

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Anike Niemeyer,

Complainant(s)

against

Docket #FIC 2019-0652

Chief, Police Department, Town of Madison;
Police Department, Town of Madison; and
Town of Madison,

Respondent(s)

August 26, 2020

The above-captioned matter was heard as a contested case on February 19, 2020, at which time the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

On March 9, 2020, the Commission received a copy of a letter from the respondents to the complainant dated February 29, 2020. The letter indicated that the 9-1-1 telephone recording requested by the complainant was hand delivered to the complainant on February 29, 2020. The letter was marked as Respondents' Exhibit B (after-filed). Accordingly, the records described in paragraph 6d., below are no longer at issue in this matter and will not be further addressed.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.
2. By letter of complaint filed October 28, 2019, the complainants appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying a request for certain records pertaining to the respondents' investigation of a homicide that occurred in Madison, CT in 2010.
3. Section 1-200(5), G.S., provides:

"Public records or files" means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.
4. Section 1-210(a), G.S., provides, in relevant part:

Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours ... or (3) receive a copy of such records in accordance with the provisions of section 1-212.

5. Section 1-212(a), G.S., provides in relevant part: "Any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

6. It is found that on October 18, 2019, the complainants made a written request to the respondents requesting the opportunity to inspect or receive copies of the following records:

- a. All investigatory records, including all files, reports, notes, transcripts, correspondence, warrant applications and affidavits, and audiovisual recordings, in electronic format.
- b. All witness statements, in electronic format.
- c. All interrogation recordings and all transcripts thereof, in tape or electronic format.
- d. The 911 telephone 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.
- e. 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.

7. It is found that the requested records, to the extent such records exist, are public records within the meaning of §§1-200(5), 1-210(a), and 1-212, G.S.

8. It is found that in a letter dated October 22, 2019, the respondents acknowledged complainant's request. In such letter, the respondents denied the complainant's request for disclosure of any of the records requested. The respondents cited §1-210(b)(3), G.S., adding that "the investigation continues to be open and ongoing".

9. Connecticut General Statute §1-210(b)(3) states:

(b) Nothing in the Freedom of Information Act shall be construed to require disclosure of:

(3) Records of law enforcement agencies not otherwise available to the public which records were compiled in connection with the

detection or investigation of crime, if the disclosure of said records would not be in the public interest because it would result in the disclosure of (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known, (B) the identity of minor witnesses, (C) signed statements of witnesses, (D) information to be used in a prospective law enforcement action if prejudicial to such action, (E) investigatory techniques not otherwise known to the general public, (F) arrest records of a juvenile, which shall also include any investigatory files, concerning the arrest of such juvenile, compiled for law enforcement purposes, (G) the name and address of the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, voyeurism under section 53a-189a, or injury or risk of injury, or impairing of morals under section 53-21, or of an attempt thereof, or (H) uncorroborated allegations subject to destruction pursuant to section 1-216;

10. On brief, the respondents specifically asserted the exemptions in subsection (C) and (D), in paragraph 9, above.

11. The threshold requirement of an exception to disclosure pursuant to §1-210(b)(3), G.S., is that the records sought must be “records of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime.”

12. It is found that the requested records pertain to the investigation of the death of Barbara Beach Hamburg and that such death was deemed a homicide by Connecticut’s medical examiner. It is further found that the death continues to be investigated by the Madison Police Department and that although the investigation is not always active, there are occasions when the police receive information and investigators work to evaluate and, if necessary, follow up on the information. Therefore, it is concluded that the records sought by the complainant are records of a law enforcement agency and that such records were compiled in connection with detection or investigation of a crime.

13. Regarding whether the records withheld by the respondents are “not otherwise available to the public,” the complaint alleges that records pertaining to the investigation have been made available to the public. The complainant offered copies of the “Report of Investigation” and “Postmortem Report” obtained through the Office of the Chief Medical Examiner as evidence of the availability of such information. The respondents testified that while certain specific records may have been disclosed to family members, the respondents have not made any general disclosure of records to the public. It is found, therefore, that the records requested by the complainant are not otherwise available to the public.

14. Regarding the complainant’s request for “all witness statements” as described in paragraph 6b., above, the Commission has long allowed for signed statements of witnesses to be withheld from disclosure pursuant to §1-210(b)(3)(C), G.S. See FIC Docket 2011-719, Ted

Baptiste v. Chief, Police Department, City of Bridgeport (8/30/2012); FIC Docket 2012-007, Ricky Nelson v. Chief, Police Department, City of Stamford and City of Stamford (10/24/2012); FIC Docket 2012-167, Michelle Sabre v. Chief, Police Department, Town of Milford and Town of Milford (9/12/2012); FIC Docket 2015-606, Nicholas Rumitti v. Commissioner, State of Connecticut Department of Emergency Services and Public Protection, et al. (3/23/2016); FIC Docket 2015-666, Thomas Tanner v. Michael Maniago, Chief, Police Department, City of Torrington, et al. (5/31/2016); FIC Docket 2019-0097, Lashawn Cecil v. Patrick J. Daley, Chief, Police Department, City of Norwich, et al. (12/11/2019); and FIC Docket 2019-0165, Anne Howard v. Chief Police Department, City of Stamford, et al. (11/14/2019). Accordingly, it is found that the respondents did not violate the FOI Act by withholding any signed statements of witnesses.

15. In regard to the records the respondents claim are exempt from disclosure pursuant to §1-210(b)(3)(D), G.S., such exemption requires an evidentiary showing (1) that the records at issue are to be used in a prospective law enforcement action and (2) that the disclosure of the records would be prejudicial to such action. Department of Public Safety, Division of State Police v. Freedom of Information Commission, 51 Conn. App. 100, 105 (1998).

16. It is found that the respondents maintain many records that document the investigation into the death of Barbara Hamburg. Such records include police reports, written statements, investigative notes, laboratory reports, photographs, video recordings and evidentiary items.

17. The respondents' sole witness was Detective Christopher Sudock of the Madison Police Department. The only evidence provided by the respondents was the testimony offered by Detective Sudock. The respondents offered only speculation that the disclosure of records responsive to the complainant's request would be used in a prospective law enforcement action arising out of the investigation into the death of Barbara Hamburg. Moreover, when asked directly by the hearing officer how disclosure of the requested records would be prejudicial to any prospective law enforcement action, Detective Sudock acknowledged that he could not identify a prospective law enforcement action and could only provide speculation. Accordingly, it is found that the respondents failed to prove that, even if there was a prospective law enforcement action, disclosure of the requested records would be prejudicial to such action.

18. In essence, the respondents' position is that the requested records, as part of an ongoing criminal investigation where it is not yet known if a prosecution will ensue, should not be disclosed. "The statute, however, does not require that an investigation be closed before disclosure is required. Additionally, the statute is not satisfied and, consequently, information is not exempted from disclosure by the mere good faith assertion that the matter to which the information pertains is potentially criminal." Id.

19. In Department of Public Safety v. Freedom of Information Commission, 2006 WL1893026 (June 26, 2006) (rev'd on other grounds Dep't of Pub. Safety v. Freedom of Info. Comm'n, 103 Conn. App. 571, 930 A.2d 739 (2007)), the agency withheld records pertaining to their investigation of a triple homicide. The agency argued that, "disclosure would be prejudicial to the pending prosecution of this matter in that among other adverse effects, it would compromise the jury selection process, potentially impact witness recollection and taint the jury pool." The Commission concluded that the assertions by the agency were speculation and

therefore the agency failed to satisfy their burden of proof under §1-210(b)(3)(D), G.S.

20. In addition to their testimony, the respondents offered as evidence of the claimed exemption a court order dated November 5, 2019, written by State's Attorney Patrick Griffin and signed by a Judge Patrick Clifford. The order directed the Office of the Chief Medical Examiner to seal the autopsy records of Barbara Beach Hamburg pursuant to §19a-411, G.S.

21. Section 19a-411, G.S., states in relevant part:

(c) Upon application by the Chief Medical Examiner or state's attorney to the superior court for the judicial district in which the death occurred, or to any judge of the superior court in such judicial district when said court is not then sitting, said court or such judge may limit such disclosure to the extent that there is a showing by the Chief Medical Examiner or state's attorney of compelling public interest against disclosure of any particular document or documents.

22. The State's Attorney did not move to intervene in the present matter nor was any witness from the State's Attorney's office present to testify in regard to the withholding of the records requested in this matter. It is therefore concluded that the order by the court referenced in paragraph 20, above, does not pertain to the records sought by the respondents in this matter as such order was prepared in response to a specific request made to the Office of the Chief Medical Examiner and that such request is not at issue in this matter.

23. On brief, the respondents cited five previous Commission decisions in which records of open police investigations were sought and in which the Commission allowed such records to be withheld. Each of the five cases is distinguished from the current matter as described below.

24. In Charles Graeber and Ross Tuttle v. Chief, Police Department, City of New Haven et al., FIC Docket 2016-0865 (Sept. 27, 2017), the Commission allowed the police records pertaining to a 1998 murder to be withheld after considering the testimony of two police lieutenants, an Assistant State's Attorney assigned to the Office of the Chief State's Attorney and a forensic science examiner. All testified that the case was actively being investigated and interviews were being conducted. The Assistant State's Attorney testified that she was spending about eight hours per week on the case. The Commission found that the respondents in Graeber provided sufficient evidence to demonstrate that the disclosure of the requested records would be prejudicial to a prospective prosecution. 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.

25. In Ellen L. F. Strauss and Mark Holofcener v. Chief, Police Department, Town of Westport et al., FIC Docket 2010-0487 (May 25, 2011), the Commission found that the police department had used DNA technology and recently obtained statements from witnesses to identify a suspect in a 1989 murder investigation. It was found that the police believed that they had probable cause for an arrest. For these reasons, the Commission found that the disclosure of the requested records would be prejudicial to the pending prosecution. It is of note that the

Commission also found that the requested records were not subject to disclosure because such disclosure would reveal investigatory techniques not otherwise known to the general public pursuant to §1-210(b)(3)(E), G.S. 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.

26. In Ethan Rouen and the New London Day v. Chief, Police Department, Town of Groton, FIC Docket 2006-064 (Jan. 24, 2007), the Commission found that the police department was still developing suspects and anticipated making more arrests and therefore concluded that the department had met its burden of proof by identifying the specific manner in which disclosure would be prejudicial to a prospective law enforcement action. 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.

27. In Eric Cotton and the Meriden Record Journal v. Chief, Police Department, City of Meriden, FIC Docket 2006-020 (Aug. 9, 2006), the police department was allowed to withhold records of a September 2005 police use of force investigation after a State's Attorney testified that the investigation was active and ongoing and identified the specific manner in which the release of records would be prejudicial to a prospective law enforcement action. The records request in the matter was made in December 2005, only a few months after the use of force incident that was being investigated. Cotton is distinguished from the current matter in that the Madison police have not presented evidence of any specific prospective law enforcement action.

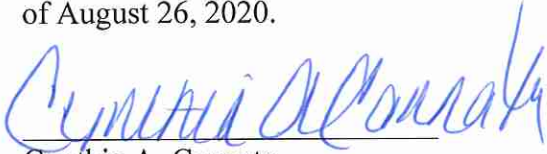
28. Finally, in Jeff Yates and the Wilton Bulletin v. Chief, Police Department, Town of Westport, FIC Docket 2005-084 (Dec. 14, 2005), the Commission allowed certain records regarding the arrest of an individual who had been charged in connection with a burglary and shooting that occurred just three months earlier to be withheld. The Commission found that the police met their burden of proof, offering evidence that the release of records beyond the record of arrest would be prejudicial to the prosecution of the person arrested. Yates is distinguished from the current matter in that an arrest had been made and the State was in the midst of preparing the case for trial. In the current matter, no arrest has been made and the Madison police presented no evidence that an arrest is expected in the ten-year old investigation at issue.

29. Based upon the specific facts and circumstances presented in this matter, it is found that the respondents failed to prove that the requested records are exempt from disclosure pursuant to §1-210(b)(3)(D), G.S. Accordingly, it is found that the respondents violated the FOI Act when they refused to disclose such records.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The respondents shall forthwith provide copies of the records responsive to the complainant's request, free of charge, with the exception of any signed statements of witnesses.
2. Henceforth, the respondents shall strictly comply with the disclosure provisions of §§1-210(a) and 1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of August 26, 2020.

A handwritten signature in blue ink, appearing to read "Cynthia A. Cannata". The signature is written in a cursive style with a horizontal line underneath the name.

Cynthia A. Cannata
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

ANIKE NIEMEYER, c/o Attorney David Schulz, Media Freedom and Information Access Clinic, P.O. Box 208215, New Haven, CT 06520

CHIEF, POLICE DEPARTMENT, TOWN OF MADISON; POLICE DEPARTMENT, TOWN OF MADISON; AND TOWN OF MADISON, c/o Attorney Floyd J. Dugas, Berchem Moses PC, 75 Broad Street, Milford, CT 06460



Cynthia A. Cannata
Acting Clerk of the Commission