SUPREME COURT

OF THE

STATE OF CONNECTICUT

JUDICIAL DISTRICT OF NEW BRITAIN

S.C. 20656

DRUMM, CHIEF OF POLICE, ET AL.

V.

FREEDOM OF INFORMATION COMMISSION, ET AL.

BRIEF OF ANIKE NIEMEYER

INTERVENOR-APPELLEE

DAVID A. SCHULZ
MEDIA FREEDOM & INFORMATION ACCESS CLINIC
YALE LAW SCHOOL
127 WALL ST.
NEW HAVEN, CT 06510
TEL. (203) 436-5827
JURIS NO. 439467
david.schulz@yale.edu

TABLE OF CONTENTS

STATEMENT OF PRINCIPAL ISSUES

1. Whether Conn. Gen. Stat. § 1-210(b)(3)(D) imposes a "reasonable possibility" standard that requires a law enforcement agency to show that a prospective law enforcement action is more than a theoretical possibility in order to withhold investigative records from disclosure.

2. Whether substantial evidence supports the Commission's finding that Plaintiffs failed to show that a prospective law enforcement action in this case was more than a theoretical possibility.

3. Whether substantial evidence supports the Commission's finding that Plaintiffs failed to demonstrate that disclosure of the investigative records in this case would prejudice a prospective law enforcement action.

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

In enacting the Freedom of Information Act ("FOIA"), Conn. Gen. Stat. § 1-210, the Connecticut Legislature mandated that law enforcement records, like public records generally, must be available for public inspection and copying, absent express statutory authority to withhold particular documents. The Legislature did not categorically exempt from this disclosure mandate the files of investigations into crimes that remain unsolved. Nor did it exempt the files of those unsolved crimes where the statute of limitations has not run, or where a suspect has been identified. Rather, the Legislature more narrowly permitted investigatory files to be withheld from the public when they contain "information to be used in a prospective law enforcement action if prejudicial to such action." Conn. Gen. Stat. § 1-210(b)(3)(D) (the "law enforcement exemption"). The Freedom of Information Commission ("Commission") and the Superior Court properly applied this exemption to the record facts in this case.

At issue are the files of Plaintiff Madison Police Department's investigation into a murder that occurred more than twelve years ago and remains unsolved. Within four days of that murder Plaintiffs had identified a prime suspect. They conducted hundreds of interviews, collected statements from all potential witnesses, executed numerous search warrants and tested every bit of DNA, but over the ensuing months and years their exhaustive investigation reached a dead end. In 2019, their lead investigator told the victim's son there was simply nothing left to investigate.

But when Intervenor Appellee Anike Niemeyer later asked to see the investigatory file in connection with a documentary the victim's son was making about his mother's murder, her FOIA request was rejected out of hand. Plaintiffs contended that all records

from their investigation were entirely exempt from disclosure simply because the murder was unsolved and the investigation officially remained "open."

Niemeyer appealed to the Freedom of Information Commission. Evidence presented at a subsequent hearing confirmed that there was no active, ongoing investigation. As the Commission explained, Plaintiffs "offered only speculation" that the requested records could one day be used in a law enforcement action, and "failed to prove" that disclosure would be prejudicial even if there were such an action. A29.[1] The Commission thus held that the law enforcement exemption did not apply.

The Superior Court found this conclusion supported by substantial evidence and affirmed. It agreed that Plaintiffs failed to meet their "minimal burden" under the law enforcement exemption to show that a future action is "something more than a theoretical possibility." A545. As the court explained, the exemption requires at least a reasonable possibility of some future law enforcement action. To clarify what this entails, the court catalogued a variety of factors previously found relevant in assessing the potential that there will be a future action. The Commission's ruling, the Superior Court concluded, was consistent with the exemption and its past application.

The Superior Court's careful analysis of the scope of the law enforcement exemption is plainly correct and should be affirmed. It recognizes that the Legislature did not adopt a categorical exemption for investigative files whenever a future prosecution remains notionally possible. It properly reads the plain language of the exemption to impose a minimal evidentiary burden on law enforcement agencies that sensibly balances the

[1] Record materials in the Appendix of Plaintiffs-Appellants are cited herein by their appendix page number as "A__."

interest in avoiding prejudice to ongoing investigations with the need for disclosure after an investigation has run its course—a level of transparency required for public oversight of and public confidence in our law enforcement agencies.

COUNTERSTATEMENT OF FACTS

Barbara Hamburg was murdered outside her home in Madison, Connecticut on March 3, 2010, and within four days of the crime Plaintiffs had identified their prime suspect. A141:17–18. But despite hundreds of interviews, many witness statements, numerous search warrants, analysis of all testable DNA, and multiple cold case reviews, no arrest was ever made. A189:9–15, A177:3–10, A213:15–18, A190:12–17, A185:19–23. By Plaintiffs' admission, there was "nothing" left to investigate when Anike Niemeyer submitted her FOIA request in October 2019. A189:9–20.

The FOIA request, submitted on behalf of Ms. Niemeyer and the victim's son, Madison Hamburg, was made in connection with a documentary they were preparing about the murder. It asked for certain specific records, such as the 911 calls and witness statements, and made a general request for the full investigatory file concerning the murder. A80–A81. Just two business days after receiving the request, Plaintiffs summarily issued a blanket denial. Plaintiffs asserted that the investigation was "open and ongoing" and simply cited to Conn. Gen. Stat. § 1-210(b)(3)(D), the FOIA exemption for information "to be used in a prospective law enforcement action if prejudicial to such action." A88.

A. Proceedings Before the Commission

Ms. Niemeyer promptly appealed to the Commission on October 28, 2019, A79, and a contested case hearing was held before Commissioner Matthew Streeter on February 19, 2020, A111–A219. At the hearing, Madison Hamburg testified to the disclosures Plaintiffs' made to the family on the status of the investigation while it was active, A133–A144, and

described his efforts to obtain information in 2019 in connection with the documentary. A149–A150. The uncontradicted record reflects that Plaintiffs' lead investigator, Detective Christopher Sudock, told Hamburg in 2019 that the investigation had reached a dead end—there were no unexplored leads to pursue, no one left to interview, no unidentified DNA, and no resources to run more tests. A141:11–A143:21, A187:24–A190:17. Plaintiffs said they had a suspect since March 7, 2010, but the investigation essentially "was stuck." A191:2–16, A190:6–11.

Detective Sudock then testified. He said the investigation remained open and expressed his view that all information should therefore "remain with the police department and not be public." A215:2–5. Detective Sudock's testimony made plain that "open" does not mean the investigation is particularly active or that the murder will ever be solved. He testified on direct that the file is periodically reviewed, A182:14–16, but would not estimate how often it actually gets looked at because it would be "hard putting a number" on that. A181:13–20. Pressed on cross-examination, he estimated that perhaps "once a month . . . we work on this case," A183:4–6, but then provided no details about the type of work being done or the amount of time being spent. Detective Sudock made clear, though, that he was "*not* saying there's new leads or new evidence" to review. A183:7–14 (emphasis added). Nor did he disavow his 2019 statement that there was no stone unturned and nothing left to investigate.

Detective Sudock pointed to just two activities in recent months as supporting the "open" status of the investigation. The first was his general, ongoing effort to stay abreast of advancements in DNA technology, A179:3–18; the second he described vaguely as receiving "information on this investigation," before clarifying that the "information" was a

witness interview arranged for the week before the FOIC hearing. A181:5–6. Beyond placing the fact of this recent meeting on the record, however, Detective Sudock refused to say anything more about it. A197:8–10. He would not say whether it was a meeting with a new witness or simply a conveniently timed re-interview of a previously questioned witness. He never testified that this meeting uncovered any new lead or produced any new evidence. A197:8–A198:3.

When asked about the basis for Plaintiffs' invocation of the law enforcement exemption, Detective Sudock could not identify any prospective law enforcement action in which the requested records would be used, pointing only to the types of things that could possibly occur in the future with any unsolved crime. "I just don't know. . . . It could be a search warrant, it could be an arrest warrant. . . . I can go on with speculating but I don't know at this point in time." A214:16–22.

Nor could Detective Sudock identify how the disclosure of any specific record in the Hamburg file would prejudice a prospective law enforcement action. He provided only conjecture unmoored to information actually in the Hamburg file: "[T]here could be somebody out there that has information that's, you know, holding onto that information because of a fear or something like that—you know, and now a documentary comes out and now they get more fear where—I just don't know." A214:11–16.

When asked on cross-examination about one record Ms. Niemeyer had requested by name—the 911 call placed by Ms. Hamburg's sister after finding the body—Detective Sudock agreed that its release would not cause any prejudice and could not say why it had been withheld. A201:5–6. (As a result of this concession, Plaintiffs provided the 911 call to Ms. Niemeyer after the hearing, A561.)

B. The FOIC Decision

On July 28, 2020, Commissioner Streeter issued a proposed decision in favor of Ms. Niemeyer, concluding that Plaintiffs had failed to justify withholding the records under the law enforcement exemption. A291 ¶ 29. The hearing officer found that Plaintiffs had "offered only speculation" about the prospect of any future law enforcement action and about any prejudice that disclosure might have on such an action. A289 ¶ 17. Plaintiffs had instead withheld the file based on their view that records of an open criminal investigation "should not be disclosed." A289 ¶ 18. Commissioner Streeter distinguished each of the inapposite authorities cited by Plaintiffs in support of their withholding and explained how controlling precedent was consistent with disclosure on the record facts in this case. A290 ¶ 23–A291 ¶ 28.

On August 26, 2020, the FOIC adopted the proposed decision with one minor amendment to its language, and ordered Plaintiffs to produce all the requested records other than signed witness statements, which are independently exempt from disclosure under Conn. Gen. Stat. § 1-210(b)(3)(C). *See* A309–A315 (the "FOIC Decision").

C. Plaintiffs' Purported Compliance with the FOIC Decision

Forty-five days later, when the time to appeal normally expires under Conn. Gen. Stat. § 4-183(c), on October 19, 2020 Plaintiffs indicated that they would comply with the FOIC Decision. They notified counsel for Ms. Niemeyer that "[a]ll of the copies are made and [Ms. Niemeyer] can make arrangement to pick them up. 2 paper boxes full." A71. The next day Ms. Niemeyer and Mr. Hamburg traveled to Madison Police Department headquarters where they were given two boxes of documents and told explicitly: "everything that we have should be in there." A55 ¶ 6.

In reviewing the documents, Ms. Niemeyer soon became aware that the two boxes did *not* contain all the requested records. A55 ¶ 7. Ms. Niemeyer, Plaintiffs, and counsel for both then exchanged many communications about what records were missing and arranging for their production. A55 ¶ 8–A56 ¶ 11. This conversation continued until December 15, 2020, when Plaintiffs reversed course and announced they would not release any missing records. A56 ¶ 12. The next week, Ms. Niemeyer filed with the Commission a complaint against Plaintiffs for their non-compliance, A54–A57; Plaintiffs the next day filed an appeal to the Superior Court. A6–A43. Because of the Governor's suspension of deadlines during COVID, the appeal remained timely. A8 ¶ 6.

D. The Superior Court Decision

After full briefing and argument, the Superior Court (Klau, J.) affirmed. In a carefully reasoned opinion, Judge Klau analyzed the language of the law enforcement exemption and surveyed its past application by the courts and the Commission before concluding that the phrase "prospective law enforcement action" in the exemption refers to a future action "the occurrence of which is at least a reasonable, not a mere theoretical, possibility." A527.

To determine how probable a "prospective" action must be under the law enforcement exemption, the court began by reviewing the limited appellate authority construing this exemption. Most relevant was *Department of Public Safety v. Freedom of Information Commission*, 51 Conn. App. 100 (App. Ct. 1998), where the Appellate Court held that the mere possibility of a future law enforcement action is not sufficient to justify withholding records under § 1-210(b)(3)(D). From this holding the trial court concluded that the "open" status of an investigation does not automatically permit records to be withheld and law enforcement agencies must provide more than a good faith assertion that a future action remains theoretically possible. A539.

Looking to past Commission decisions, Judge Klau noted that the Commission in *Graeber v. Chief, Police Dep't, City of New Haven*, No. FIC 2016-0865 (Sept. 27, 2017), expressly construed the law enforcement exemption to impose a "reasonable possibility" standard. A540. Other Commission decisions cited by Plaintiffs he found of dubious precedential value because they focused on the meaning of the prejudice prong of the exemption rather than the meaning of a "prospective law enforcement action." A547.

Judge Klau looked for further guidance from the application of the law enforcement exemption in the federal FOIA, which contains an exemption "substantially identical" to § 1-210(b)(3)(D). A541. The U.S. Court of Appeals for the District of Columbia Circuit has consistently held the federal exemption to require a showing that a law enforcement action is "pending or reasonably anticipated." *Id.* (citing *Mapother v. Dep't of Just.*, 3 F.3d 1533, 1540 (D.C. Cir. 1993)). Acknowledging that a federal court's interpretation of a federal statute does not bind a Connecticut state court, Judge Klau nevertheless considered it persuasive authority.

Turning to the evidentiary burden imposed by the obligation to show a "reasonable possibility" of a future action, the trial court identified seven factors considered relevant in prior decisions applying the law enforcement exemption. A544–A545. In articulating these factors, the court explained that the list was non-exhaustive, no factor was necessarily determinative, and the Commission may rely on any admissible evidence that bears on the question of whether a prospective law enforcement action is a reasonable possibility. A545. Under the reasonable possibility standard, the trial court explained, law enforcement agencies have only a "minimal burden" to convince the Commission that a prospective action is "something more than a theoretical possibility." *Id.*

Plaintiffs failed to meet even this minimal burden. The Commission found a prospective law enforcement action by Plaintiffs to be purely speculative, A312 ¶ 17, and Judge Klau found that determination supported by substantial record evidence. A546. The trial court rejected Plaintiffs' claim that the FOIC Decision was arbitrary and capricious because it departed from precedent, explaining that each case cited by Plaintiffs could be distinguished by its unique facts. A547. "If anything," Judge Klau observed, the decisions "show the extraordinary amount of deference that the FOIC gives to law enforcement agency exemption claims under § 1-210(b)(3)(D)." *Id.*

Judge Klau did find the FOIC Decision unclear as to whether it applied the reasonable possibility standard in this case. The Decision, however, expressly found any prospective law enforcement action in this case to be purely speculative—a finding supported by substantial evidence. A545–A546. The trial court thus held as a matter of law that "§ 1-210(b)(3)(D) does not justify the withholding of records in this case because a prospective law enforcement action is not a reasonable possibility." A546.

Turning to Plaintiffs' further obligation to establish prejudice from the release of information in its Hamburg file, Judge Klau stressed the "significant deference" owed to a law enforcement agency's judgment of the impact of releasing investigatory records, and underscored the right of an agency initially to decline a record request while it conducts a review to identify records whose disclosure would be prejudicial. A543. What the exemption does not permit, the court concluded, is what Plaintiffs did here—a wholesale withholding of records because "some of them contain information, which, if released, could prejudice a prospective law enforcement action." *Id.*

STANDARD OF REVIEW

Judicial review of an administrative agency's action is generally "very restricted." *City of New Haven v. Freedom of Info. Comm'n*, 205 Conn. 767, 773 (1988) (quoting *Lawrence v. Kozlowski*, 171 Conn. 705, 707–708 (1976)). The Commission's findings are reviewed under the deferential "substantial evidence" test. Conn. Gen. Stat. § 4-183(j), a test that is "more restrictive . . . than standards embodying review of weight of the evidence or clearly erroneous action." *Huang Do v. Comm'r of Motor Vehicles*, 330 Conn. 651, 667 (2019) (citations omitted).

This Court may review the trial court's application of the substantial evidence test *de novo*. *Unistar Properties, LLC v. Conservation & Inland Wetlands Comm'n of Town of Putnam*, 293 Conn. 93, 114 (2009). However, as to questions of fact, "it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency." *Goldstar Med. Servs., Inc. v. Dep't of Soc. Servs.*, 288 Conn. 790, 800 (2008) (citing *Griffin Hosp. v. Comm'n on Hosps. & Health Care*, 200 Conn. 489, 496 (1986)). Even "[c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." *Id.* (citing *Celentano v. Rocque*, 282 Conn. 645, 652 (2007)).

ARGUMENT

In affirming the FOIC Decision, the trial court did three things. First, it rejected the "theoretical possibility" standard urged by Plaintiffs as inconsistent with Conn. Gen. Stat. § 1-210(b)(3)(D) and precedent construing it, and upheld the FOIC Decision under the "reasonable possibility" standard previously used by the Commission. Second, it reviewed the factual record and found the Commission's conclusion that Plaintiffs failed to satisfy this statutory standard to be supported by substantial evidence. Third, it found Plaintiffs to have failed to provide evidence of future prejudice to a prospective law enforcement action from disclosure of any specific information. All three components of the court's ruling are fully supported in law and fact.

I. PLAINTIFFS FAILED TO ESTABLISH THAT THE REQUESTED RECORDS CONTAIN "INFORMATION TO BE USED IN A PROSPECTIVE LAW ENFORCEMENT ACTION"

A. The "Reasonable Possibility" Standard Articulated by the Trial Court Correctly Applies the Law Enforcement Exemption

The trial court correctly applied the statutory exemption claimed by Plaintiffs, which permits a law enforcement agency to withhold only those investigatory files that contain "information to be used in a prospective law enforcement action if prejudicial to such action." Conn. Gen. Stat. § 1-210(b)(3)(D). Judge Klau considered the plain statutory language, surveyed relevant precedent, and acknowledged the competing interests in safeguarding criminal investigations and enabling public oversight, before concluding that § 1-210(b)(3)(D) requires an agency claiming the exemption to present evidence establishing that a prospective law enforcement action is at least "a reasonable possibility." A545. The trial court then assessed whether Plaintiffs had presented "a sufficiently detailed record" to demonstrate at least a reasonable possibility of a future law enforcement action

in this case. *City of New Haven v. Freedom of Info. Comm'n*, 205 Conn. 767, 776 (1988). It found the Commission's conclusion that Plaintiffs had failed to do so support by substantial record evidence.

1. The "reasonable possibility" standard is neither new nor contrary to past rulings by the Commission and the courts.

As the trial court recognized, a reasonable possibility requires "something more than a theoretical possibility," but far less than certainty. A545. Contrary to Plaintiffs' protestation, this construction of the burden imposed by the law enforcement exemption is not new and was not retroactively applied.

As a threshold matter, this construction is entirely consistent with the clear language of the Act. The exemption aims to reasonably balance the public's right of access against law enforcement's operational constraints. *Comm'r of Emergency Servs. & Pub. Prot. v. Freedom of Info. Comm'n*, 330 Conn. 372, 383–84 (2018) (noting that the FOIA exemptions "reflect a legislative intention to balance the public's right to know what its agencies are doing, with the governmental and private needs for confidentiality" (citations omitted)). The exemption applies only to information "to be used" in a "prospective" law enforcement action. The phrase "to be used" implies at least some greater-than-speculative certainty of future use; "prospective" does as well. *E.g.*, Prospective, *Black's Law* Dictionary (11th ed. 2019). ("2. Anticipated or expected; *likely to come about*." (emphasis added)).

Requiring more than a theoretical possibility is also consistent with precedent applying the law enforcement exemption. While the trial court noted that "no Connecticut court has *directly* addressed" the specific question of just how probable a future law enforcement action must be for the exemption to apply, A537 (emphasis added), it found ample precedent supporting the "reasonable possibility" standard. The Commission

expressly adopted this standard in one past ruling and the standard is inherent in and crucial to other precedent from both the courts and the Commission.

The Appellate Court, for example, has held on somewhat different facts that the law enforcement exemption does not apply unless there is evidence showing that the requested records will in fact "*be used*" in some future action. *Dep't of Pub. Safety v. Freedom of Info. Comm'n*, 51 Conn. App. 100, 105 (App. Ct. 1998) (hereafter "*DPS*"). That appeal arose out of a request for records of an investigation in a drowning at a state park, and at the time of the request the Department of Public Safety was treating the drowning as only a potential criminal matter. *Id.* at 103 n.7. The Department nonetheless denied the FOIA request by invoking § 1-210(b)(3)(D). The Commission rejected application of the exemption because a criminal charge might never be brought, but the trial court reversed. In the court's view, the law enforcement exemption could be invoked as long as the Department had "'a good faith basis" for asserting that "a *possible* prosecution [would] ensue." *Id.* at 104 (emphasis added).

The Appellate Court reversed the trial court. It unambiguously rejected the proposition that evidence of a *possible* future action provides a sufficient basis to invoke the law enforcement exemption. "[T]he clear language of the statute," it explained, requires "an evidentiary showing that the actual information sought *is going to be used* in a law enforcement action." *Id.* at 105. Acknowledging that, the factual circumstances of *DPS* differ from those of the instant case, Judge Klau found *DPS* to stand for the legal proposition that "the mere possibility of a future prosecution is not enough to support a [law enforcement] exemption claim." A539.

DPS rejects Plaintiffs' contention that any "possible" future action is sufficient. Indeed, it could be read to command law enforcement agencies to establish with some certainty that information "is going to be used." But Judge Klau did not read *DPS* to require a guarantee of some future action, believing that such a strict interpretation would render the exemption "unworkable and essentially meaningless." A540. Instead, he read *DPS* to demand something between a theoretical possibility and certainty. *Id.*

This same understanding of the exemption is evident in past FOIC decisions. One decision, *Graeber*, explicitly applies the "reasonable possibility" formulation articulated by the Superior Court. *Graeber v. Chief, Police Dep't, City of New Haven*, No. FIC 2016-0865 (Sept. 27, 2017), A565. In that case, the Commission considered a twenty-year old murder investigation and concluded that the New Haven Police Department ("NHPD") had demonstrated that a prospective law enforcement action remained a "reasonable possibility." A568 ¶ 24. Plaintiffs claim the only thing distinguishing *Graeber* from this case "is the number of witnesses" presented, Pls.' Br. at 17, but the two records tell a different story. In *Graeber*, an Assistant State's Attorney testified that she devoted at least eight hours per week to the case and was supervising several detectives actively pursuing the investigation. A568. She continued to interview witnesses and examine evidence, and NHPD was currently engaged in more precise testing on remaining DNA samples. *Id.* The Commission credited this testimony establishing that the NHPD investigation was neither dormant nor cold, A568 ¶ 23, and found NHPD to have carried its "minimal burden" to show that a future action is "more than a theoretical possibility." A545, A540. Such testimony was sorely lacking here.

In addition to *Graeber*, several other Commission decisions applying the law enforcement exemption are based on findings consistent with the reasonable possibility standard. The Commission tacitly found a law enforcement action reasonably possible in another twenty-year-old investigation in *Strauss v. Chief, Police Dep't, Town of Westport*, No. FIC 2010-487 (May 25, 2011), A584. Despite the age of the case, it had become active in the two years before the Commission's decision because forensic advances and new witness statements had created new leads that were currently being pursued. A585 ¶ 11. The Westport Police Department testified that it anticipated an arrest—it already had probable cause and was in the "final stages of investigation." *Id.*

The Commission similarly found the exemption satisfied in *Hoda v. Chief, Police Dep't City of New Haven*, No. FIC 2007-143 (Jan. 23, 2008), where the NHPD was "*actively* pursuing leads and a suspect" in a one-year-old unsolved murder. A573 ¶ 12 (emphasis added). And again in *Rouen v. Chief, Police Dep't, Town of Groton*, No. FIC 2006-064 (Jan. 24, 2007), the Commission exempted records where police actively "anticipated making more arrests" in an investigation just 1.5-years-old. A582 ¶ 11. In all four of these rulings the Commission engaged in a factor-weighing exercise and found a future proceeding to be a more than a theoretical possibility.

As the trial court recognized, these decisions found a variety of factors relevant in assessing the reasonable possibility of a future action. A non-exhaustive list of such factors was articulated by Judge Klau:

(1) The length of time since the commission of the crime;

(2) The length of time since the law enforcement agency last obtained significant new evidence or leads;

(3) Whether the agency has classified the investigation as a cold case, even if technically open;

(4) The number of investigators currently assigned to the investigation;

(5) The amount of time investigators currently commit to the investigation;

(6) Whether the agency has a suspect and, if so, whether the agency's suspicion is supported by more than speculation; and

(7) Whether advances in scientific techniques or technology may lead to new evidence or fruitful reexamination of existing evidence.

A544–A545.

Graeber and *Strauss* most clearly illustrate the application of these factors. In both cases, the Commission weighed the age and staleness of the investigation—the first and second factors—against credited law enforcement testimony about on-going investigative activity. For example, it was significant in *Strauss* that the police had again begun to work the case actively and that fresh new leads had pushed them into the "final stages" of their investigation. At least the second, sixth, and seventh factors made a prospective action reasonably possible. Similarly in *Graeber*, evidence established that the Assistant State's Attorney and a number of detectives continued to devote considerable time and effort to the investigation—the fourth and fifth factors—and NHPD was engaged in ongoing DNA testing—the seventh factor.

Even in the much-younger investigations of *Hoda* and *Rouen*, the Commission based its decisions on reasonable possibility factors. It made findings that that the police were *actively* investigating and developing suspects and that arrests were anticipated. Because the cases were new and active, with anticipated arrests, at least the first, second, third, and sixth factors made prospective action reasonably possible. *See also Cotton v. Chief, Police Dep't, City of Meriden*, No. FIC 2006-020 (Aug. 9, 2006) (finding a prospective action reasonably possible where State's Attorney's active investigation was only seven months old), A562; *Yates v. Chief, Police Dep't, Town of Westport*, No. FIC 2005-084 (Dec.

14, 2005) (finding same where criminal cases were pending against an arrested suspect), A587.

In all these cases the Commission considered the types of factors Judge Klau identified as relevant, and each required more than a theoretical possibility of a future action. Contrary to the contentions of Plaintiffs and their Amicus, each case rested on more than good faith allegations that future action is possible because the suspect remained alive.[2] The trial court interpretation of the law enforcement exemption is entirely consistent with its language and with past precedent.

2. The alternative approach proposed by Plaintiffs and their Amicus is contrary to the more limited the authority to withhold the records of unsolved cases granted by Conn. Gen. Stat. § 1-210(b)(3)(D).

Before the Commission and the trial court, Plaintiffs argued that the law enforcement exemption should apply whenever a prospective action is theoretically possible. A537. As Judge Klau summarized Plaintiff's position: a prospective law enforcement action remains theoretically possible "unless the statute of limitations has expired or the sole suspect has died, both of which would preclude any criminal prosecution." *Id.* Plaintiffs continue to argue for that standard but now seek to frame it in different language, urging for the first time a "reasonably anticipated" standard. *See* Pls.' Br. at 18–22.

Plaintiffs derive this formulation from Louisiana precedent rather than any Connecticut decisions. They portray the Louisiana standard as different from their

[2] Plaintiffs also cite *Lopez v. Chief, Police Department, City of Bridgeport,* No. FIC 2015-398 (Feb 24, 2016), A575, as requiring no more than the theoretical possibility they demonstrated here. But the Commission in *Lopez* found credible the testimony that the investigation remained active and the detectives reviewed the file "as new evidence is discovered." A579. Plaintiffs here made no claim to continuing to find new evidence and, to the contrary, said at this point they have "nothing." A189:9–15.

"theoretical possibility" standard rejected by the trial court, but fail to explain how the two differ. They do not. Both the "theoretical possibility" standard and the "reasonably anticipated" standard allow records to be withheld so long as a future action is not an impossibility, as the Louisiana authority cited by Plaintiffs makes plain.

The Louisiana courts in *In re A Matter Under Investigation*, 15 So. 3d 972, 992 (La. 2009), and *Does v. Foti*, 81 So. 3d 101, 107 (La. App. 2011), articulated and then applied the "reasonably anticipated" standard. The cases concerned an investigation into deaths occurring when Hurricane Katrina hit New Orleans in 2005. The storm killed power to a major hospital, cutting off life support for dozens of patients. Ryan Bailey, *The Case of Dr. Anna Pou: Physician Liability in Emergency Situations*, 12 AMA J. ETHICS VIRTUAL MENTOR 726, 726–27 (2010). Realizing that some patients likely could not survive, physicians sedated and possibly euthanized those patients. *Id*. After the storm, the bodies of forty-three patients were removed from the hospital, triggering a murder investigation into their deaths. *Foti*, 81 So. 3d at 104.

In short order, the Louisiana Attorney General compiled an investigative file thousands of pages long, arrested three medical professionals, obtained indictments against two, and granted them immunity in exchange for their testimony against the third. *Id.* But in July 2007, a grand jury refused to indict that third medical professional. *Id. See also* Carrie Khan & Robert Siegel, *Jury Sides with Doctor in Katrina "Mercy Killings*," NPR (July 24, 2007), https://www.npr.org/transcripts/12205440; Adam Nossiter, *Grand Jury Won't Indict Doctor in Hurricane Deaths*, N.Y. Times (July 25, 2007), https://www.nytimes.com/2007/07/25/us/25doctor.html. At that point, several news

organizations sought to see the investigative file and the Louisiana Attorney General sought a declaratory judgment to clarify what files could be withheld.

The case ultimately arrived at the Louisiana Supreme Court, which set forth a list of twelve factors to be considered in determining whether criminal litigation is "reasonably anticipated." *In re A Matter Under Investigation*, 15 So. 3d at 992. Those factors focus largely on whether a future prosecution remains a viable option for the prosecutor, addressing such issues as the authority and intent of the district attorney to bring criminal charges, whether the statute of limitations has passed, the continuing availability of witnesses and evidence, the likelihood that a missing defendant or witness can be found, and the likelihood that additional witnesses will come forward. This inquiry assesses whether a future prosecution is a viable possibility, rather than assessing whether a future prosecution is reasonably likely—the focus of this State's law enforcement exemption.

The functional equivalence of the "reasonably anticipated" inquiry and the "theoretical possibility" standard is confirmed by its application in the Louisiana courts. On remand in *Foti*, a grand jury had refused to indict the key suspect and the Attorney General had agreed to expunge that professional's arrest record. 81 So. 3d at 109. Nevertheless, the appeals court found that criminal litigation was "reasonably anticipated." Each factor prescribed by the Louisiana Supreme Court was evaluated to determine whether any bar to a future prosecution existed. Thus, for example, the court found:

- No bar to a future prosecution because there was no time limitation on murder prosecutions;
- No bar to the district attorney seeking a future indictment of the key suspect, notwithstanding the failure of one grand jury to do so and the expungement of the suspect's arrest record;
- No bar to a future prosecution of the two witnesses given immunity if new evidence was found;

- No bar to a future prosecution because the District Attorney had inherent authority to prosecute and "never expressed an intention not to prosecute;" and
- No bar to a future prosecution because all evidence had been preserved, and nothing suggested that witnesses would become unavailable or that defendants would flee.

Id. at 108–111.

With respect to *every* factor for which case-specific evidence was required, the court determined that a future law enforcement action was not *impossible*. Though neither the Attorney General nor the District Attorney were investigating the case, a future action remained theoretically possible. Other Louisiana cases apply the standard in just this same way. *E.g.*, *Pardee v. Connick*, 267 So. 3d 179, 183 (La. App. 2019) (finding future criminal litigation "reasonably anticipated" where convict's request to vacate his conviction "could potentially" re-open his case). In short, the reasonably anticipated standard advocated by Plaintiffs is indistinguishable from the theoretically possible standard rejected by the trial court as inconsistent with the Connecticut statute and its past application by the Commission and courts of this State.[3]

Plaintiffs are equally misdirected in gesturing at two other foreign cases, neither of which adopts the "reasonably anticipated" standard they want and both of which are readily distinguishable. *Newman v. King County*, 947 P.2d 712 (Wash. 1997), construed the

[3] Other differences in Connecticut and Louisiana's statutory disclosure regimes further explain the different outcomes under the laws of the two states. Unlike Connecticut's FOIA, Louisiana law provides the immediate family of a murder victim "unlimited access" to the entire investigative file ten years after the victim's death. *See* La. Stat. Ann. § 44:3(F). Plaintiffs thus urge this court to adopt Louisiana's "reasonably anticipated" standard, but under Louisiana law that standard would never be applied to this case because records concerning a murder more than ten years ago are being requested for a family member of the victim.

Washington Public Disclosure Act that grants a broad categorical exemption to all information "the nondisclosure of which is essential to effective law enforcement." Wash. Rev. Code § 42.56.240. In construing this provision, Washington's courts follow federal precedent which creates a categorical disclosure exemption for "open and active police investigation files." *E.g.*, *U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press*, 489 U.S. 749, 776–78 (1989) (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 223–24 (1978)); *Newman*, 947 P.2d at 716. Under this approach, the *Newman* court interpreted the Washington law to require categorical withholding of all information in any open criminal investigation because "the statute does not define or establish any guidelines to limit the scope of the exemption." *Id.* at 716.

Loevy & Loevy v. New York City Police Department, 139 A.D.3d 598 (N.Y. 2016), similarly construed a New York law that allows withholding any record "which, if disclosed, would interfere with law enforcement investigations," and upheld the withholding of records of an open investigation where the police department had "recently pursued potential leads" and the investigation was "active" and "ongoing." *Id.* at 599. Like Washington, New York adopts the federal approach and permits "generic" categorizations of exempt material. *Lesher v. Hynes*, 19 N.Y.3d 57, 67 (N.Y. 2012) (quoting *Robbins*, 437 U.S. at 236).

Such a categorical exclusion of all records relating to open investigations is not permitted under the distinct terms of Connecticut's law enforcement exemption. As the trial court noted, this Court "expressly rejected the use of a categorical approach when evaluating a personal privacy exemption claim." A542 (citing *Director, Ret. & Benefits Servs. Div. v. Freedom of Info. Comm'n*, 256 Conn. 764, 779 (2001)). Because the privacy exemption turns on an evidentiary evaluation of the extent to which the requested

information pertains to a matter of public concern and whether its disclosure would be highly offensive to a reasonable person, this Court declared broad, categorical approaches improper. *Dep't of Pub. Safety, Div. of State Police v. Freedom of Info. Comm'n*, 242 Conn. 79, 87 (1997); *see also Director*, 256 Conn. at 779. Like the privacy exemption, the law enforcement exemption requires a case-by-case evaluation to determine whether disclosure of records would prejudice a prospective law enforcement action, making a categorical approach improper.

Indeed, accepting a categorical approach would contradict the clear legislative choice not to exempt all investigative files whenever a future prosecution remains theoretically possible. The legislature adopted categorical exemptions in other portions of Conn. Gen. Stat. § 1-210(b)(3), exempting, for example, the identities of all unknown sources *id.* at (b)(3)(A), all witness statements *id.* at (b)(3)(C) and all juvenile arrest records, *id.* at (b)(3)(F), among other categorical exemptions. It chose a different path with investigative files, requiring a particularized showing that an identifiable harm is a reasonably possibility if records are released, rather than categorically exempting all files of open investigations.

The bright line standard for applying the law enforcement exemption advanced by Plaintiffs' amicus, the Division of Criminal Justice ("Amicus"), is off base for the same reasons as Plaintiffs' foreign precedent proposal. Amicus argues that the "prospective action" prong of the exemption should categorically be deemed satisfied whenever "evidence before the Commission establishes that law enforcement's investigation is open, a suspect has been identified, and no insurmountable obstacles exist to a future prosecution"—that is, when "nothing renders a future arrest/prosecution *impossible*."

Amicus Br. at 3, 6 (emphasis added). Amicus's position is doubly flawed—it offers an inappropriate categorical approach to apply an incorrect "theoretically possible" standard.

Fundamentally, Plaintiffs and their Amicus argue for the same thing: allowing records to be withheld so long as there is a "theoretical possibility" of some future action. In every case where law enforcement has a possible suspect in mind and the statute of limitations has not run the exemption would apply. In a murder case, with no statute of limitations, it would suffice for law enforcement simply to state that they have a suspect—something true in almost every investigation, as anyone who watches police procedurals knows. Indeed, in this case the Madison police have had the same suspect in mind since four days after the murder.

The approach of Plaintiffs and their Amicus contradicts the statutory language requiring a "prospective" action where information is "to be used," and undermines the "overarching legislative policy" behind FOIA to "favor[] the open conduct of government and free public access to government records." *Pictometry Int'l Corp. v. Freedom of Info. Comm'n,* 307 Conn. 648, 671 (2013) (citations omitted). It bears emphasis that adopting their alternative standard would deprive the public of important information that citizens need "to express . . . sovereignty over the agencies which serve them." *Glastonbury Educ. Ass'n v. Freedom of Info. Comm'n,* 234 Conn. 704, 712 (1995). Permitting access once disclosure is unlikely to prejudice an ongoing investigation promotes good performance by law enforcement agencies and allows shortcomings to be detected and corrected. In cold cases, public release of investigative information can also revitalize the investigation, generating fresh leads and insights. It can also provide some degree of closure to victims' families.

Plaintiffs' approach denies the public of these benefits by effectively sealing from inspection the files of all unsuccessful investigations and unsolved crimes. This would include the files of about 40% of all murders and non-negligent homicides, which go unsolved. A549 (citing Department of Justice, Bureau of Justice Statistics, Table 26). An even greater proportion of all violent crime remains unsolved—65.5%. *Id.* Applying the exemption whenever it is theoretically possible that a case might one day be solved would conceal a large swathe of records needed for public understanding and oversight.

The Legislature rejected this path because access enables oversight; and oversight curbs overreach, identifies areas for improvement and promotes the reasonable allocation of taxpayer assets. *See* 18 H. R. Proc., Pt. 8, p. 3911 (Conn. 1975) (statement of Rep. Martin B. Burke, FOIA sponsor) ("[T]he people do not yield their sovereignty to the agencies which serve them . . . [or] give their public servants the right to decide what is good for them to know . . . ."). While "[t]here are strong public policy reasons for denying the general public *unfettered* access . . . *while the police are actively investigating a crime*," A549 (emphasis added), once an investigation has run cold the law enforcement exemption recognizes the public interest in knowing what was done.

3. Neither the trial court nor the Commission committed reversible error in construing Conn. Gen. Stat. § 1-210(b)(3)(D) to impose a "reasonable possibility" standard.

Plaintiffs depict a litany of supposed errors in the trial court's application of the reasonable possibility standard. They claim the trial court unfairly announced a new standard and then retroactively applied it. Plaintiffs further assert that the trial court improperly upheld Commission findings that effectively require law enforcement to produce multiple witnesses to assert the law enforcement exemption. None of these arguments withstand scrutiny.

Plaintiffs contention that the trial court retroactively applied a new standard in a way that exposed them to "fundamental unfairness" and "prejudice" fails for two independently dispositive reasons. First, as demonstrated above, the reasonable possibility standard is not a new standard. It has previously been applied by the Commission, expressly and implicitly, and previously endorsed implicitly by the Appellate Court. It is also entirely consistent with FOIA. While the trial court identified potentially relevant factors in greater detail than previously presented, a review of precedent—and a measure of common sense—establishes that those factors have been routinely considered relevant by fact-finders in the past.

Indeed, it may be impossible to evaluate an invocation of the law enforcement exemption meaningfully *without* such factors. For example, two of the factors articulated by Judge Klau are the time elapsed since commission of the crime and since the agency last obtained a new lead. Another is the amount of time investigators are currently spending on the case. A545. To claim that the use of such sound considerations was "prejudicial" or surprising, effectively concedes the weakness of Plaintiffs' position. The exemption did not apply because the Hamburg investigation had reached a dead end, not because the trial court's ruling or its analysis was flawed.

Second, the equitable principle Plaintiffs invoke in claiming prejudice is itself inapposite. It applies only to common law adjudications; statutory interpretations are not evaluated for retroactive fairness. In the sole case Plaintiffs cite, *Amodio v. Amodio*, the Court of Appeals declined to modify retroactively an equitable division of assets agreed to by the parties in a divorce case. 56 Conn. App. 459, 473 (App. Ct. 2000). The *Amodio* holding is based on *Ostrowski v. Avery*, 243 Conn. 355, 377 n.18 (1997), which addresses

only retroactive applications of a "common law decision." Even were the reasonable possibility standard new (and it is not), Plaintiffs cite no authority instructing courts to reject a novel interpretation of a statute if it produces an "inequitable" result.

Plaintiffs are equally mistaken in arguing that the trial court's decision effectively requires presentation of multiple witnesses to establish a prospective law enforcement action. The trial court's decision requires no such thing. Plaintiffs base their argument on the unartful manner in which the FOIC Decision distinguishes *Graeber* and *Rouen*, but in reciting the "reasonable possibility" factors, the trial court makes no mention of the number of witnesses needed to satisfy the reasonable possibility standard. Logically, the number of witnesses cannot change the "reasonable possibility" that a law enforcement action will take place. What is dispositive are the facts, regardless of how they are admitted onto the record. The issue is the quality, not quantum, of evidence.

Nor does the trial court hold that law enforcement must present evidence of an actual action—an "actual arrest" or "actual charges pending" as Plaintiffs suggest. Pls.' Br. at 8. The trial court held exactly the opposite:

> [I]t would be *absurd* to interpret § 1-210(b)(3)(D) to require law enforcement to prove to an absolute certainty, or even a probability, that an open criminal investigation will eventually lead to an arrest and prosecution. Such a high evidentiary burden would render the statute unworkable and essentially meaningless.

A540 (emphasis added). What is required, the trial court held, is evidence that a prospective action is more than a theoretical possibility.

B. Substantial Evidence Supports the Finding that Plaintiffs Failed to Show a Reasonable Possibility of a Future Law Enforcement Proceeding

The Commission found that Plaintiffs presented "only speculation" that the requested records would ever be used "in a prospective law enforcement action arising out of the

investigation into the death of Barbara Hamburg." A312 ¶ 17. After carefully analyzing the record, the trial court upheld this finding as supported by substantial evidence and agreed with the Commission that the law enforcement exemption requires "something more." A545–A546. This holding is plainly correct.

As the trial court reasoned, no single factor is necessarily dispositive in determining whether there is at least a reasonable possibility of a future law enforcement action. It was thus proper for the Commission to weigh factors such as the age of the investigation, the staleness of evidence, the absence of any unexplored leads despite multiple cold case reviews, the minimal time and effort still committed to the investigation, the unsuccessful pursuit of the same suspect for more than a decade, and the possibility that technological advance might open a new lead.

In weighing these factors, the Commission concluded that Plaintiffs' failed to establish a reasonable possibility of a future action. To determine whether substantial evidence supports this finding, a reviewing court needs only to find "something less than the weight of the evidence." *Unistar Properties*, 293 Conn. at 114 (quoting *Samperi v. Inland Wetlands Agency*, 226 Conn. 579, 587–88 (1993)). Far more exists here, where the record fully supports the Commission's conclusion.

Plaintiff's witness, Detective Sudock, is a veteran police officer who began investigating the Hamburg case "from day one" nearly twelve years ago, and is more familiar than anyone with this case. A173:7–21. His testimony established that the investigation had gone cold notwithstanding that Plaintiffs had a suspect within days of the murder. A141:14–18. Detective Sudock himself characterized the case as "stale." A178:14–19. He testified that occasionally "something pop[ped] up," A178:19–21, but also

admitted there were sometimes “long periods of time without any work being done” on the investigation, A179:1–2, and he refused to “put[] a number” on how often he worked on the case. A181:7–13.

Detective Sudock did offer that he had interviewed one witness just the week before the hearing, A181:5–6, but then would not say whether it was a new witness or simply another one of the “hundreds and hundreds and hundreds” of re-interviews that had been done over the years. A197:8–10, A189:12–13. Detective Sudock was unambiguous on one point, however: he was “*not* saying there’s new leads or new evidence” to explore. A183:11–12 (emphasis added). In his words, “we’ve got nothing.” A189:9–15. There is no next move.

Plaintiffs wrongly assert that “**one week prior** to the FOIC hearing, new information was obtained.” Pls.’ Br. at 4 (emphasis in original). This distorts an exchange with the Hearing Officer after Detective Sudock disclosed that he had interviewed someone just a week earlier. When counsel for Ms. Niemeyer sought to follow up on cross about the absence of new leads, the Hearing Officer interjected “He said he got a lead last week,” and the Detective responded: “That’s absolutely correct.” A196:10–12. On further questioning, however, Detective Sudock would not say if the interview was of a new witness, he would not say anything about what the interview concerned, and he would not say whether a new lead resulted. A197:8–10. On this record, the Commission correctly concluded that Plaintiffs failed to establish that they had any leads left to pursue.

With no leads to pursue, Plaintiffs had even sought assistance from other investigators, to no avail. Multiple “cold case looks” by the Chief State’s Attorney and the New Haven County Cold Case Squad years earlier had failed to identify any additional

investigative steps, any alternative leads—any new avenues to pursue at all. A187:8–23. Plaintiffs had already thoroughly run down every possible lead. *Id*. The case was so stalled that Detective Sudock had no idea what a future law enforcement action could possibly be:

> "It could be a search warrant, it could be an arrest warrant. It 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."

A214:17–22. Presented with this testimony by the lead investigator on the case, the Commission sensibly concluded that a prospective action was no more than a theoretical possibility.

In reaching this conclusion, the Commission was not disregarding the superior knowledge of police about how investigations progress, as the Amicus contends. Amicus Br. at 5. The Commission was applying a standard highly deferential to the uncertainties of investigations, but one that required something more than pure speculation. This is a factual determination the Legislature vested in the Commission, and in making it, "the commission 'is not required to believe any witness, even an expert, nor is it required to use in any particular fashion any of the materials presented to it so long as the conduct of the hearing is fundamentally fair.'" *Unistar Properties*, 293 Conn. at 114 (quoting *Huck v. Inland Wetlands & Watercourses Agency*, 203 Conn. 525, 542 (1987)); A536, A546.

Plaintiffs are equally off base in complaining that the Commission should have found for them because Detective Sudock's testimony resembled testimony found sufficient in other cases. It did not. Unlike the State's Attorney in *Graeber*, A565, Detective Sudock worked the Hamburg investigation so infrequently that he resisted even estimating how often he looked at the case files. He spoke in only nonspecific terms about his one recent interview and about "keeping an eye" on the possibility that new technology could advance

the case. A179:14–18. And unlike the Westport Police Department in *Strauss*, Detective Sudock did not testify either that the recent interview had progressed the case or that Plaintiffs had applied new forensic technology to advance the investigation. A585 ¶ 11. Given the different record facts, a different outcome was entirely proper.

Moreover, even if the evidence arguably could have supported a different outcome here (and it could not), "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Unistar Properties*, 293 Conn. at 114 (quoting *Samperi*, 226 Conn. at 587–88); *accord* A546. As the trial court held, and as set forth above, the Commission's finding that Plaintiffs "offered only speculation" that a future action could possibly occur is plainly supported by substantial evidence. A312 ¶ 17.

No court, not even this one, may "retry the case" or "substitute its judgment for that of the administrative agency" if it is supported by substantial evidence. *Goldstar Med. Servs., Inc. v. Dep't of Soc. Servs.*, 288 Conn. 790, 800 (2008) (citing *Griffin Hosp. v. Comm'n on Hosps. & Health Care*, 200 Conn. 489, 496 (1986)). Applying this standard, the FOIC Decision should be affirmed.

II. PLAINTIFFS FAILED TO ESTABLISH THAT DISCLOSURE OF THE REQUESTED RECORDS WOULD PREJUDICE ANY FUTURE LAW ENFORCEMENT ACTION

Substantial evidence also supports the Commission's conclusion that Plaintiffs failed to prove that disclosure of the requested records would be prejudicial to a prospective action. Just as plaintiffs could not identify a law enforcement action that was more than a theoretical possibility, they could not provide anything other conclusory speculation about how disclosure of any particular information would create prejudice.

This Court has made clear that "broad, conclusory" allegations that a disclosure of records "*might*" have the negative effect proscribed by an exemption is insufficient to carry an agency's burden under FOIA. *Hartford v. Freedom of Info. Comm'n*, 201 Conn. 421, 434 (1986). Applying this principle, the Superior Court in *Sedensky v. Freedom of Info. Comm'n*, for example, rejected as insufficient a police officer's testimony that the "prejudicial effect of individual pieces of evidence . . . may not be known until later in the investigation." 2013 WL 6698055, at *15 (Amicus App. 7). If uncertainty about the future impact of a disclosure were sufficient, the court reasoned, it would effectively allow law enforcement officials to find records "exempt because 'I say so.'" *Id.*

As in *Sedensky*, Detective Sudock relied on the "open" status of the Hamburg investigation to suggest that disclosure could create future prejudice, despite not "know[ing] at this point in time" what records might ever be used or how. A214:22. Testifying broadly that "a myriad of things . . . could happen if all the information in this case was public," A176:21–23, Detective Sudock offered no more than generalizations about the importance of keeping information confidential in *any* unsolved case. A175:24–25 (testifying that "there's always information that's not revealed that's critical to prosecuting a case"). Asked specifically how disclosure would prejudice this investigation, Detective Sudock provided only theoretical possibilities, suggesting that the release of some never identified information might permit a perpetrator to fashion an alibi or intimidate witnesses. *Id.* at A176–A177. But it is at least as hypothetically possible that releasing the records might produce progress in such a cold case—the TV show America's Most Wanted has reportedly facilitated at least 1,187 arrests by shining a light on unsolved crimes. *See* Danielle Turchiano, *"America's Most Wanted" Viewer Tip Leads to 1,187th Capture*, Variety

(Mar. 24, 2021), https://variety.com/2021/tv/news/ americas-most-wanted-1187th-capture-exclusive-1234937141/.

At bottom, such hypothetical conjecture either way is insufficient, and the Commission has repeatedly so held. In *Altimari v. Dep't of Emergency Servs. & Pub. Prot.*, No. FIC 2017-0623 (Sept. 26, 2018), for example, the Commission found that the mere "potential for witness' names and identities to be revealed" and "potential witness intimidation" were insufficient to establish prejudice under the law enforcement exemption. Appendix of Intervenor-Appellee Niemeyer, A9 ¶¶ 35–36. *See also Wood v. Chief, Police Dep't, Town of Enfield*, No. FIC 2008-523 (July 22, 2009) (finding "general concerns" about the potential for destruction of evidence insufficient to establish prejudice). *Id.* at A27 ¶ 31.

Nor are Plaintiffs' hypothetical claims of prejudice from disclosure of the records at issue advanced by their citation to an order sealing Barbara Hamburg's autopsy records. That sealing order applies only to a limited set of autopsy records that originated with the Chief Medical Examiner, not the Madison Police investigators. This distinction matters because disclosure of the Chief Medical Examiner's records is governed by a different statute, applying a different standard and imposing confidentiality for a different reason than the law enforcement exemption.

Autopsy records may be sealed if the Chief Medical Examiner or state's attorney shows a "compelling public interest against disclosure of any particular document or documents." Conn. Gen. Stat. 19a-411(c). This standard looks broadly to the public interest in generally keeping autopsy records confidential and does not require a specific showing of prejudice. It does so because autopsy records often contain information "sufficiently sensitive to warrant the imposition of disclosure restrictions not applicable to

other records of public agencies." *Galvin v. Freedom of Info. Comm'n*, 201 Conn. 448, 461 (1986).

Plaintiffs' total failure to grapple with their distinct statutory obligation to demonstrate potential prejudice from the release of specific information is only confirmed by their shifting-sands position on prejudice. Plaintiffs initially represented that no records at all could be disclosed without causing prejudice when they denied Ms. Niemeyer's FOIA request just two business days after receiving it. Appendix of Plaintiffs-Appellants, A88. Plaintiffs' reasons for reaching this conclusion is unknown because Detective Sudock had "no idea on that." A202:21–A203:1. He could not say what had been decided, why or by whom. A198–A202. In the course of testifying, however, Detective Sudock readily acknowledged that there was no proper basis to withhold the 911 records, one of the items Ms. Niemeyer had specifically requested, because the disclosure of those records could not possibly prejudice the investigation. A200–A201.

Forty-five days after the FOIC Decision, Plaintiffs produced two boxes of records in claimed full compliance with the order, A55 ¶ 6, only to backtrack and acknowledge that many records were still being withheld. A55 ¶ 7–A56 ¶ 12. Plaintiffs contended for the first time on appeal that what they disclosed in response to the Commission's order is supposedly those records unlikely to cause prejudice, but insisted that disclosing the remaining withheld records surely would be prejudicial—a claim unproven by evidence, untested by cross-examination, and entirely *de hors* the record. A325. Plaintiffs' constantly shifting position on prejudice position only confirms that they failed to demonstrate prejudice before the Commission, where it was their obligation to do so.

The Commission was not arbitrary, capricious, or clearly erroneous in finding on the record before it that Plaintiffs failed to meet their burden on the prejudice prong, just as they failed to meet their threshold burden to show that a future action was a reasonable possibility.

CONCLUSION

For these reasons, the decision of the trial court should be affirmed.

Dated: April 28, 2022

Respectfully submitted,

Intervenor Defendant/ Appellee
Anike Niemeyer

By: _/s/ *David A. Schulz*_
David A. Schulz
Stephanie Rice (law student intern)
Emile Shehada (law student intern)
MEDIA FREEDOM AND
INFORMATION ACCESS CLINIC
ABRAMS INSTITUTE
Yale Law School[4]
P.O. Box 208215
New Haven, CT 06520
(212) 663-6162
David.Schulz@yale.edu
Juris. No.: 439467

[4] This Brief has been prepared by a clinic associated with the Abrams Institute for Freedom of Expression at Yale Law School but does not purport to represent the school's institutional views, if any.

CERTIFICATION OF SERVICE AND COMPLIANCE

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that

(1) a copy of the electronically submitted brief and appendix has been delivered electronically to each counsel of record as follows, Floyd J Dugas, Esq. at fdugas@berchemmoses.com, Valicia Harmon, Esq. at valicia.harmon@ct.gov, Matthew A. Weiner, Esq. at matthew.weiner@ct.gov, and Sarah Hanna, Esq. at sarah.hanna@ct.gov, and

(2) a paper copy of the brief and appendix has been sent by first class mail to each counsel of record as follows: Floyd J Dugas, Esq., Berchem Moses PC, 75 Broad Street, Milford, CT 06460, Valicia Harmon, Esq., Freedom of Information Commission of the State of Connecticut, 165 Capitol Avenue, Suite 1100, Hartford, CT 06106, Matthew A. Weiner, Esq., Sarah Hanna, Esq, Assistant State's Attorneys, Appellate Bureau, Office of the Chief State's Attorney, 300 Corporate Place and 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, in compliance with § 67-2; and

(2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(4) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically pursuant to § 67-2(g); and

(5) the brief complies with all provisions of this rule.

Dated at New Haven, Connecticut this 28th day of April 2022.

/s/ David A. Schulz
David A. Schulz