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FREEDOM OF INFORMATION



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Charles Graeber and Ross Tuttle
Complainant(s)
against

Notice of Meeting

Docket #FIC 2016-0865

Chief, Police Department, City of New Haven; Police Department,
City of New Haven; Commissioner, State of Connecticut, Department
of Emergency Services and Public Protection; State of Connecticut,
Department of Emergency Services and Public Protection; and State
of Connecticut, Office of the Chief State's Attorney
Respondent(s)

September 7, 2017

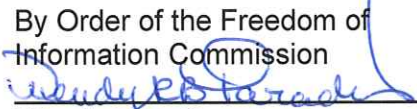
Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2:00 p.m. on Wednesday, September 27, 2017**. At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission **ON OR BEFORE September 15, 2017**. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed **ON OR BEFORE September 15, 2017**. **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fifteen (15) copies** be filed **ON OR BEFORE September 15, 2017** and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of
Information Commission

Wendy R.B. Paradis
Acting Clerk of the Commission

Notice to: Attorney Daniel J. Klau; Attorney Kathleen Foster; Attorney Brian Austin, Jr.;
Assistant Attorney General Stephen R. Sarnoski

FIC# 2016-0865/I/TRA/LFS//TAH/WRBP/2017-09-7

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Charles Graeber and Ross Tuttle,

Complainants

against

Docket #FIC 2016-0865

Chief, Police Department, City of New Haven; Police Department, City of New Haven; Commissioner, State of Connecticut, Department of Emergency Services and Public Protection; State of Connecticut, Department of Emergency Services and Public Protection; and State of Connecticut, Office of the Chief State's Attorney,

Respondents

September 1, 2017

The above-captioned matter was heard as a contested case on April 17, 2017, at which time the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

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

1. It is found that by letters dated November 4 and 10, 2016, the complainants sent a written request for copies of records to the respondents. It is found that the complainants requested copies of the following:

[a.] All records comprising or constituting the investigatory file for the murder of Suzanne Jovin on December 4, 1998[;]

[b.] Any other records maintained or kept on file relating to the murder of Suzanne Jovin [; and]

[c.] All records submitted to the Freedom of Information ("FOI") Commission for in camera inspection in In re complaint by Jeffrey Mitchell v. Chief, Police Department, City of New Haven (Docket #FIC 2001-131(2002)).

2. By letter filed December 15, 2016, the complainants appealed to this Commission, alleging that the respondents violated the FOI Act by failing to provide the records they requested.

3. It is found that the respondents New Haven Police Department (“NHPD”) and Connecticut Department of Emergency Services and Public Protection (“DESPP”) are public agencies within the meaning of §1-200(1), G.S.

4. 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, ... whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

5. 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 section 1-212.

6. 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.

7. It is found that responsive records maintained by NHPD and DESPP are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

8. The respondent Office of the Chief State’s Attorney claims that it is not a public agency within the meaning of §1-201, G.S.

9. Section 1-201, G.S., provides: “...[T]he Division of Criminal Justice shall not be deemed to be a public agency except in respect to its administrative functions.”

10. Article 23 of the Connecticut Constitution provides in relevant part:

There shall be established within the executive department a division of criminal justice which shall be in charge of the investigation and prosecution of all criminal matters. Said division shall include the chief state’s attorney, who shall be its

administrative head, and the state's attorneys for each judicial district, which districts shall be established by law.

11. It is concluded that the Division of Criminal Justice includes the respondent Office of the Chief State's Attorney. It is concluded, therefore, that the respondent Office of the Chief State's Attorney is not a public agency except in respect to its administrative functions.

12. It is found that the Office of the Chief State's Attorney maintains responsive records. It is found that the Office of the Chief State's Attorney uses such records to investigate the unsolved murder of Suzanne Jovin.

13. The complainants contend that because the Office of the Chief State's Attorney is acting in a law enforcement capacity with respect to the responsive records, the Office should be treated as a law enforcement agency for purposes of whether such records are subject to disclosure.

14. It is concluded, however, that the plain language of §1-201, G.S., provides that the Office is not a public agency except with respect to its administrative functions. "[A]administrative records are records pertaining to budget, personnel, facilities, and physical operations..." Clerk of the Superior Court v. FOI Commission, 278 Conn. 28, 42 (2007). It is found that the Office's investigation of the Jovin murder is not an administrative function.

15. It is concluded, therefore, that the respondent Office of the Chief State's Attorney is not a public agency with respect to the records at issue in this matter.

16. With respect to the complainants' request, described in paragraph 1.c, above, it is found that after conducting a diligent search, the NHPD was unable to determine what records were submitted for in camera inspection in the contested case before this Commission and the subsequent administrative appeal that occurred more than 15 years ago. Therefore, it is concluded that the respondents did not violate the FOI Act by not providing such records to the complainants.

17. With respect to the complainants' request for records constituting the "investigatory file," described in paragraph 1.a, above, it is found that the NHPD transferred such records to the Office of the Chief State's Attorney in 2007, so that investigators from that Office could pursue the investigation. As set forth in paragraph 14, above, it is found that such records do not pertain to the administrative functions of the Office of the chief State's Attorney; therefore, such records are not subject to disclosure pursuant to §§1-210(a) and 1-212(a), G.S.

18. With respect to the complainants' request described in paragraph 1.b, above, for all other records maintained or kept on file pertaining to the Jovin murder, it is found that both NHPD and DESPP maintain responsive records.

19. The respondents claim that §1-210(b)(3), G.S., exempts such records from mandatory disclosure. The respondents also claim other exemptions; however, because it is concluded that

§1-210(b)(3)(D), G.S., is dispositive, as set forth in paragraphs 20 through 29, below, such other exemptions need not be considered herein.

20. Section 1-210(b)(3), G.S., provides in relevant part that nothing in the FOI Act requires disclosure of:

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...

21. To prove that the records are exempt from disclosure, the respondents offered the testimony of: Lt. Darcia Siclari, from the Records Division of NHPD; Lt. Herb Johnson, Officer in Charge of the Detective Bureau of NHPD; Assistant State's Attorney Marcia Pillsbury, of the Office of the Chief State's Attorney; and Michael Bourke, Ph.D., Lead Forensic Science Examiner for DESPP's Division of Scientific Services.

22. NHPD and DESPP also submitted copies of all records responsive to the request described in paragraph 1.b, above, for an in camera inspection.

23. It is found that the Jovin murder remains unsolved. It is found that no one has been arrested for the murder. It is also found, however, that the investigation is not dormant. It is found that the investigation is active, and that Assistant State's Attorney Pillsbury devotes at least 8 hours per week on the case, and supervises a number of detectives in pursuing the investigation. It is found that witnesses continue to be interviewed, evidence examined, and ever more precise DNA testing continues to be a focus of the investigation.

24. It is found that a prospective law enforcement action is a reasonable possibility.

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

seemingly innocuous evidence could become critical to corroborate or refute new leads as they arise.

26. The complainants contend that since much about the criminal investigation is known to the public, having been released at least in part by law enforcement officials in furtherance of their efforts to obtain help from the public, the respondents are unable to show that disclosure of the records of investigation that contain such information would prejudice a prospective prosecution.

27. It is found, however, after an in camera review, that the records contain greater details than the official statements, and also provide corroborating evidence of such statements. It is found that the actual records themselves are not otherwise available to the public within the meaning of §1-210(b)(3), G.S.¹

28. Based especially on law enforcement officials' need to preserve the integrity of and control over an active murder investigation, it is found that the respondents provided sufficient evidence to demonstrate that disclosure of the requested records would result in the disclosure of information that would be prejudicial to a prospective prosecution for the murder of Suzanne Jovin.

29. It is concluded, therefore, that §1-210(b)(3)(D), G.S., exempts the requested records from mandatory disclosure.

30. In light of the Commission's conclusion in paragraph 29, above, the Commission declines to consider the applicability of other exemptions claimed by the respondents.

31. Accordingly, it is concluded that the respondents NHPD and DESPP did not violate §§1-210(a) and 1-212(a), G.S., by withholding the records responsive to the complainants' request described in paragraph 1.b, above, from the complainants.

32. In addition, it is concluded that the respondent Office of the Chief State Attorney did not violate §§1-210(a) and 1-212(a), G.S., because the responsive records that the Office maintains do not pertain to the Office's administrative functions.

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

1. The complaint is dismissed.

¹ Some newspaper and magazine articles are included in the in camera submission by NHPD. NHPD did not claim an exemption for such records, but it is unclear whether the complainants contemplated such records in their request. If they wish to receive a copy of such records, they should inform NHPD and NHPD should provide them to the complainants.



Lisa Fein Siegel
as Hearing Officer

FOIC2016-0865/HOR/lfs/090117