs/Appellants.

As such, the Trial Court's decision to adopt the reasonable possibility standard and apply it retroactively to this case to conclude that the requested records were not exempt from disclosure under Conn. Gen. Stat. § 1-210(b)(3) should be reversed.

### D. The appropriate standard of review should be that a criminal action is "reasonably anticipated."

While some jurisdictions protect criminal investigation documents indefinitely even without a showing of a prospective law enforcement action (e.g., Neb. Rev. Stat. §84-712.05(5)), in recognition of the fact that Connecticut does require such a showing, it is appropriate to draw from states that apply similar standards.

The "reasonably anticipated" standard applicable in Louisiana should be adopted in Connecticut. Louisiana enshrines public record access as a "fundamental right" in its Constitution, yet in recognition of the importance of protecting ongoing criminal investigations, the state supreme court articulated the "reasonably anticipated" standard as follows:

> **The generally understood meaning of the term reasonably anticipated is reasonably foreseen or contemplated. The term reasonably anticipated does not require a certainty or even a near certainty. Thus, criminal litigation can be said to be reasonably anticipated when it is reasonably foreseen or contemplated. The plain language of the statute does not**

**require a finding that criminal litigation will be pursued or will almost certainly be pursued for the exemption to apply. Rather, the exemption applies if it is reasonably foreseen or contemplated, i.e., if it is reasonably anticipated, that criminal litigation will be brought against some potential criminal defendant who was part of the investigation.**

In re Matter Under Investigation, 15 So.3d 972, 991 (La. 2009) (emphasis added). The Louisiana Supreme Court articulated several "objective factors" that "must serve the dual purpose of protecting the public's right to know and safeguarding a prosecutorial authority's ability to preserve the integrity of an investigatory file when criminal prosecution is reasonably anticipated . . . ." Id. at 992. The non-exhaustive factors are:

- Whether criminal litigation may still be initiated given the prescriptive period of the offense to be charged;
- The temporal and procedural posture of each case;
- Whether criminal litigation has been finally adjudicated or otherwise settled;
- The assertion of the prosecutorial authority as to its intent or lack thereof to initiate criminal litigation;
- Whether the prosecutorial authority has taken objective, positive, and verifiable steps to preserve its ability to initiate criminal litigation, including but not limited to: preserving evidence, maintaining contact with witnesses, and continuing an investigation;
- The time it would take to appropriately investigate and try an offense;
- The prosecutor's inherent authority to determine whom, when, and how he will prosecute;
- The severity of the crime;
- The availability of witnesses, victims, and defendants;
- The spoliation of evidence;
- The reasonable likelihood that a missing witness or an absconded defendant might be found; and
- The reasonable likelihood that additional witnesses might be willing to come forward with the passage of time.

Id. In applying the test following a remand to the trial court, the Court of Appeal of Louisiana, First Circuit, held that records pertaining to possible homicides surrounding deaths at a hospital following Hurricane Katrina were properly exempt, even where some grand juries had declined to indict certain individuals, others were granted immunity, and the district attorney said he did not have sufficient evidence to go forward with a prosecution at the

present time but would continue to investigate. Does v. Foti, 81 So.3d 101 (La. App. 1 Cir. 2011).

Indeed, other jurisdictions with similar law enforcement exemptions have protected from disclosure investigation records under similar circumstances. For instance, in Newman v. King Cty., 947 P.2d 712 (1997), the Washington Supreme Court reversed a decision of the trial court that had ordered the release of an investigation file of a homicide that had occurred some twenty-seven years earlier in 1969. In making its determination, the court relied on the standard used by the United States Supreme Court in determining whether law enforcement records are exempt from disclosure under the Federal Freedom of Information Act. Id. at 716. The federal courts in making this determination examine "(1) 'affidavits by people with direct knowledge of and responsibility for the investigation ...'; (2) whether resources are allocated to the investigation; and (3) whether enforcement proceeding are contemplated." Id. After applying this test, the court found that disclosure was not required and stated as follows:

> **The County has shown they and the FBI have personnel assigned to the case. Evidence was presented by individuals responsible for the investigation who stated the case was still open and enforcement proceedings were contemplated. The evidence also establishes the documents requested cannot be disclosed because their release would impair the ability of law enforcement to share information and would inhibit the ability of police officers to determine, in their professional judgment, how and when information will be released. We hold the broad language of the statutory exemption requires the nondisclosure of information compiled by law enforcement and contained in an open and active police investigation file because it is essential for effective law enforcement**

Id. (emphasis added).

Similarly, in Loevy & Loevy v. New York City Police Dep't, 33 N.Y.S.3d 185 (N.Y. App. Div. 2016), the New York Supreme Court Appellate Division reversed a decision of the trial

court that had ordered the NYPD to "disclose all documents pertaining to an unsolved homicide" that had occurred almost thirty years earlier in 1987, pursuant to New York's Freedom of Information Law. In so doing, the court held as follows:

> **NYPD properly withheld the requested materials pursuant to the exemption to FOIL for documents that "are compiled for law enforcement purposes and which, if disclosed, would . . . interfere with law enforcement investigations" (Public Officers Law § 87 [2] [e] [i]). NYPD met its burden of "identify [ing] the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents" (Matter of Lesher v Hynes, 19 NY3d 57, 67 [2012]). In particular, NYPD submitted an affidavit by a detective averring that he was handling an active, ongoing investigation into the homicide, and had recently pursued potential leads. The detective's affidavit established that disclosure of the records could interfere with the active investigation by, among other things, leading to witness tampering or enabling the perpetrator to evade detection**.

Id. (emphasis added).

Here, as discussed previoulsy, Detective Sudock testified that the homicide investigation was an open case that was still being actively investigated and as recently as the week before the hearing at the FOIC, there was new new information on the case. Sudock Testimony, Record at 96-97, 103: 2-6, App. 1 at A-174-175, A-181. He further testified that the release of the records "would make it extremely more difficult to make an arrest and also to prosecute the case." Sudock Testimony, Record at 098-099, App. 1 at A-176-177. Cleary, here, the evidence of a prospective law enforcement action and the resulting prejudice is comparable to or stronger than the evidence that the courts in Newman and Loevy & Loevy found sufficent to preclude discloure. If the "reasonably anticipated" test is applied, several factors would strongly militate against disclosure, including that there is no statute of limitations on homicide, no criminal matters related to the crime have been finally adjudicated or settled, the police intend for the crime to be prosecuted, the police have

taken steps to preserve the ability to initiate criminal litigation including preserving evidence and continuing to investigate, homicide is a severe crime, evidence has not been spoliated, witnesses and defendants remain available, additional witnesses might be willing to come forward with the passage of time (as recently occurred just prior to the FOIC hearing).

Moroever, while Plaintiffs/Appellants understand that, historically, exemptions to FOIA are to be narrrowly construed; FOIA "does not mandate a construction so narrow that the very purpose of the exemption, no matter how limited, is effectively defeated." Barfield v. City of Ft. Lauderdale Police Dep't, 639 So. 2d 1012, 1017 (Fla. Dist. Ct. App. 1994). This is exactly what will happen if theTrial Court's decision is allowed to stand.

Accoridngly, the appropriate standard of review should be that a criminal action is "reasonably anticipated."

## II. The Trial Court erred in upholding the FOIC's finding that there was substantial evidence in the record that a prospective law enforcement action was purely speculative.

### A. Standard of Review

Whether the Trial Court's conclusion that the administrative record contained "substantial evidence" to support the FOIC's finding that a prospective law enforcement action, disclosure of which would be prejudicial, was purely speculative is a question of law over which this Court's review is plenary. See Unistar Props., LLC v. Conservation & Inland Wetlands Comm'n of Town of Putnam, 293 Conn. 93, 114 (2009) ("Whether the substantial evidence test was applied properly by the trial court in its review of the [agency's] decision is a question of law over which our review is plenary."); Christopher R. v. Comm'r of Mental Retardation, 277 Conn. 594, 612 n.18 (2006) (whether substantial evidence existed presented a question of law); Shelton v. Statewide Grievance Comm., 277 Conn. 99, 108

(2006) ("We review de novo the issue of whether substantial evidence existed because it presents a pure question of law."). Here, Plaintiffs/Appellants presented the **unrefuted, credible, and well-founded** testimony of Detective Sudock as to what the prospective law enforcement action would be, i.e., a murder prosecution, and that it would make it "extremely more difficult" to make an arrest and to prosecute the case if the records were disclosed. Sudock Testimony, Record at 098: 15-25, 099: 1-2, App. 1 at A-176-177. Despite this substantial evidence of a prospective law enforcement action, the Trial Court incorrectly held that the FOIC's finding that "a prospective law enforcement action was purely speculative" was supported by substantial evidence. Memo of Decision at 21, App. 1 at A-546. In fact, there was **no** evidence to support such a finding.

### B. Plaintiffs/Appellants presented the unrefuted, credible, and well-founded testimony of Detective Sudock that there was a prospective law enforcement action

The Trial Court's finding that there was substantial evidence that a prospective law enforcement action was "purely speculative," was clearly erroneous, and Plaintiffs/Appellants' appeal should be sustained. See Winsor v. Comm'r of Motor Vehicles, 101 Conn. App. 674, 688-89 (2007) ("Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . .The evidence must be substantial enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . .**The obvious corollary to the substantial evidence rule is that a court may not affirm a decision if the evidence in the record does not support it**.") (emphasis added).

Plaintiffs/Appellants presented the **unrefuted, credible, and well-founded** testimony of Detective Sudock that a murder occurred, that they had a primary suspect, that they were

"close" but did not have sufficient evidence to arrest, and that it would make it "extremely more difficult" to make an arrest and to prosecute the case if the records were disclosed. Sudock Testimony, Record at 098: 15-25, 099: 1-2, 113: 9-16, App. 1 at A-176-177, A-191. Indeed, when specifically asked what type of prospective law enforcement action would be prejudiced, Detective Sudock testified as follows:

> UNKNOWN SPEAKER: But just to clarify, so what prospective law enforcement action would be prejudiced? In other words, would it be preparation of a future search warrant? Would it be preparation of a future arrest warrant? Would it be the ability to identify another suspect? I mean what types of future law enforcement actions?
>
> THE WITNESS: **Well, I think it could by any of those things**. I don't know what it could be. It could be, you know, there could be somebody out there that has information that's, you know, holding onto that information because of a fear or something that – you know, and now a documentary comes out and now they get more fear where -- I just don't know. There's so much information there. **It could be a search warrant, it could be an arrest warrant. I could be another scene. I mean there's so many things that it could be.** I can go on with speculating but I don't know at this point in time. **But I know there's information in there that I need if it's going to be an arrest warrant, if it's going to be a search warrant, if it's going to be an interview with somebody. The information, we have the information and that information in my opinion should be remain with the police department and not be public because it's only going to hamper any further investigative tool or technique that we would have in the future.**

Sudock Testimony, Record at 136: 1-25, 137: 1-7, App. 1 at A-214-215 (emphasis added).

Detective Sudock clearly testified that given that a homicide had occurred, a prospective law enforcement action could be preparation of a future search, preparation of a future arrest warrant, the ability to identify another suspect, and/or the identification of another scene. Id. Accordingly, there was substantial evidence in the record that there was a prospective law enforcement action. Indeed, substantial evidence "exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred." Winsor, 101 Conn. App. at 688-89. There is no substantial evidence,

as stated by the Trial Court, that a law enforcement action was only speculative. Rather, the substantial and uncontradicted evidence is that the police continued to work toward an arrest and prosecution of the perpetrator of the homicide. It is self-evident that given that a murder is involved in this case, and the case has remained open and active, that should further evidence warranting an arrest come to light, there will in fact be a law enforcement action, namely, a murder prosecution.

Despite this unrefuted and substantial evidence, the FOIC argued in its trial court brief that Detective Sudock "could only offer speculation that if some unknown event occurred at some point in the future that unknown event could have some sort of impact on the ability of the respondents to engage in some unknown prospective law enforcement action." FOIC Brief at 15, App. 1 at A-405. Similarly, Intervenor Niemeyer claimed in her trial court brief that Detective Sudock "offered only vague conjecture about hypothetical law enforcement proceedings in which the requested records might be used if the current facts somehow change." Niemeyer Brief at 17, App. 1 at A-431. Apparently, and erroneously, the Trial Court was persuaded by these arguments and found that there was substantial evidence in the record to support the FOIC's finding "that a prospective law enforcement action was purely speculative." Memo of Decision at 21, App. 1 at A-546. However, the law enforcement action anticipated was clear, and only the identity of the individual to be prosecuted is unconfirmed. The FOIC has upheld the exemption in many cases, including Graeber, where the crime had not yet been solved and the identity of the perpetrator was not yet known, as cited in Plaintiffs'/Appellants' briefs and *infra*. Indeed, in finding a reasonable possibility existed the FOIC relied upon the following factors: the murder was unsolved, no one had yet been arrested, the investigation was not dormant but rather was active, witnesses continued to be

interviewed, and "ever more precise DNA testing continues to be a focus of the investigation." Id. at 4. If the reasonable possibility test could be met in Graeber without the perpetrator's identity being confirmed, and no arrest being made, so too could it be here, where there was at least a suspect.

The claim that Detective Sudock was only speculating as to a prospective law enforcement action is based on his use of the word "speculate" in response to a particular question at the FOIC hearing. Detective Sudock had been asked whether the disclosure would prejudice a search warrant or an arrest warrant or the identification of a suspect. No FOIC decision has ever required the police department to identify the **precise step** in the process that would be compromised by the disclosure of the evidence, and that was what Detective Sudock was being asked to do. His reluctance to "speculate" as to whether it would be a search warrant or an arrest warrant that would be compromised does not mean that all of his testimony about prospective law enforcement actions was merely speculative.

In fact, Detective Sudock made clear in his testimony that there is a suspect and he referred to some specific information about the suspect in relation to the crime. While there is not enough evidence at this moment in time to charge that individual, if sufficient additional information is obtained, the Madison Police Department would arrest that individual and pursue a murder prosecution. See Sudock Testimony, Record at 98: 5-25, 99: 1-2, 136: 1-25, 137: 1-7, App. 1 at A-176-177, A-214-215. Clearly, based on Detective Sudock's **unrefuted, credible, and well-founded** testimony, "**a prospective law enforcement action is something more than a theoretical possibility**," and not purely speculative. Memo of Decision at 20, App. 1 at A-545 (emphasis added).

Notwithstanding this, and the Trial Court finding that the law enforcement agency does not need "**to prove that an arrest and prosecution is likely or probable**;" rather, the agency only has **the minimal burden "to present evidence that persuades the FOIC that a prospective law enforcement action is something more than a theoretical possibility**;" it erroneously affirmed the FOIC's decision. Id. (emphasis added).

Indeed, Detective Sudock's testimony was more than sufficient to meet the Plaintiffs/Appellants' minimal burden of showing that that a prospective law enforcement action is something more than a theoretical possibility. Detective Sudock made clear in his testimony that there is a suspect and identified the potential law enforcement actions that could happen, including an arrest for murder, if sufficient additional information is obtained. See Sudock Testimony, Record 98: 5-25, 99: 1-2, 136: 1-25, 137: 1-7, App. 1 at A-176-177, A-214-215. Accordingly, there was substantial evidence in the record before the FOIC and the Trial Court that there was a prospective law enforcement action.

In further support that there was substantial evidence that the requested records were to be used in a prospective law enforcement action, Plaintiffs/Appellants cited to the Court's (Clifford, J.) Order sealing records related to the murder of Ms. Hamburg from the Office of the Chief Medical Examiner. Within a week of Ms. Niemeyer's request for investigative files from Plaintiffs/Appellants, she also requested records related to the murder of Ms. Hamburg from the Office of the Chief Medical Examiner. App. 2 at A-559-560. The Court (Clifford, J.) ordered the records sealed on the grounds that there was a compelling public interest against disclosure of the documents of an **active investigation**. Id. 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 is not 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**.

Id. at A-559 (emphasis added). While Plaintiffs/Appellants acknowledge that the Order only pertained to records of the Office of the Chief Medical Examiner, the Order shows that as of October 24, 2019 within a week of the initial FOIA request to Plaintiffs/Appellants, Judge Clifford found that Madison Police Department was **still actively pursuing a murder investigation**. Further, Judge Clifford found a compelling public interest against disclosure of similar documents to the ones Plaintiffs/Appellants are trying to protect so as to not prejudice the murder investigation. This Order was presented as evidence to the FOIC. Record at 164-165, App. 2 at A-559-560.

Accordingly, the Trial Court erred in upholding the FOIC's finding that there was not substantial evidence in the record that the requested records were to be used in a prospective law enforcement action.

## III. The Trial Court erred in not finding that the FOIC acted arbitrarily and capriciously in violation of Conn. Gen. Stat. § 4-183(j) when, in its decision, it required Plaintiffs/Appellants to provide (a) evidence that an actual law enforcement action was pending, and (b) multiple witnesses to testify about any prospective law enforcement action resulting from the murder investigation.

### A. Standard of Review

When reviewing the trial court's decision, this Court “look[s] to see if the [trial] court reviewing the administrative agency acted unreasonably, illegally, or in abuse of discretion.” Nelseco Nav. Co. v. Dep't of Liquor Control, 34 Conn. App. 352, 355 (1994); see also Dortenzio v. Freedom of Info. Comm'n, 48 Conn. App. 424, 430 (1998) (same).

Further, the Trial Court’s decision should be overturned if this Court “find[s] that substantial rights of the plaintiffs have been prejudiced because the administrative findings, inferences, conclusions or decisions are, inter alia, clearly erroneous in view of the reliable, probative and substantial evidence in the whole record.” Nelseco Nav. Co., 34 Conn. App. at 355 (citing Conn. Gen. Stat. § 4-183(j)(5)).

Here, the Trial Court failed to address and/or erroneously disregarded Plaintiffs/Appellants’ argument that the FOIC acted arbitrarily and capriciously in violation of Conn. Gen. Stat. § 4-183(j) when, in its decision, it required Plaintiffs/Appellants to provide (a) evidence that an **actual**, rather than prospective, law enforcement action was pending, and (b) multiple witnesses to testify about any prospective law enforcement action resulting from the murder investigation.

### B. The Trial Court erred in not finding that the FOIC Decision was arbitrary and capricious in violation of Conn. Gen. Stat. § 4-183(j) when it ignored its own precedent and imposed requirements not mandated by statute

The Trial Court erroneously found that the previous FOIC decisions cited by Plaintiffs/Appellants in their post-hearing brief “did not dictate a particular result” in this case. Memo of Decision at 22, App. 1 at A-547. In making this finding, the Trial Court failed to address and/or erroneously disregarded Plaintiffs/Appellants’ argument that the FOIC acted arbitrarily and capriciously in violation of Conn. Gen. Stat. § 4-183(j) when, in its decision, it required Plaintiffs/Appellants to provide (a) evidence that an actual law enforcement action

was pending, and (b) multiple witnesses to testify about any prospective law enforcement action resulting from the murder investigation.

Indeed, Plaintiffs/Appellants in their Appeal Brief cited to seven previous FOIC decisions where the Commission found that records related to open investigations and/or pending law enforcement actions were exempt from disclosure in similar circumstances. See Appeal Brief at 12-17, App. 1 at A-328-333. The standards applied in those cases are amply met here. Id. Further, Plaintiffs/Appellants in their reply briefs pointed out how in its Final Decision, the FOIC unsuccessfully attempted to distinguish these cases. See Reply to Brief to FOIC (Docket Entry No. 119) at 6-8, App. 1 at A-509-511; Reply to Brief of Intervenor Defendant Anike Niemeyer (Docket Entry No. 120) at 4-7, App. 1 at A-518-521.

For instance, as discussed above, the only basis the FOIC articulated for distinguishing Graeber is the number of witnesses and that is an arbitrary basis for distinguishing these cases, particularly because Detective Sudock's testimony was not refuted in these respects. Indeed, Detective Sudock's testimony was virtually identical to the testimony in Graeber that the FOIC found sufficient to support the exemption.

Similarly, in Strauss v. Chief, Police Department, Town of Westport, no arrest had yet been made, yet the FOIC found the exemption applied. Likewise, in Rouen v. Chief, Police Department, Town of Groton, the FOIC exempted records, even though no arrest had been made. The FOIC stated in its decision, "Strauss is distinguished from the current matter in that the Madison police have not identified any suspects nor was any evidence of a specific prospective law enforcement action presented at the hearing." As to Rouen, the FOIC stated in its decision, "Rouen is distinguished from the current matter in that the Madison police have not identified any suspects and provided no evidence of an anticipated arrest." This is

a clear error as to fact. Detective Sudock testified that there was a "**number one suspect**" and stated that the individual had his or her phone off for 24 hours around the time of the murder. Sudock Testimony, Record, at 113: 2-8, App. 1 at A-191 (emphasis added). This was plainly a reference to a specific individual, even if the individual was not referred to by name. Although it is not required that a suspect be identified in order to invoke this exemption, the FOIC's claim that the Madison police "have not identified any suspects" was clearly erroneous in view of the evidence. Madison police have indeed identified one or more suspects and the prospective law enforcement action would plainly be the arrest and prosecution of the suspect for murder once sufficient evidence is obtained.

As to Cotton v. Chief, Police Department, City of Meriden, the FOIC stated, "Cotton is distinguished from the current matter in that the Madison police have not presented evidence of any specific prospective law enforcement action." Again, Madison police have identified a primary suspect and the prospective law enforcement action would plainly be the arrest and prosecution of the suspect for murder once sufficient evidence is obtained. The prospective action in this case is self-evident. In Lopez v. Chief, Police Department, City of Bridgeport, the FOIC wrote, "The respondents submitted oral testimony that these cases remain active, and that detectives review the evidence gathered in the investigation of the homicides as time permits and as new evidence is discovered. The respondents' detective testified that disclosure of records of their investigations, including the nature of their evidence, could put the respondents at a considerable disadvantage in solving the homicides." Based on this, the FOIC "found that the respondents proved that disclosure of the investigatory files in the open homicide cases would result in the disclosure of information to be used in a prospective law enforcement action and that such disclosure would be

prejudicial to such action, within the meaning of §1-210(b)(3)(D), G.S." Further, there was no specific articulation as to the existence of a suspect. These were **unsolved** homicides, yet the FOIC held that the exemption applied. Again, here, Madison police have identified one or more suspects and the prospective law enforcement action would plainly be the arrest and prosecution of the suspect for murder once sufficient evidence is obtained.

Likewise, in Hoda v. Chief, Police Department, City of New Haven, the FOIC held the exemption applied because disclosure of investigative records would prejudice the arrest and conviction of the murderer. As in Lopez, unlike here, there was no specific articulation as to the existence of a suspect. Finally, in Yates et al. v. Chief, Police Department, Town of Westport, the FOIC stated that the case was "distinguished" because "[i]in the current matter, no arrest has been made and the Madison police presented no evidence that an arrest is expected . . . ." **In effect, the FOIC is attempting to add another legal requirement (that an actual arrest has to be made or imminent in order for the records to be exempt from disclosure) that does not exist under the FOIA or the FOIC's case law.**

Despite Plaintiffs/Appellants pointing out the arbitrary and capricious way in which the FOIC distinguished its own prior decisions from this case, including imposing new standards that required Plaintiffs/Appellants to provide (a) evidence that an actual law enforcement action was pending, and (b) multiple witnesses to testify about any prospective law enforcement action resulting from the murder investigation, the Trial Court nevertheless found that the cited FOIC decisions did not "dictate a particular outcome in this case." Memo of Decision at 22, App. 1 at A-547. In doing so, the Trial Court totally disregarded that the evidence of a prospective law enforcement action in this case was clearly superior to the evidence in any of the cited FOIC decisions. It is clear that the FOIC deviated from its well-

established standards in an arbitrary and capricious manner. The FOIC purported to distinguish cases on arbitrary grounds (number of witnesses) and factually inaccurate grounds (the claim that no suspect has been identified in the current case) and introduce new standards, i.e., requiring an actual pending law enforcement action (search warrant versus arrest warrant, etc.). The FOIC is making up the rules as it goes along, which is the essence of arbitrary and capricious, and extremely prejudicial to the rights of Plaintiffs/Appellants. The Trial Court in affirming the FOIC's decision abused its discretion as "the administrative findings, inferences, conclusions or decisions are, inter alia, clearly erroneous in view of the reliable, probative and substantial evidence in the whole record." Nelseco Nav. Co., 34 Conn. App. at 355.

Further, to support its decision, the Trial Court stated that "the cases on which the MPD relies largely focused on whether the release of the requested records would be prejudicial to a prospective law enforcement action. FOIC decisions focused on the prejudice prong of § 1-210 (b) (3) (D) have little, if anything, to say about what a law enforcement agency must do to establish that a prospective law enforcement action is more than a theoretical possibility." Memo of Decision at 22, App. 1 at A-547 (internal quotations omitted).

However, in all the cited FOIC cases in order to determine whether the requested records were exempt from disclosure, the law enforcement agency seeking to withhold the records had to show **both** that the records were to be used in a prospective law enforcement action and that the release of the records would be prejudicial to such action. As such, in each cited case a decision had to be made that a prospective law enforcement action was more than a theoretical possibility in order to move on to the question of prejudice of such prospective action. To the extent that the decisions focused more on the prejudice

requirement, this may be an indication that the more difficult of the two requirements to satisfy is the prejudice prong, with the FOIC not requiring demanding evidence or analysis as to whether a prospective law enforcement action was more than a theoretical possibility.[2] Further, whether or not these decisions went into an extensive analysis as to whether a prospective law enforcement action was more than a theoretical possibility, **each one did indeed have to find that a prospective law enforcement action was more than a theoretical possibility**. And because the evidence of a prospective law enforcement action was stronger here than in those other decisions, the Trial Court affirming the FOIC's decision is clearly erroneous in view of the substantial evidence in the record.

Finally, the Trial Court's finding that "because the court has determined that §1-210 (b)(3)(D) requires the FOIC to determine whether a prospective law enforcement action is a reasonable possibility-a legal standard that the FOIC only expressly applied in one previous case-the previous decisions on which the MPD relies are of dubious precedential value" (Memo of Decision at 23, App. 1 at A-548), underscores the fundamental unfairness to Plaintiffs/Appellants in the Trial Court announcing and retroactively applying a new a legal standard. See Section IB, supra.

Therefore, the Trial Court erred in not finding that the FOIC Decision was arbitrary and capricious in violation of Conn. Gen. Stat. § 4-183(j) when it ignored its own precedent and imposed requirements not mandated by statute.

---

[2] Because the Trial Court upheld the FOIC's finding that there was substantial evidence in the record that a prospective law enforcement action was purely speculative, it did not address Plaintiffs/Appellants' "argument that the FOIC erred when it concluded that [Plaintiffs/Appellants] had not met its burden of proving prejudice." Memo of Decision at 21, n. 7., App. 1 at A-546. To the extent that this Court overrules the Trial Court's decision, Plaintiffs/Appellants maintain that there is sufficient evidence in the record establishing prejudice to the investigation, if the records are released.

## CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Plaintiffs/Appellants the Town of Madison, the Town of Madison Police Department, and its Chief of Police John Drumm, urge this Court to reverse the decision of the Trial Court.

**PLAINTIFFS/APPELLANTS**
**JOHN DRUMM, CHIEF OF POLICE;**
**TOWN OF MADISON POLICE**
**DEPARTMENT; TOWN OF MADISON**

By: /s/ Floyd J. Dugas, Esq.

Floyd J. Dugas, Esq.
Berchem Moses PC
75 Broad Street
Milford, CT 06460
(203) 783.1200
fdugas@berchemmoses.com
Juris No.: 022801

## CERTIFICATION OF SERVICE AND COMPLIANCE

In accordance with Connecticut Rules of Appellate Procedure §§ 67-2(g) and (i), the undersigned, counsel for Plaintiffs/Appellants in the above appeal, certifies as follows:

A copy of the electronically filed Brief and Appendices have been electronically delivered to all counsel of record listed below, to wit, Valicia Harmon, Esq., at her email address, valicia.harmon@ct.gov, and David Schulz, Esq., at his email address, david.schulz@yale.edu. Said documents do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court or case or law;

A paper copy of Plaintiffs/Appellants' Brief and Appendices, as submitted, has been sent to each counsel of record, to wit, Valicia Harmon, Esq. Freedom of Information Commission of the State of Connecticut, 165 Capitol Avenue, Suite 1100, Hartford, CT 06106, and David Schulz, Esq., Media Freedom and Information Access Clinic, Yale Law School, 127 Wall Street, P.O. Box 208215, New Haven, CT 06520 in compliance with § 67-2;

A paper copy of Plaintiffs/Appellants' Brief and Appendices, as submitted, has been sent to the Honorable Daniel J. Klau, Connecticut Superior Court, 90 Washington Street, Hartford, CT 06106, the judge who rendered a decision that is the subject matter of this appeal;

That the Brief and Appendices being filed with the Appellate Clerk are true copies of the brief and appendices that were submitted electronically pursuant to § 67-2(g) and do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court or case or law; and

that, to the undersigned's best knowledge and belief, the brief complies with all provisions of this rule.

Dated at Milford, Connecticut this 31st day of January, 2022.

/s/ Floyd J. Dugas
Floyd J. Dugas, Esq.