DOCKET NO.: HHB-CV21-6063380-S : SUPERIOR COURT

JOHN DRUMM, CHIEF OF POLICE, TOWN OF MADISON; POLICE DEPARTMENT, TOWN OF MADISON; AND TOWN OF MADISON : JUDICIAL DISTRICT OF NEW BRITAIN

v.

FREEDOM OF INFORMATION COMMISSION : AUGUST 13, 2021

MEMORANDUM OF DECISION

The state Freedom of Information Act ("FOIA")[1] permits the police to refuse to disclose records that contain "information *to be used* in a *prospective* law enforcement action if prejudicial to such action." (Emphasis added.) General Statutes § 1-210 (b) (3) (D).[2] This administrative appeal requires the court to consider how this exemption applies to what are colloquially known as "cold cases," i.e., unsolved criminal cases in which the police have effectively exhausted all investigative leads and do not have sufficient evidence to arrest and prosecute a suspect.

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While a prospective law enforcement action always remains a theoretical possibility in a cold case, the likelihood of an arrest and prosecution is significantly lower than in cases where the police continue to gather new evidence and pursue new leads. Thus, the contents of the investigatory files in cold cases are unlikely "to be used" in a prospective law enforcement

[1] General Statutes § 1-200 *et seq.*

[2] General Statutes § 1-210 (b) (3) states in relevant part: "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 such 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."

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A. Jordanopoulos, 8/13/21

action." Yet law enforcement agencies routinely refuse to release investigatory files in cold cases so long as an arrest and prosecution remain theoretically possible.

In this appeal the plaintiffs challenge the FOIC's final decision ordering them to disclose investigatory files relating to the decade-old unsolved murder of Barbara Hamburg. After an evidentiary hearing, the FOIC found that the plaintiffs "offered only speculation that the disclosure of records responsive to [the FOIA request] would be used in a prospective law enforcement action. . . ." Final Decision (dated Aug. 26, 2020) ("FD"), p. 4, ¶ 17.[3] The plaintiffs challenge that finding in particular, and the FOIC's final decision and disclosure order generally, on both factual and legal grounds.

For the following reasons the court concludes that the phrase "prospective law enforcement action" in § 1-210 (b) (3) (D) refers to a future law enforcement action, i.e., an arrest and prosecution, the occurrence of which is at least a reasonable, not a mere theoretical, possibility.[4] Because substantial evidence supports the FOIC's findings and conclusion that a prospective law enforcement action in the Hamburg case was speculative, the court affirms the FOIC's final decision.

I

FACTUAL AND PROCEDURAL BACKGROUND

On March 3, 2010, Barbara Beach Hamburg was found dead outside her home in Madison, Connecticut. Her death, from multiple blunt and sharp force injuries, was declared a homicide. Her murder remains unsolved.

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[3] The decision appears in the administrative record ("R") at R299-306.

[4] This decision does not address whether § 1-210 (b) (3) (D) also applies to civil law enforcement actions by state agencies, such as of the Office of the Attorney General.

Almost ten years later, on October 18, 2019, Anike Niemeyer ("Niemeyer") submitted an FOIA request to the Madison Police Department ("MPD") on behalf of herself and Barbara Hamburg's son, Madison Hamburg. Niemeyer and Hamburg are documentary filmmakers. The FOIC request sought to inspect or obtain copies of the records the MPD had compiled in the course of its investigation of Barbara Hamburg's murder. FD, ¶ 6; R002-003. The MPD acknowledged and then denied the request several weeks later, citing General Statutes § 1-210 (b) (3) and stating that "the investigation continues to be open and ongoing." FD, ¶ 8; R010.

On October 28, 2019, Niemeyer and Hamburg filed a complaint with the FOIC alleging that the MPD had violated the FOIA by failing to disclose the requested documents. FD, ¶ 2; R001.

A

Witness Testimony at the FOIC Hearing

The FOIC heard the matter as a contested case on February 19, 2020. Madison Hamburg testified in support of the FOIA complaint. MPD Detective Christopher Sudock was the sole witness for the MPD. The parties also stipulated to certain facts and introduced exhibits. FD, p. 1. The court briefly summarizes the testimony of Hamburg and Det. Sudock. Their full testimony is set forth in the hearing transcript, which is part of the record.

Hamburg testified that he met with members of the MPD on multiple occasions in 2013, 2016 and 2019. R0056. At the 2013 meeting, the MPD told Hamburg that DNA found under Barbara Hamburg's fingernails "matched the male Hamburg lineage but wasn't a strong enough match to garner an arrest warrant." R057-058. The MPD asked Hamburg whether he was still in touch with his father, Jeffrey Hamburg, and whether he thought his father had killed his mother. R058.

At the 2016 meeting, Hamburg met with MPD Police Chief Jack Drumm, Det. Sudock, Det. Mulhern "and two cold case detectives I believe." R059. Hamburg was told that the investigation of his mother's murder was "being reviewed by the Cold Case Unit." R059-062.

At the 2019 meeting Hamburg met with MPD Det. Sudock. The court quotes the salient portions of Hamburg's testimony regarding that meeting:

Q. Okay. Great. So you started to go into what Det. Sudock shared with you during the meeting. Would you mind telling us what he shared in full?

A. Um-hum. I mean the biggest takeaway is that he seemed stuck as an investigator, no new leads. He [said] the cold case reviewed the case but didn't find anyone new to interview. That they've had the same suspect since March 7, 2010. I think March 7. He said that he has no unidentified DNA. They don't have the resources to run any more DNA tests. That the DNA test kits that were used on my mother's homicide were expired kits, which is by the Meriden Crime Lab. I've done a lot of research on the Meriden Crime Lab. And I'm trying to remember what else we talked about. They said that the DNA was enough to develop suspects but not enough to prosecute, kind of similar to 2013, and that the number one suspect's phone was turned off for a 24-hour period around the time of the murder.

Q. Okay, great. And so just to clarify Det. Sudock told you that they no longer had unidentified DNAs; is that correct?

A. Correct.

. . .

Q. And when Det. Sudock told you that there was no identified DNA did he say what it meant for the case?

A. That they -- well, he said that they can't do -- they don't have the resources to continue testing the forensic evidence that they have. Yeah, and that they used -- that they were using faulty kits.

Q. Okay.

A. Or not faulty, expired test kits.

Q. And you mentioned that Det. Sudock told you that the cold case review had produced no new leads, correct?

A. I think the way he put it was there was no -- the cold case review didn't develop any new people to interview.

Q. And did Det. Sudock tell you whether or not that review was complete?

A. Yeah, it seemed like it was -- I don't know to the extent that cold cases ever stop, I believe the Cold Case Unit still has my mother's case but it seemed like the initial review was complete based on the way that it was framed.

Q. Okay. And did Det. Sudock indicate to you whether or not he was still looking into leads?

A. I don't think there's -- it didn't seem like there were any new leads. I mean, I think he said he was stuck.

R063-065.

Hamburg testified that after the 2019 meeting with the MPD, he reached out to the Chief of Police Drumm, Det. Sudock and other MPD representatives requesting to interview them for

the purpose of a documentary. He received no response. R0071-072. Eventually he received a voicemail message from the executive assistant to the Chief of Police. The message stated that the MPD was following state guidelines regarding open investigations and that Chief Drumm would not talk to him. R072-073.

As noted, Det. Christopher Sudock testified for the MPD. He testified that among the requested records "there is information . . . that are unknown to the perpetrator and if such information were to be disclosed it would allow for the creation of alibis, potentially hinder witness prosecution and intimidation of witnesses. There's a myriad of things that could happen if all the information in this case was 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 to prosecute the case." R098-099.

On cross-examination, Det. Sudock was asked, "You're claiming the exemption that the release of information would be prejudicial to a prospective law enforcement action. . . . So, can you just provide a little more detail as to what sort of law enforcement [action it] would be prejudicial to?" R135. Det. Sudock answered, "[t]here are hundreds of interviews, sir. There are tens of written statements. There are numerous search warrants with key information in them. There are photographs that show things that only the perpetrator knows. There's [sic] videotapes that show something only the perpetrator knows. I can't say that there's something in a report that's viewed insignificant now that may be important, a year from now, five years from now." R135.

The FOIC's counsel sought further clarification on this issue. "But just to clarify, 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?" R136. Det. Sudock responded, "Well, I think it could be 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, 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. It could be another scene. I mean there's so many things that it could be. I could go on 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 [sic] 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." R136-37.

Det. Sudock also testified that although the MPD suspects a particular person of having committed the crime, it does not have sufficient evidence for an arrest. R81, R98-99, R136-37.

B

The FOIC's Findings of Fact and Conclusions of Law

The FOIC issued its final decision on August 26, 2020. On the basis of the evidence presented, the FOIC made three key factual findings. First, "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." FD, ¶ 12; R301. Thus, the FOIC determined that the MPD had satisfied the "threshold requirement of an exemption pursuant to § 1-210(b)(3) . . . that the records 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 a crime.'" FD, ¶ 11; R301.

Second, the FOIC found that Det. Sudock, the MPD's sole witness, "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." FD, ¶ 17; R302. Thus, the FOIC concluded that the MPD failed to meet its burden of establishing that the requested records were "to be used" in a prospective law enforcement action. FD, ¶ 15; R302 (citing *Dept. of Public Safety, Div. of State Police* v. *Freedom of Information Commission*, 51 Conn. App. 100, 105, 720 A.2d 268 (1998)); FD, ¶ 29; R304.

Third, the FOIC found that that "when asked directly by the hearing officer how disclosure of the requested records would be prejudicial to any prospective law enforcement action, Det. 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." FD, ¶ 17; R302.

In addition to these key factual findings, the FOIC also addressed the MPD's argument that in previous FOIC decisions involving requests for investigatory records in open police investigations the FOIC had upheld the local police department's exemption claim under § 1-210

(b) (3) (D). The MPD argued that these precedents required a similar outcome in this case. The FOIC considered each case and ruled that they were distinguishable. FD, ¶¶ 23-29; R303-04.

Ultimately, "[b]ased upon the specific facts and circumstances presented in this matter, [the FOIC] found that the respondents failed to prove that the requested records are exempt from disclosure pursuant to § 1-210 (b) (3) (D) [ ]. Accordingly, it is found that the respondents violated the FOI Act when they refused to disclose such records." FD, ¶ 29; R304. The FOIC ordered that "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." FD, p. 6; R304. The FOIC further ordered, as it customarily does when it finds a violation, that "the respondents shall strictly comply with the disclosure provisions of" the Freedom of Information Act. FD, p. 6; R304.

The MPD initially responded to the final decision by telling Niemeyer, on October 19, 2020, that copies of the requested records were available for pick up. Although the MPD produced two boxes of documents, Niemeyer and Madison Hamburg quickly realized that many documents that should have been produced pursuant to the FOIC's ruling had not been. Brief of Intervenor Defendant Anike Niemeyer (dated Mar. 15, 2021) ("Niemeyer Br.") p. 8. When they protested, the MPD filed this appeal.[5]

II

DISCUSSION

General Statutes § 1-210 (b) (3) (D) provides: "Nothing in the Freedom of Information Act shall be construed to require disclosure of: . . . (3) Records of law enforcement agencies not

[5] Although the MPD filed this appeal well beyond the forty-five day time period that usually governs administrative appeals, Governor Lamont had suspended that filing deadline by executive order due to COVID-19. The appeal is thus timely.

otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of such records would not be in the public interest because it would result in the disclosure of . . . (D) information to be used in a prospective law enforcement action if prejudicial to such action."

Accordingly, a law enforcement agency seeking to withhold investigatory records pursuant to this FOIA exemption has the burden of proving three essential facts: (1) the requested records were "compiled in connection with the detection or investigation of a crime;" (2) the records are "to be used in a prospective law enforcement action;" and (3) public release of the records would be "prejudicial to such action." Cf. *Dept. of Public Safety* v. *Freedom of Information Commission*, supra, 51 Conn. App. 105 (the statute "requires an evidentiary showing (1) that the records are to be used in a prospective law enforcement action and (2) that the disclosure of the records would be prejudicial to such action.").

The FOIC found that the MPD failed to prove the second and third of these factual elements. The MPD challenges the FOIC's findings and ultimate conclusion of law on both evidentiary and legal grounds. The court addresses these arguments, and the responses thereto, below.

A

Standard of Review

The standard of review of administrative agency decisions is well established. The question a court must answer is "not whether [it] would have reached the same conclusion [as the agency] but whether the record before the agency supports the action taken." (Internal quotation marks omitted.) *Levy* v. *Commission on Human Rights & Opportunities*, 236 Conn. 96, 98-99 n.3, 671 A.2d 349 (1996). To the extent that the MPD challenges certain factual findings,

General Statutes § 4-183 (j) states that the court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." A court may not disturb an agency's factual findings if they are supported by substantial evidence in the record. Such evidence exists if the record provides "a substantial basis of fact from which the fact in issue can be reasonably inferred." (Internal quotation marks omitted.) *FairwindCT* v. *Connecticut Siting Council*, 313 Conn. 669, 689, 99 A.3d 1038 (2014). "The reviewing court must take into account [that there is] contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. . . ." (Internal quotation marks omitted.) *Huck* v. *Inland Wetlands & Watercourses Agency*, 203 Conn. 525, 542, 525 A.2d 940 (1987).

Because this case involves the interpretation and application of an FOIA exemption, the court also notes that "the overarching legislative policy of [the act] is one that favors the open conduct of government and free public access to government records. [I]t is well established that the general rule under the [act] is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the [act] . . . . [Thus] [t]he burden of proving the applicability of an exception [to disclosure under the act] rests upon the party claiming it." *Lieberman* v. *Aronow*, 319 Conn. 748, 754-55, 127 A.3d 970 (2015).

B

Predicting the Future: How Probable Must a "Prospective Law Enforcement Action" Actually Be to Satisfy the Law Enforcement Exemption?

By its express terms, § 1-210 (b) (3) (D) necessarily requires a prediction whether a future event, a "prospective law enforcement action," will occur. How certain must the occurrence of that future event be for the exemption to apply? Is a mere theoretical possibility

sufficient, or must the party claiming the exemption prove that a future law enforcement action is likely or probable to occur? Or is proof that such an action is a reasonable possibility sufficient?

To the court's knowledge, no Connecticut court has directly addressed this question. At oral argument, counsel for the MPD essentially argued for a theoretical possibility standard. Counsel further argued that unless the statute of limitations has expired or the sole suspect has died, both of which would preclude any criminal prosecution, a prospective law enforcement action for a long unsolved crime remains theoretically possible.

In her brief, Niemeyer appears to support a reasonable possibility standard. Niemeyer Br., pp. 14, 16. Although the FOIC has applied that standard in the past, the final decision in this case does not expressly apply that standard.

Both Niemeyer and the FOIC also place great weight on the Connecticut Appellate Court's 1998 decision in *Dept. of Public Safety* v. *Freedom of Information Commission*, supra, 51 Conn. App. 100 [hereinafter *DPS* v. *FOIC*]. Initially, the Appellate Court emphasized that the exemption only applies to law enforcement records containing "information *to be used in a prospective law enforcement action if prejudicial to such action* . . . ." (Emphasis in original.) Id., 105. The Appellate Court then held that "[t]he statute, therefore, requires an evidentiary showing (1) that the records are to be used in a prospective law enforcement action and (2) that the disclosure of the records would be prejudicial to such action." Id.

The FOIC and Niemeyer focus on the "to be used" language that is central to the text of the § 1-201 (b) (3) (D) exemption and the Appellate Court's holding in *DPS* v. *FOIC*. They argue that this language requires more than the speculative, theoretical possibility of a future prosecution. In response, the MPD argues that *DPS* v. *FOIC* is distinguishable on its facts.

The court agrees with the MPD that *DPS* v. *FOIC* decision does not control the outcome of this appeal. Nonetheless, the decision is instructive regarding the legal burden that a party relying on § 1-210 (b) (3) (D) bears.

DPS v. *FOIC* involved a request for records of an investigation in a drowning at a state park in July 1995. Shortly after the drowning occurred several journalists requested access to the Department of Public Safety's investigative files. The department denied the request at the time because the investigation had not yet concluded. The journalists filed a complaint with the FOIC. The investigation, including an autopsy, concluded in mid-August 1995 that the drowning was accidental and that there was no criminal aspect to the unfortunate event.

The FOIC heard the journalists' complaint about six months after the drowning. After the hearing the FOIC determined that the department had not met its burden for withholding the documents under § 1-210 (b) (3) (D).[6]

The department appealed to the Superior Court, which concluded "that all of the requested reports were exempt from disclosure under § [1-210 (b) (3) (D)] because the investigation was conducted as if a crime may have been committed. The trial court found that the plaintiff had satisfied the statute by initially treating the matter as 'potentially criminal.' The trial court concluded by finding that as long as there is a 'good faith basis for the assertion' that an investigation is potentially criminal in nature and that a possible prosecution will ensue, disclosure in the future would not be required." *DPS* v. *FOIC*, 51 Conn. App. 103-04.

The Appellate Court reversed. "In this case, the record discloses, as the commission correctly points out, that the plaintiff's evidentiary claim had its basis in a showing that the

[6] The case involved a previous version of the statute, then codified at General Statutes § 1-19 (b) (3).

completed records had not yet been reviewed by the division of criminal justice and that the office of the state's attorney had not yet closed the case. 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. As we have stated, *there must be an evidentiary showing that the actual information sought is going to be used in a law enforcement action and that the disclosure of that information would be prejudicial to that action.*

"The trial court improperly concluded, therefore, that 'the law does not require disclosure of records of investigations where it is not yet known if a crime has been committed or whether a prosecution will ensue, as long as there is a good faith basis for the assertion.' The trial court misinterprets the clear language of the statute." (Emphasis in original.) Id., 105.

The factual differences between *DPS* v. *FOIC* and this case are clear. The former involved an investigation into an accidental drowning with no criminal component. Given that conclusion, a prospective law enforcement action, i.e., an arrest and prosecution, was a factual impossibility. By contrast, this case involves a homicide. A future arrest and prosecution are not impossibilities.

Although *DPS* v. *FOIC* is distinguishable, it offers useful guidance. It teaches that the mere possibility of a future prosecution is not enough to support an exemption claim under § 1-210 (b) (3) (D). It teaches that more than good faith assertions by law enforcement are required. And it teaches that the fact that an investigation remains open does not automatically preclude disclosure of investigatory files. However, the decision does not answer the question at

the heart of this case: How likely must a prospective law enforcement action actually be to satisfy the requirements of the exemption?

Notably, the FOIC has applied the reasonable possibility test in a past case involving § 1-210 (b) (3) (D). *Graeber* v. *Chief, Police Dept., City of New Haven*, No. FIC 2016-0865 (Sept. 27, 2017) (party claiming exemption must establish that prospective law enforcement action is a "reasonable possibility"). Whether it applied that standard in this case is unclear. The final decision applies the "to be used" holding in *DPS* v. *FOIC* without further elaboration. Even assuming that the FOIC followed its own precedent in the *Graeber* case and implicitly used a reasonable possibility standard here, that standard is not time-tested, nor has it been subject to judicial scrutiny. Consequently, it is not entitled to deference. *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 526, 93 A.3d 1142 (2014); *Longley* v. *State Employees Retirement Commission,* 284 Conn. 149, 163-64, 931 A.2d 890 (2007). But that does not mean the standard is wrong. Reviewing § 1-210 (b) (3) (D) de novo, the court concludes that the reasonable possibility standard is correct. The court reaches this conclusion for several reasons.

First, although factually distinguishable, *DPS* v. *FOIC* indicates that a law enforcement agency withholding records under § 1-210 (b) (3) (D) must establish that a prospective law enforcement action is more than a theoretical possibility.

Second, it 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. Connecticut courts follow the plain meaning rule of statutory construction, which eschews absurd and unworkable interpretations of state

statutes. *Lindquist* v. *Freedom of Information Commission*, 203 Conn. App. 512, 531, 248 A.3d 711 (2021).

Third, although no Connecticut appellate tribunal has directly addressed the statutory interpretation question at hand, the United States Court of Appeals for the District of Columbia has. The federal FOIA includes an exemption that is substantially identical to § 1-210 (b) (3) (D). Exemption 7(A) of the federal law exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552 (b) (7) (A). The D.C. Circuit Court of Appeals, which hears the vast majority of federal FOIA appeals, has long interpreted this exemption to require federal agencies to prove that law enforcement proceedings are "pending or *reasonably anticipated.*" (Emphasis in original.) *Mapother* v. *Dept. of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993). Accord *Citizens for Responsibility and Ethics in Washington* v. *United States Dept. of Justice*, 746 F.3d 1082, 1096 (D.C. Cir. 2014) (citing *Mapother*). Although a federal appellate court's interpretation of a comparable federal statute is not binding on this court, it is persuasive authority on which this court may rely to interpret an analogous statute. *Galvin* v. *Freedom of Information Commission*, 4 Conn. App. 468, 478, 495 A.2d 1089 (1985), rev'd on other grounds, 201 Conn. 448, 518 A.2d 64 (1986) ("Federal decisions regarding the federal Freedom of Information Act have given Connecticut courts a decisional path in the interpretation of its state legislation on the same subject").

The court notes one significant distinction between federal and Connecticut FOI law. The United States Supreme Court has "encouraged the making of 'categorical decisions' in deciding whether material requested under [federal] FOIA is exempt." *United States Dept. of Justice* v.

Reporters Committee for Freedom of the Press, 489 U.S. 749, 776, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989). Under this approach, "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction." Id., 489 U.S. 776. The D.C. Circuit Court of Appeals has applied a categorical approach to cases involving federal FOIA Exemption 7(A). *Mapother* v. *Dept. of Justice*, 3 F.3d 1542.

If the categorical approach applied to Connecticut FOIA exemptions, proper analysis of an exemption claim under § 1-210 (b) (3) (D) would not depend on the facts and circumstances of each particular case. However, Connecticut has not adopted the categorical approach; it requires exemption claims to be decided on a case-by-case basis. In *Director, Retirement & Benefits Services Division* v. *Freedom of Information Commission*, 256 Conn. 764, 775 A.2d 981 (2001), the Supreme Court expressly rejected the use of a categorical approach when evaluating a personal privacy exemption claim. "The trial court, therefore, in ruling that a state employee does not have a protected privacy interest in his residential address, improperly took an overly broad, categorical approach in its examination of all the addresses requested. The *Perkins* test requires that a determination be made regarding each request for information. *Dept. of Public Safety* v. *Freedom of Information Commission,* [242 Conn. 79, 87 (1997)] (approved method of trial court, which held that disclosure of multiple investigatory reports 'should be decided, not categorically, but on a case-by-case basis')." Id., 779.

Absent Connecticut appellate authority requiring, or at least permitting, agencies, the FOIC and courts to employ a categorical approach to state FOIA exemption claims, the court will not do so here. Therefore, exemption claims under § 1-210 (b) (3) (D) must be decided on

the basis of the unique facts and circumstances of each case, which is exactly what the FOIC did below.

Although the court concludes that the reasonable possibility test applies to exemptions claims under § 1-210 (b) (3) (D), a law enforcement agency's judgment that the release of investigatory records could prejudice a prospective law enforcement action is still entitled to significant deference. The court need not consult legislative history to know that the purpose of the exemption is to avoid prejudicing the government's investigation and case in court by allowing premature public access (and therefore access by potential suspects) to investigatory files. Cf. *NLRB* v. *Robbins Tire and Rubber Co.*, 437 U.S. 214, 224-25, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978) (purpose of federal FOIA law enforcement exemption is to "prevent [harm] to the Government's case in court by not allowing litigants early or greater access to agency investigatory files than they would otherwise have").

Accordingly, when a law enforcement agency receives a request for investigatory records of an open criminal investigation, it may (but of course is not required to) initially decline the request pursuant to § 1-210 (b) (3) (D), subject to a review of the records to determine whether their release, in whole or in part, would prejudice a prospective law enforcement action. Records that would not cause such prejudice must be released even if a prospective law enforcement action is a reasonable possibility. A law enforcement agency may not withhold all investigatory records just because some of them contain information which, if released, could prejudice a prospective law enforcement action.

If the requestor files a complaint with the FOIC, the requestor must present evidence at the FOIC hearing showing a prima facie violation of the FOIA. That is, the requestor must present evidence that it requested the disclosure of records of a public agency and that the agency

denied the request. The burden of production and of proof then shifts to the law enforcement agency invoking the exemption. *Lieberman* v. *Aronow*, supra, 319 Conn. 755 (burden of proving the applicability of an FOIA exception "rests upon the party claiming it"). The agency must present evidence that the investigation remains open and that no insurmountable obstacles to a prospective law enforcement action exist, such as expiration of the statute of limitations or the death of the only suspect. The agency must explain, through testimony and argument of counsel, why it believes a prospective law enforcement prosecution is a reasonable possibility. And of course the agency must also present evidence that release of the records would prejudice such a prospective law enforcement action. After the agency presents its case in support of its exemption claim, the requestor may, but is not required to, present rebuttal evidence.

Once the hearing is concluded, the FOIC hearing officer must determine whether the agency has met its burden of proving, by a preponderance of evidence, both of the critical elements of the § 1-210 (b) (3) (D), i.e., that a prospective law enforcement action is a reasonable possibility and that the release of the requested records would be prejudicial to such action. If the hearing officer determines that the agency did not meet its burden of proof on the first element, all requested records must be released unless they are exempt on some other basis. If the hearing officer determines that the agency met its burden of proof on the first element, she must then determine whether the agency met its burden of proving prejudice.

Because the outcome of the reasonable possibility test turns on the specific facts and circumstances of each particular case, it behooves the court to articulate the factors relevant to determining whether a prospective law enforcement action is a reasonable possibility in a particular case. At a minimum, the FOIC must consider the following: (1) the length of time that has elapsed since the commission of the crime; (2) the length of time that has elapsed since the

law enforcement agency last obtained significant new evidence or leads, i.e., whether the agency has effectively exhausted all investigatory leads; (3) whether the agency has classified the investigation, even if technically open, as a cold case or the functional equivalent thereof; (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; (7) whether advances in scientific or technology, such as advances in DNA analysis, may lead to new evidence or permit the fruitful reexamination of existing evidence.

This list is non-exhaustive and no single factor is necessarily determinative. The parties may introduce, and the FOIC may rely on, any admissible evidence that bears on whether a prospective law enforcement action is a reasonable possibility. The court reiterates that the test does not require the law enforcement agency to prove that an arrest and prosecution is likely or probable. The agency's minimal burden is to present evidence that persuades the FOIC that a prospective law enforcement action is something more than a theoretical possibility.

As noted, it is unclear whether the FOIC used a reasonable possibility test in rendering the decision below. The FOIC's previous decisions involving the § 1-210 (b) (3) (D) exemption have not applied the reasonable possibility test with sufficient regularity for the court to assume that the hearing officer applied the test, particularly as this opinion represents the first occasion on which a state court has articulated the proper burden. Thus, the court must consider whether the FOIC's possible failure to apply the reasonable possibility standard constitutes harmless error. *Levy* v. *Commission on Human Rights & Opportunities*, 236 Conn. 96, 110, 671 A.2d 349, 358 (1996) (harmless error analysis is available in the administrative context).

In *Levy* v. *Commission on Human Rights & Opportunities*, supra, the Supreme Court determined that a CHRO hearing officer used an incorrect burden shifting analysis in a decision. The Supreme Court applied a harmless error analysis which required the court to determine whether the hearing officer would have reached the same conclusion if she had applied the correct legal analysis. To answer that question the court examined the hearing officer's factual findings. The court concluded that "[t]hese factual findings, *which the hearing officer reached irrespective of any particular mode of legal analysis employed*, necessarily require the [same] conclusion" that the hearing officer reached when she applied the incorrect burden shifting analysis. (Emphasis added.) Id., 112.

Here, the FOIC hearing officer found that a prospective law enforcement action was purely speculative. The hearing officer made this finding irrespective of any particular mode of legal analysis. The court has reviewed the record and determines that while the evidence did not compel only this finding, substantial evidence supports it. This court is required to defer to agency factual findings supported by substantial evidence. Accordingly, the court concludes that this finding supports only one conclusion as a matter of law, viz., § 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.[7]

[7] As previously stated, § 1-210 (b) (3) (D) requires a law enforcement agency to prove that the requested records are "to be used" in a prospective enforcement action *and* that their release would be prejudicial to such an action. *DPS* v. *Freedom of Information Commission*, 51 Conn. App. 100. Consequently, the court's ruling in Part II.B of this opinion requires the disclosure of the requested records regardless of whether disclosure might be prejudicial. Therefore, the court does not decide the MPD's argument that the FOIC erred when it concluded that the MPD had not met its burden of proving prejudice.

C

Previous FOIC Decisions Do Not Dictate a Particular Result In This Case

The MPD also argues that the FOIC's decision must be reversed because it misapplies the FOIC's own precedents and is arbitrary and capricious. Appellant's Brief in Support of Their Administrative Appeal (dated Feb. 22, 2021) ("MPD Br."), pp. 12-27. The gist of this argument is that in seven previous cases involving a request for investigatory records in open criminal investigations, the FOIC upheld exemption claims under § 1-210 (b) (3) (D). In particular, the MPD points to *Graeber* v. *Chief, Police Dept., City of New Haven*, No. FIC 2016-0865 (Sept. 27, 2017), which involved a nearly two-decade old unsolved murder case of a Yale student. The FOIC found that a prospective law enforcement action in that case was a reasonable possibility.

The court disagrees with the MPD's argument that the cases it cites dictate a particular outcome in this case. As the court has explained, exemption claims under § 1-210 (b) (3) (D) are evaluated on the basis of the particular facts and circumstances of each case. In every case an FOIC hearing officer considered the evidence, made findings of fact and applied the law (as it then existed) to those facts. If anything, the decisions in the cases the MPD cites show the extraordinary amount of deference that the FOIC gives to law enforcement agency exemption claims under § 1-210 (b) (3) (D). That the FOIC reached a different conclusion in this case based on its findings of fact does not mean that the agency acted arbitrarily and capriciously.

Also, 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.

Lastly, 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.

D

In two paragraphs at the end of its brief, the MPD argues that the FOIC exceeded its authority when it ordered the MPD to produce copies of the documents free of charge. MPD Br., p. 27. The court declines to review this argument because it is inadequately briefed. *State* v. *Baccala*, 326 Conn. 232, 267-68, 163 A.3d 1 (2017).

III

CONCLUSION

The court has attempted to resolve a long unsettled question about the degree of certainty concerning a prospective law enforcement action that is required to lawfully withhold records under § 1-210 (b) (3) (D). The court has given particular weight to decisions of the D.C. Circuit Court of Appeals, which has applied a "reasonably anticipated" test to an analogous exemption under the federal FOIA. But the court has no doubt that this decision is not the last word on this issue, nor should it be. It is more than a reasonable possibility, pun intended, that the Connecticut Appellate or Supreme Court will review this decision. That is as it should be. The issue warrants appellate scrutiny.

Nevertheless, the court is compelled to observe that in the long run the far better solution is for the General Assembly to address the issue of cold cases through legislation. It is an unfortunate yet indisputable fact that more than half of all violent crimes committed in the United States do not result in an arrest and prosecution. According to the Department of Justice,

only 45.5% of violent crimes were cleared by arrest in 2019.[8] The statistics for murders and nonnegligent homicides are better: 61.4% are cleared by arrest. That means 4 of every 10 murders and nonnegligent homicides go unsolved. These heinous crimes receive maximum law enforcement attention and investigation. But notwithstanding the often Herculean efforts of law enforcement to solve these types of crimes, a very high percentage simply prove to be unsolvable. Arrests and prosecutions remain theoretically possible, but realistically improbable.

There are strong public policy reasons for denying the general public unfettered access to investigation files while the police are actively investigating a crime and continuing to collect new evidence and pursue new leads. The law enforcement exemptions in federal and state FOIA laws instantiate those public policy reasons. However, when law enforcement has effectively exhausted all efforts to arrest and prosecute a suspect, and when the statistical data show that the probability of a prosecution resulting from long unsolved cases approaches zero, it is difficult to understand how denying public access to criminal investigation files in perpetuity serves the public interest in solving crimes and bringing perpetrators to justice. The old adage about a "fresh pair of eyes" is particularly apt. Moreover, allowing the public access to cold case files after an appropriate period of time is far more likely to improve the odds of an arrest and successful prosecution than it is to prejudice that outcome.

Precisely how much time should pass before cold case files are opened to the public is a matter over which reasonable minds can disagree. Certainly it should be considerably longer than a few years after the commission of a crime, particularly one as heinous as murder. But a legislative enactment that sets a clear time after which the records of cold cases become public,

[8] See Department of Justice, Bureau of Justice Statistics, Table 26, available at: https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-26.

perhaps with some carefully drafted exceptions, is preferable to a case-by-case approach to resolving § 1-210 (b) (3) (D) exemption claims in such cases.

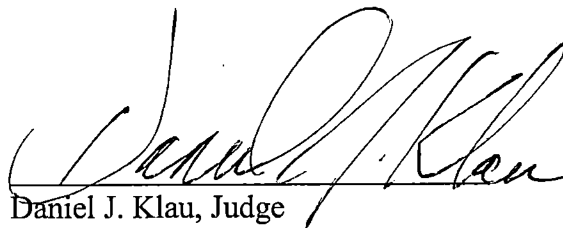
Of course, the General Assembly could decide that cold case files should remain closed to public inspection in perpetuity. Such a decision would be well within the prerogative of the legislature. The court's point is simply that the General Assembly is the branch of government best suited to address the broad public policy questions that this case raises.

V

ORDER

For the reasons set forth above, the final decision of the Freedom of Information Commission dated August 26, 2020 is AFFIRMED. Judgment shall enter for the defendants. Because of the likelihood of an appeal, and because of the difficult and debatable legal issues that this opinion has addressed, any proceedings to enforce or carry out the judgment are stayed until the time to file an appeal has passed, and if an appeal is timely filed, until the final determination of the cause. Practice Book § 61-12.

SO ORDERED.



August 13, 2021

Daniel J. Klau, Judge