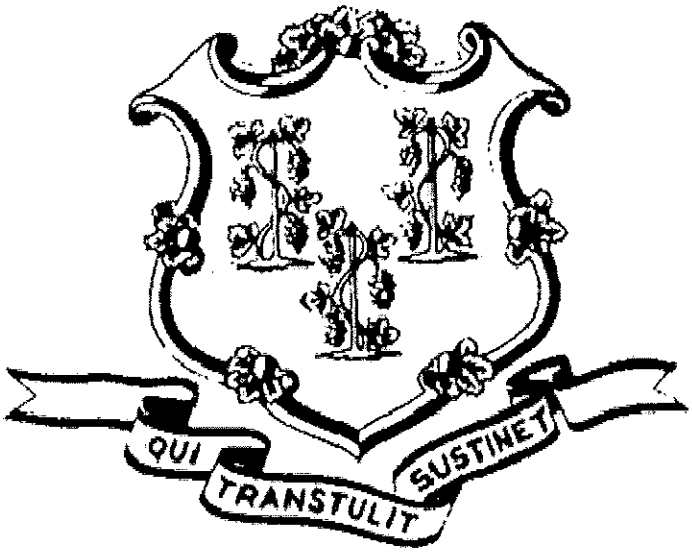
State of Connecticut



Task Force on Victim Privacy and the Public's Right to Know

Proposed Final Report

January 24, 2014

The Connecticut General Assembly

Task Force on Victim Privacy and the Public's Right to Know

Co-Chairs:

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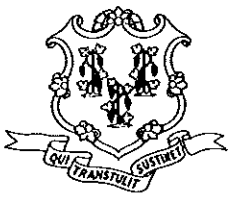
Don DeCesare, President and General Manager of
WLIS-AM in Old Saybrook
and WMRD-AM in Middletown



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January 27, 2014

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Dear Legislative Leaders,

Attached is the report of the Task Force established under Public Act 13-311 § 4 "to consider and make recommendations regarding the balance between victim privacy under the Freedom of Information Act and the public's right to know."

It has been our privilege to serve as Co-Chairs of the Task Force. We thank you for entrusting us with this responsibility. Given the vitally important policy issues that fell within the mandate of the Task Force, it is unsurprising that there was often sharp disagreement and passionate debate among its members. Nevertheless, you will find that the Task Force's recommendations were supported overwhelmingly by its members who

came from varied and distinguished backgrounds. We are grateful to each of them for their dedication and time during the past six months.

We also wish to thank the members of the public who testified at our three public hearings. We hope those who testified will provide their insights again as the General Assembly considers the recommendations of the Task Force.

Additionally, we would like to thank the legislative employees who provided staff services to the Task Force. Shannon McCarthy of the Legislative Commissioners' Office provided valuable counsel with respect to legal and procedural issues. Terry Adams and Chris Reinhart of the Office of Legislative Research conducted excellent research on a wide range of complex questions posed by the Task Force. Our clerks, Ken Neal and Barbara Gordon, were exceptional administrators.

Again, we thank you for the opportunity to serve, and respectfully offer ourselves to assist in any further manner you find useful. Although the work on the issues we debated is by no means complete with the submission of this report, we hope you will find it valuable as you continue your own deliberations upon the proper balance between victim privacy and the public's right to know.

Sincerely,

Hon. Angel Arce
State Representative
4th District – Hartford

Don DeCesare
President & General Manager
WLIS-AM, Old Saybrook and
WMRD Radio, Middletown

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Terrance Adams and Christopher Reinhart, Office of Legislative Research

TASK FORCE CHARGE

Public Act 13-311 (§ 4), An Act Limiting The Disclosure of Certain Records of Law Enforcement Agencies and Establishing a Task Force Concerning Victim Privacy Under the Freedom of Information Act, established a 17-member task force to make recommendations regarding the balance between victim privacy under the Freedom of Information Act and the public's right to know.

The act required the task force to meet at least monthly through December 2013 and report its findings and recommendations to the legislature's majority and minority leadership. The task force terminates on January 1, 2014 or when it submits its report, whichever is later.

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INTRODUCTION

SUMMARY OF TASK FORCE ACTIVITIES

The Task Force began its work on August 1, 2013 and held a total of 11 meetings through January 2014. It additionally held three public hearings, two in Hartford and one in Bridgeport. A broad range of speakers testified at these hearings, including victims' rights advocates, representatives of media organizations, open government advocates, witnesses to the December 2012 Sandy Hook (Newtown) public school shootings, and family members of the shooting victims.

The Task Force received informational presentations from the Department of Emergency Services and Public Protection (DESPP), Freedom of Information Commission (FOIC), Office of Legislative Research and Legislative Commissioners' Office, Office of the State Victim Advocate, Professor William Dunlap, and Representative Angel Arce.

As the Task Force transitioned away from the information-gathering process, it focused its discussions on three categories of records addressed by PA 13-311: (1) the identities of witnesses who are minors, (2) images of homicide victims, and (3) certain audio recordings describing a homicide victim. Section 4 of the act, which created the Task Force and gave it its charge, also received discussion (e.g., whether the Task Force's recommendations should address homicide victims only). Please refer to Appendix B for a summary of PA 13-311.

PA 13-311 created exemptions from disclosure under the Freedom of Information Act (FOIA) for each of the three records categories listed above. For each exemption, the Task Force discussed whether to expand, narrow, repeal, or maintain it. It debated and voted on several motions made by various members concerning access to one or more of these records (a complete list of motions is available in Appendix A). Additionally, five members submitted written proposals for consideration: Representative Angel Arce, Klarn DePalma, Senator Leonard Fasano, and Chief State's Attorney Kevin Kane submitted proposals at the Task Force's November 27 meeting, while State Victim Advocate Garvin Ambrose and Kevin Kane submitted a joint proposal at the December 17 meeting.

At its December 17 meeting, the Task Force approved four recommendations for further action by the legislature, which are summarized on pages 9-10 and discussed further in the rest of the report.

REPORT STRUCTURE

The report begins by summarizing the Task Force's four recommendations and provides the vote tally for each recommendation. It then discusses each recommendation in more detail, presenting the views of Task Force members on both sides of the issue.

The report also includes several appendices, including each formal motion and the vote for that motion, a summary of PA 13-311, a list of meeting and public hearing dates, a list of research materials and other submissions presented to the Task Force, and statements presenting the views of individual Task Force members.

RECOMMENDATIONS

Recommendation 1: Exempt from disclosure under FOIA a law enforcement record, compiled in detecting or investigating crime, that would reveal the identity of a witness (1) to a crime of violence, drug offense, or sexual offense and (2) who was a minor as defined in CGS § 1-1d (i.e., younger than age 18) at the time of the crime or declaration.

Vote: 14 to 3

Recommendation 2: Exempt the following records from disclosure under FOIA, but create a process allowing any person to inspect and, under certain circumstances, receive copies of them: (1) a photograph, film, video, or digital or other visual image depicting the condition of a body or any portion thereof of a homicide victim and (2) an audio recording of an emergency 9-1-1 call or other call for assistance made by a member of the public or an operative communication among law enforcement and emergency personnel related to a homicide, which captures, conveys, or relates the impaired physical condition or mental anguish of the caller or another person.

- The exemptions apply if disclosure would constitute an unwarranted invasion of personal privacy.
- Any person can view the images or listen to the recordings; any unauthorized copying or recording is a crime.
- Any person can obtain a transcript of a recording.
- Any person can request a copy of an image or recording and may appeal a denial of such a request to FOIC.
- A victim's next-of-kin or legal representative must (1) receive written notice of any request for a copy of an image or recording, (2) have an opportunity to object to the image's or recording's release, and (3) receive 24 hours' notice before any decision or order to disclose an image or recording takes effect.

Vote: 14 to 3

Recommendation 3: The legislature should ask the Legislative Program Review and Investigations Committee or another suitable entity to further study the issue of victim

privacy in all of its aspects and make recommendations for any necessary legislative changes.

Vote: 14 to 3

Recommendation 4: The legislature should consider the potential fiscal impact on state and municipal agencies of implementing the Task Force's recommendations.

Vote: 17 to 0

RECOMMENDATION 1: IDENTITIES OF WITNESSES WHO ARE MINORS

PA 13-311: The act exempts from disclosure under FOIA law enforcement records, compiled in detecting or investigating crime, that would disclose the identity of witnesses who are minors. The exemption applies only if disclosure would not be in the public interest.

All witnesses regardless of age were already covered by a similar provision in existing law, but that provision limits the withholding to witnesses not otherwise known and to disclosures that would endanger the witness's safety or subject him or her to threat or intimidation. Existing law also exempts signed witness statements from disclosure.

Task Force Recommendation 1: Exempt from disclosure under FOIA a law enforcement record, compiled in detecting or investigating crime, that would reveal the identity of a witness (1) to a crime of violence, drug offense, or sexual offense and (2) who was a minor as defined in CGS § 1-1d (i.e., younger than age 18) at the time of the crime or declaration.

Vote: 14 to 3

DISCUSSION

Introduction

The Task Force devoted considerable time to this exemption. Areas of discussion included (1) the need for the exemption, (2) the age limit for the exemption, (3) when a person is considered a witness, (4) whether the minor's identity should be permanently withheld, (5) whether the exemption should be limited to certain crimes, and (6) issues relating to criminal trials. Each of these areas is addressed separately below.

The Task Force concluded by recommending that PA 13-311's exemption be narrowed so that it covers only those minors who witness a crime of violence, a drug offense, or a sexual offense.

Need for a Minor-Specific Exemption

The Task Force first discussed whether a specific exemption for witnesses who are minors was necessary in light of an existing FOIA exemption (predating PA 13-311) for witnesses' identities. Under this exemption, a law enforcement agency may withhold from disclosure under FOIA the identities of witnesses (including minors) not otherwise known if the agency can prove that the witness would have his or her safety endangered

or be subject to threat or intimidation if his or her identity were made known (CGS § 1-210(b)(3)(A)). FOIA also exempts signed witness statements from disclosure (CGS § 1-210(b)(3)(C)).

Proponents of a categorical exemption for minors' identities noted that the general witness exemption (CGS § 1-210(b)(3)(A)) requires a law enforcement agency to prove that a witness would be harmed by disclosure, and they argued that there are times when it is difficult to make this showing. The proponents argued that disclosing a minor's identity is inherently harmful, even if there is no specific threat that can be articulated. They also stated that minors need the protection because they are not fully aware of their actions. Further, proponents argued that minors who have their identities disclosed would potentially face retribution, which would deter them from coming forward as witnesses.

Members who opposed a minor-specific exemption believed that the general witness exemption provided sufficient protection for minors. They stated that, to the extent there was a legitimate threat of harm to the minor, his or her identity would be protected by the general exemption. One member reported being unaware of any instances where a minor suffered harm that was specifically attributable to a disclosure under FOIA.

The Task Force concluded by recommending that a minor-specific exemption be maintained.

Age of a Minor

The Task Force also discussed the appropriate ages to which the exemption should apply. PA 13-311 did not specifically define a minor, but by law, a minor is someone who is younger than age 18, unless otherwise specified (CGS § 1-1d).

At the Task Force's November 13 meeting, Jodie Mozdzer-Gil made a motion that would have limited the exemption to those minors who are age 13 or younger. (The motion also addressed the duration of the exemption, as described below.) She stated that minors who are older than 13 have more awareness about the consequences of their actions and can therefore make an informed decision about whether or not to cooperate as witnesses.

Members who opposed lowering the age to 13 argued that a young person is still maturing. One member referenced legislation from 2007 that raised the age of juvenile court jurisdiction from 16 to 18. This member noted that the change was supported by research that showed that young people's brains continue developing and maturing well into their teenage years and argued that this research would also support leaving the witness exemption at age 18. Ms. Mozdzer-Gil's motion failed by a 7 to 7 vote.

At the November 27 meeting, the co-chairmen proposed recommending that the legislature further study the appropriate age to which the exemption should apply. However, the Task Force ultimately recommended that a "minor" be defined as it is in CGS § 1-1d (i.e., that a minor is someone younger than age 18).

When a Person Is Considered a Witness

The Task Force debated the point in time, relative to the crime, that a person should be considered a witness for the purposes of the exemption. At the December 17 meeting, one member suggested having the exemption be connected to the time a witness makes an oral or written declaration to a law enforcement official. For example, this member believed that if a person witnessed a crime when he or she was a minor, but did not make a declaration until he or she was an adult, then this person's identity should not be withheld.

However, opponents of this suggestion argued that it would eliminate protection for those minors who are identified as witnesses but do not make a declaration. Thus, the Task Force declined to accept the suggestion. Instead, it recommended specifying that the exemption apply to a witness who was a minor at the time of the crime or declaration.

Duration of Exemption

The Task Force similarly debated whether the exemption should be permanent or if it should expire once a person turns 18. The second part of Jodie Mozdzer-Gil's November 13 motion would have made the minor's identity disclosable under FOIA when he or she turned 18. Ms. Mozdzer-Gil stated that a minor's identity should not be permanently withheld; journalists, researchers, and others interested in the case may be interested in identifying and speaking with the witness. Another member added that, at age 18, a person is old enough to deal with the consequences of his or her actions; protection that may be necessary for a minor is not necessary for an adult.

Opponents of making the identity disclosable at age 18 believed that it would negate the protection provided by the exemption. They argued that a reason for the exemption is to protect a person from the consequences of actions taken when he or she was not fully mature; making the identity disclosable at age 18 would defeat the purpose of that protection. They also argued that the prospect of retribution continues even after a person turns 18.

Ms. Mozdzer-Gil's motion failed by a 7 to 7 vote. Professor Dunlap made a similar motion at the December 17 meeting, which the Task Force rejected, 14 to 3.

Crimes Covered by the Exemption

The Task Force also discussed whether the exemption should be limited to minors who witness certain types of crimes. Under PA 13-311, the identity is exempt if it is obtained during the course of any criminal investigation.

On November 27, the co-chairmen jointly proposed that the exemption apply only to minors who witness crimes of violence or drug offenses. However, other members noted that this proposal excluded many other serious crimes, particularly sex crimes. In response, the Chief State's Attorney and the Victim Advocate submitted a proposal at the December 17 meeting that mirrored the co-chairmen's proposal but added sex crimes to the list of covered crimes.

The Task Force ultimately recommended that the exemption apply to minors who witness crimes of violence, drug offenses, or sexual offenses.

Issues Related to Criminal Trials

The Task Force discussed two issues concerning the exemption's potential impact on criminal trials. The first issue concerned the public nature of criminal trials. One member noted that the U.S. Constitution requires criminal trials to be public. This member argued that, because witnesses' identities are public in a criminal trial, they should not be exempt from public disclosure before a trial. In response, other members noted that not all criminal investigations result in a trial, and not all witnesses to a crime are called to testify in a trial. They argued that the public nature of a criminal trial is a separate issue from whether a witness's identity should be disclosed under FOIA before a trial.

The other trial-related issue was the exemption's potential impact on criminal defendants and their attorneys. The Chief Public Defender proposed amending the exemption to make the identity of a minor witness available under FOIA to defense counsel in a criminal matter, juvenile delinquency action, or habeas corpus matter. She argued that both PA 13-311 and the Task Force's recommendation harm her office's ability to defend its clients. She stated that there have been instances in which minor witnesses have fabricated and misstated facts, causing innocent adults and juveniles to be arrested, prosecuted, and incarcerated. She also described instances where (1) prosecutors withheld or did not obtain all relevant information from law enforcement agencies in response to her office's discovery requests and (2) FOIA requests to law enforcement agencies allowed her office to gain information (including witness identities) that it did not obtain through the discovery process. She stated that information obtained through FOIA has been valuable in preparing a defense for clients in certain cases.

In response, other members argued that exempting witnesses' identities from disclosure under FOIA would not affect a defendant's ability to obtain information through the discovery process. They argued that FOIA and discovery are separate and that the Task Force should not comingle them. One member pointed to a statute that states that FOIA

must not be deemed to "limit the rights of litigants…under the laws of discovery of this state" (CGS § 1-213(b)(1)). Another member stated that while the Chief Public Defender made valid arguments for making witnesses' identities publicly available, defendants and their attorneys should not have special access under FOIA over and above that of the general public.

The Task Force rejected the Chief Public Defender's motion, 15 to 2.

RECOMMENDATION 2: IMAGES AND AUDIO RECORDINGS RELATING TO HOMICIDE VICTIMS

PA 13-311: The act exempts from disclosure under FOIA a photograph, film, video, digital, or other visual image depicting a homicide victim, to the extent that the record could reasonably be expected to constitute an unwarranted invasion of the victim's or surviving family members' personal privacy. The record must have been created by a law enforcement or other government agency.

The act also exempts from disclosure under FOIA the portion of a recording or audio tape that describes a homicide victim's condition. The exemption (1) applies only to law enforcement agencies, (2) does not extend to 9-1-1 or other calls for assistance made by a member of the public to a law enforcement agency, and (3) expires on May 7, 2014.

Task Force Recommendation 2: The Task Force makes the following recommendation concerning the disclosure under FOIA of images of a homicide victim and certain audio recordings:

1. Exempt from disclosure under FOIA a photograph, film, video, or digital or other visual image depicting the condition of a body or any portion thereof of a homicide victim.
2. Exempt from disclosure under FOIA an audio recording of an emergency 9-1-1 call or other call for assistance made by a member of the public or an operative communication among law enforcement and emergency personnel related to a homicide, which captures, conveys, or relates the impaired physical condition or mental anguish of the caller or another person.
3. Apply the exemptions if disclosure would constitute an unwarranted invasion of personal privacy.
4. Allow any person to (a) view or listen to (not copy or record) an exempted (as above) image or audio recording at the custodial agency and (b) obtain a transcript of a recording upon request for a reasonable cost.
5. Make the removal, photographing, recording, duplication, or copying of an image or recording a crime.
6. Require an agency to notify the victim's next of kin or legal representative after receiving a request to disclose an image or recording covered by the exemption.
7. Allow a next of kin or legal representative to object to disclosure and have an opportunity for a hearing before an image or recording is disclosed.
8. Require the agency to notify any next of kin or legal representative objecting to disclosure 24 hours before disclosing the record.

Vote: 14 to 3

DISCUSSION

Introduction

The Task Force's recommendation concerning the disclosure of images of a homicide victim applies to the same images identified in PA 13-311. Concerning audio recordings, the Task Force recommends expanding PA 13-311's exemption to include recordings of certain 9-1-1 calls made by members of the public that relate to a homicide victim, which were specifically excluded from PA 13-311's exemption. Such recordings include those that capture, convey, or relate the impaired physical condition or mental anguish of another person.

PA 13-311 exempts only those recordings of operative communications that describe the condition of a homicide victim, and the exemption expires on May 7, 2014. The Task Force recommends maintaining this exemption and expanding its scope so that it matches the proposed exemption for 9-1-1 recordings.

For recordings of both 9-1-1 calls and operative communications, the Task Force recommends exempting them from disclosure under FOIA only if disclosure would be an unwarranted invasion of personal privacy. Under PA 13-311, recordings of operative communications are categorically exempt from disclosure.

Lastly, as described above, the Task Force recommends creating a process to (1) view these images and listen to these recordings, (2) obtain a transcript of a recording for a reasonable cost, and (3) obtain disclosure of the image or recording under certain conditions.

Scope of Recommendation. The Task Force's recommendation is based largely on the proposal submitted by the Chief State's Attorney and Victim Advocate at the December 17 meeting. The proposal included (1) a conceptual overview of the recommendations and (2) proposed legislative language. At the suggestion of Co-Chairman DeCesare, the Task Force limited its discussion to the conceptual overview and ultimately voted only on an amended version of the overview.

However, the proposed legislative language contained one provision with which some Task Force members agreed, but that was not addressed in the conceptual overview. The proposed language makes the unauthorized copying or recording of an exempt record a crime, but this provision is not included in the conceptual overview. Because it is consistent with the rest of the overview, this omitted concept is thus reflected in the recommendation.

Focus Areas. The Task Force's discussions about the images and recordings focused on (1) the records covered by the exemptions, (2) where members of the public could view the images and listen to the recordings, and (3) the standard for determining whether to disclose an image or recording. Each of these issues is addressed separately below.

Records Covered by Exemption

Images. The Task Force recommendation concerning images of homicide victims covers the same images as the exemption in PA 13-311 (and additionally allows any person to view such images without copying them). However, the Task Force debated both narrowing and expanding the exemption.

In terms of narrowing the exemption, Klarn DePalma's November 27 proposal suggested limiting the exemption to images of homicide victims who are minors, but the Task Force did not vote on this proposal. At the December 17 meeting, James Smith introduced an amendment to limit the exemption to images of the Newtown shooting victims. He stated that because concern over the release of these images was the impetus for PA 13-311, any exemptions from disclosure for images of homicide victims should be limited to images of the Newtown victims. The Task Force rejected Mr. Smith's amendment, 12 to 5.

Conversely, other members argued for expanding the exemption. The Chief State's Attorney's and Victim Advocate's December 17 proposal recommended that the exemption additionally include images of people who are injured or the subject of a medical or other emergency. However, other Task Force members noted that the group's discussions had focused on homicide victims only, and they did not feel comfortable making a recommendation for other victims without further study (see Recommendation 3).

Recordings. As described above, the Task Force recommends expanding PA 13-311's exemption for audio recordings. Members who supported this expansion believed that 9-1-1 recordings should be handled in the same manner as images (i.e., withheld if disclosure would constitute an unwarranted invasion of personal privacy). They noted that, on some 9-1-1 recordings, a listener can hear the victim's or caller's anguish, and that such emotions should not be available to the public. They argued that the exemption is needed to prevent the recordings from being disseminated in an exploitative manner. Some of these members were also concerned that the prospect of having a 9-1-1 recording become public could deter a person from calling 9-1-1.

Other members believed that 9-1-1 recordings should remain publically available. These members argued that the recordings provide important information about the performance of first responders (e.g., whether the response time was too long). They also believed that, in deciding whether to call 9-1-1, people will not be deterred by the possibility of having a recording of the call be publicly released; they will call 9-1-1 if it is warranted.

Additionally, these members argued that journalists use careful judgment when deciding how to report on sensitive materials. For example, during the course of the Task Force's proceedings, FOIC ordered the release of 9-1-1 recordings from the Newtown shootings; the recordings were released on December 4 after the state's motion for a stay was denied (see *Stephen J. Sedensky III, State's Attorney for the Judicial District of Danbury v. Freedom of Information Commission, et. al.*, Docket No. HHB-CV-13-6022849-S, Judicial District of New Britain, November 26, 2013 (Prescott, J.)). One member commented that the media reported on these recordings in a responsible manner. Another member cited a newspaper that held hours of discussions before deciding to post the recordings online. This member noted that, while the recordings contain sensitive and graphic material, it is up to members of the public to decide whether or not to listen to them.

Where to Access the Records

While generally agreeing on the concept of allowing any person to view an image or listen to a recording, Task Force members disagreed on where the public should access the images and recordings. For example, in his November 27 proposal, Klarn DePalma suggested that there be one central location in the state where members of the public could view the images or listen to the recordings. He proposed FOIC's offices in Hartford, but indicated that he was open to other locations (e.g., State Police headquarters in Middletown).

However, other members believed that inspection of the images and recordings should be at the custodial agency's offices (e.g., a municipal police department). They argued that having a central repository would place an administrative burden on both the custodial agencies and the repository agency. Some of these members believed that, given the sensitivity of these records, they should remain with the custodial agency.

In response, one member argued that members of the public may feel intimidated by visiting a police department. Reflecting this view, James Smith proposed an amendment to require that municipal libraries (or the State Library) be the repositories of the images and recordings. The Task Force rejected this amendment, 16 to 1.

The Task Force concluded by recommending that the images and recordings be available for inspection at the custodial agency's offices.

Standard for Determining Whether to Disclose an Image or Recording

Task Force members agreed that the images and recordings should be disclosed under certain conditions and not be categorically exempt from disclosure. However, members disagreed as to what standard FOIC and courts should use in determining whether an image or recording should be released. The discussion focused on two tests, one from a state Supreme Court case (*Perkins v. Freedom of Information Commission,* 228 Conn.

158 (1993)) and one from a U.S. Supreme Court case (*National Archives and Records Administration v. Favish,* 541 U.S. 157 (2004)).

Perkins addressed a provision in Connecticut's FOIA that allows a public agency to withhold from disclosure a personnel, medical, or similar file if disclosure "constitutes an invasion of personal privacy" (CGS § 1-210b(2)). In *Perkins*, the Connecticut Supreme Court held that the disclosure of such a file would constitute an invasion of personal privacy only if (1) the file does not pertain to a legitimate matter of public concern and (2) disclosure would be highly offensive to a reasonable person. The burden of proof is on the public agency.

Favish addressed a provision in the federal FOIA that exempts from disclosure records or information compiled for law enforcement purposes if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy" (5 USC § 552(b)(7)(C)). In *Favish*, the U.S. Supreme Court held that the federal FOIA recognizes surviving family members' right to personal privacy with respect to death scene images of their close relatives. The Court held that a person who seeks a record covered by this exemption must provide a sufficient reason for disclosure and show that the public interest sought to be advanced is a significant one. The requestor must then show that the information requested is likely to advance that interest. Otherwise, disclosure would be considered an unwarranted invasion of personal privacy.

The Task Force thus debated whether to recommend the phrase "invasion of personal privacy" (the standard at issue in *Perkins*) or the phrase "unwarranted invasion of personal privacy" (the standard at issue in *Favish*). Some members preferred that the standard be "unwarranted invasion of personal privacy" because, under this standard, the public interest in disclosure is balanced with victim privacy. These members noted that *Perkins* does not balance these competing interests. For instance, under *Perkins*, if a record pertains to a legitimate matter of public concern, it must be disclosed, regardless of whether disclosure would be highly offensive to a reasonable person. These members also stated that, in FOIA-related cases, *Perkins* has previously been used only in the context of personnel, medical, or similar files held by public agencies. They argued that a test used for determining whether to release a public employee's personnel file should not be used to determine whether to release an image or recording relating to a homicide victim.

Other Task Force members preferred that the standard be "invasion of personal privacy." These members noted that Connecticut has used the *Perkins* test for 20 years and that it is a familiar standard for both requestors and public agencies. One member stated that, while the test is currently applied to FOIA-related cases only in the context of personnel, medical, or similar files, it is taken from tort law and could be applied to other records (e.g., the images and recordings at issue) if state statutes were amended. Supporters of the "invasion of personal privacy" standard also noted that the "unwarranted invasion of personal privacy" standard is used in the federal FOIA, a law that they believe is weaker than Connecticut's FOIA in terms of public access. Additionally, under Connecticut's FOIA, the burden of establishing an exemption from disclosure rests on the party

claiming it (i.e., the public agency). Opponents of using "unwarranted invasion of personal privacy" noted that it would be contrary to Connecticut's FOIA because, as interpreted by the U.S. Supreme Court in *Favish*, it would require the requestor to show a public interest in disclosure.

Professor Dunlap made a motion at the December 17 meeting that, as he stated, was intended to establish *Perkins* as the test for determining whether or not to disclose the images and recordings. The Task Force rejected this motion, 9 to 8.

The Task Force concluded by recommending that the images and recordings be exempt from disclosure under FOIA if such disclosure "would constitute an unwarranted invasion of personal privacy." This recommendation is similar, but not identical, to the federal FOIA, which uses the phrase "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The recommendation suggests that FOIC and Connecticut's courts would use a balancing test to determine whether to release the images and recordings. However, Task Force members disagreed as to whether that balancing test would necessarily be the test established by *Favish*. Some members who supported using the "unwarranted invasion of personal privacy" standard argued that *Favish* applied only to records requested under the federal FOIA and that FOIC and the state's courts are thus free to develop a different test. Other members, primarily those who supported using the "invasion of personal privacy" standard, argued that because the recommended language is so similar to the language from the federal FOIA, FOIC and the state's courts would be compelled to use the test established by *Favish*.

RECOMMENDATION 3: FURTHER STUDY OF VICTIM PRIVACY

Task Force Recommendation 3: The legislature should ask the Legislative Program Review and Investigations Committee or another suitable entity to further study the issue of victim privacy in all of its aspects and to make recommendations for any necessary legislative changes.

Vote: 14 to 3

DISCUSSION

The Task Force was charged with making recommendations concerning the balance between victim privacy under FOIA and the public's right to know. Its discussions focused on homicide victims specifically, but some members believed that the legislature needs to consider the privacy interests of other victims. Some of these members were particularly concerned about victims of violent crimes other than homicides (e.g., domestic violence and sexual assault), while others were concerned about a broader class of victims. For example, the Chief State's Attorney's and Victim Advocate's December 17 proposal recommended that the FOIA exemption for certain images additionally include images of people who are injured or the subject of a medical or other emergency.

The Task Force agreed that the privacy interests of other victims merited consideration. However, it believed it did not have enough information to decide whether its recommendations regarding images and audio recordings should be expanded to include other victims.

The Task Force thus recommends a study of current privacy protections for victims generally and whether further protections are needed. It specifically recommends that the Legislative Program Review and Investigations Committee conduct the study, but acknowledges that the committee may not agree to do so. In that case, the legislature should designate another suitable entity to conduct the study. The entity conducting the study should submit a report to the legislature with findings and any recommendations for legislative changes.

RECOMMENDATION 4: FISCAL IMPACT OF PROPOSED RECOMMENDATIONS

Task Force Recommendation 4: The legislature should consider the potential fiscal impact on state and municipal agencies of implementing the Task Force's recommendations.

Vote: 17 to 0

DISCUSSION

Recommendation 2 requires state and municipal agencies to provide an area where the public can view or listen to the images and recordings described in the recommendation. Commissioner Bradford stated that Recommendation 2 would have a fiscal impact on DESPP. In addition to providing such an area, the agency would also need to provide equipment for the public to listen to audio recordings as well as staff to provide the records and supervise the public using the viewing area. Currently, DESPP responds to most FOIA requests by mailing the records to the requestor and not by providing in-person inspection of the records.

Commissioner Bradford asked that the Task Force formally recommend that the legislature consider the fiscal impact of the recommendations on DESPP. Professor Dunlap noted that this burden would also extend to other agencies, such as municipal police departments. He offered a friendly amendment to the motion so that the recommendation would include the fiscal impact on all public agencies. The commissioner accepted this amendment, and the Task Force adopted the amended motion.

Task Force Report Prepared By:
Terrance Adams, Office of Legislative Research
Shannon McCarthy, Legislative Commissioners' Office
Connecticut General Assembly
Report # 2014-R-0009

APPENDIX A: MOTIONS AND VOTE TALLIES

The Connecticut General Assembly

Task Force on Victim Privacy and the Public's Right to Know

Co-Chairs:

Rep. Angel Arce, State Representative, Hartford

Don DeCesare, President and General Manager of
WLIS-AM in Old Saybrook
and WMRD-AM in Middletown

Legislative Office Building, Room 2200
Hartford, CT 06106

Phone: (860) 240-8517
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VOTE TALLY SHEET
Date: Wednesday, November 13, 2013
Legislative Office Building, Room 1C

Chair: DeCesare **Motion:** Ambrose **Second:** Kane

Action: Call the Question

	Yea	Nay	Abstain	Absent
Ambrose, Garvin	X			
Bradford, Reuben	X			
Coleman, Eric		X		
Depalma, Klarm	X			
Dunlap, William		X		
Fasano, Len	X			
Hovey, Debra Lee				X
Kane, Kevin	X			
Knox, Jillian				X
Koonz, Brian	X			
Mozdzer-Gil, Jodie	X			
Murphy, Colleen	X			
Smith, Jim	X			
Storey, Susan				X
Woods, Andrew	X			
Arce, Angel	X			
DeCesare, Don		X		
TOTALS	11	3	0	3

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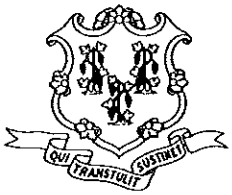

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VOTE TALLY SHEET
Date: Wednesday, November 13, 2013
Legislative Office Building, Room 1C

Chair: DeCesare **Motion:** Ambrose **Second:** Murphy

Action: Member not present to vote may designate a member of the task force. Effective date after today's meeting.

	Yea	Nay	Abstain	Absent
Ambrose, Garvin	X			
Bradford, Reuben	X			
Coleman, Eric		X		
Depalma, Klarm				X
Dunlap, William		X		
Fasano, Len	X			
Hovey, Debra Lee				X
Kane, Kevin	X			
Knox, Jillian				X
Koonz, Brian	X			
Mozdzer-Gil, Jodie	X			
Murphy, Colleen	X			
Smith, Jim		X		
Storey, Susan				X
Woods, Andrew		X		
Arce, Angel	X			
DeCesare, Don		X		
TOTALS	8	5	0	4

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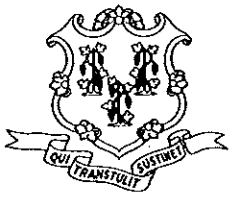

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VOTE TALLY SHEET
Date: Wednesday, November 13, 2013
Legislative Office Building, Room 1C

Chair: DeCesare **Motion:** Mozdzer-Gil **Second:** Koonz

Action: the identity of a witness who has not attained the age of 13 shall not be disclosed until witness attains the age of 18

	Yea	Nay	Abstain	Absent
Ambrose, Garvin		X		
Bradford, Reuben		X		
Coleman, Eric		X		
Depalma, Klarm	X			
Dunlap, William	X			
Fasano, Len		X		
Hovey, Debra Lee				X
Kane, Kevin		X		
Knox, Jillian				X
Koonz, Brian	X			
Mozdzer-Gil, Jodie	X			
Murphy, Colleen	X			
Smith, Jim	X			
Storey, Susan				X
Woods, Andrew		X		
Arce, Angel		X		
DeCesare, Don	X			
TOTALS	7	7	0	3

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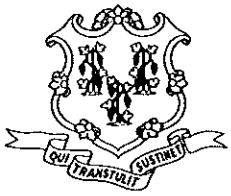

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VOTE TALLY SHEET
Date: Wednesday, December 17, 2013
Legislative Office Building, Room 1B

Chair: DeCesare **Motion:** Storey **Second:** Smith

Action: Except that the identity of a minor witness shall be made available at the request of counsel for a defendant in a criminal case, delinquency action or habeas corpus matter.

	Yea	Nay	Yea *(Voting by Proxy)*	Nay *(Voting by Proxy)*	Abstain
Ambrose, Garvin		X			
Bradford, Reuben		X			
Coleman, Eric		X			
Depalma, Klarn		X			
Dunlap, William		X			
Fasano, Len		X			
Hovey, Debra Lee		X			
Kane, Kevin		X			
Knox, Jillian		X			
Koonz, Brian		X			
Mozdzer-Gil, Jodie				X	
Murphy, Colleen		X			
Smith, Jim	X				
Storey, Susan	X				
Woods, Andrew		X			
Arce, Angel		X			
DeCesare, Don		X			
TOTALS	2	14	0	1	0

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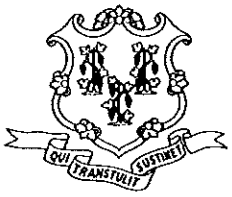

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VOTE TALLY SHEET
Date: Wednesday, December 17, 2013
Legislative Office Building, Room 1B

Chair: DeCesare **Motion:** Dunlap **Second:** Koonz

Action: the identity of a witness to a crime of violence, a sexual offense or a drug offense at the time of the request, was a minor as that term is defined in section 1-1d,

	Yea	Nay	Yea *(Voting by Proxy)*	Nay	Abstain
Ambrose, Garvin		X			
Bradford, Reuben		X			
Coleman, Eric		X			
Depalma, Klarn		X			
Dunlap, William	X				
Fasano, Len		X			
Hovey, Debra Lee		X			
Kane, Kevin		X			
Knox, Jillian		X			
Koonz, Brian	X				
Mozdzer-Gil, Jodie			X		
Murphy, Colleen		X			
Smith, Jim		X			
Storey, Susan		X			
Woods, Andrew		X			
Arce, Angel		X			
DeCesare, Don		X			
TOTALS	2	14	1	0	0

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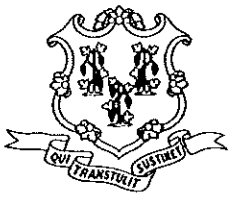

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VOTE TALLY SHEET
Date: Wednesday, December 17, 2013
Legislative Office Building, Room 1B

Chair: DeCesare **Motion:** Hovey **Second:** Fasano

Action: (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, (B) the identity of a witness to a crime of violence, sexual offense or a drug offense who, at the time of the crime or at the time of the declaration, was a minor as that term is defined in section 1-1d, (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,

	Yea	Nay	Yea *(Voting by Proxy)*	Nay	Abstain
Ambrose, Garvin	X				
Bradford, Reuben	X				
Coleman, Eric	X				
Depalma, Klarn	X				
Dunlap, William	X				
Fasano, Len	X				
Hovey, Debra Lee	X				
Kane, Kevin	X				
Knox, Jillian	X				
Koonz, Brian	X				
Mozdzer-Gil, Jodie			X		
Murphy, Colleen		X			
Smith, Jim		X			
Storey, Susan		X			
Woods, Andrew	X				
Arce, Angel	X				
DeCesare, Don	X				
TOTALS	13	3	1	0	0

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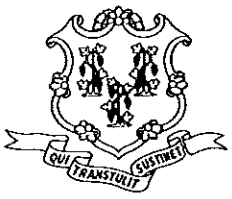

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VOTE TALLY SHEET
Date: Wednesday, December 17, 2013
Legislative Office Building, Room 1B

Chair: DeCesare **Motion:** Dunlap **Second:** Smith

Action: (a) An audio recording of an emergency 9-1-1 call or other call for assistance by a member of the public in regard to a homicide which captures, conveys or relates the impaired physical or mental anguish of the caller or another person; and
(b) a photograph, film, video or digital or other visual image depicting the condition of a body, or any portion thereof, of a victim of homicide.

The balance occurs in providing, first, that all such records are automatically available for listening and for visual inspection at the agency holding the record without need of any special showing and, second, in protecting from further unrestricted disclosure those records whose disclosure constitutes an invasion of personal privacy in the absence of a legitimate public interest.

	Yea	Nay	Yea *(Voting by Proxy)*	Nay	Abstain
Ambrose, Garvin		X			
Bradford, Reuben		X			
Coleman, Eric		X			
Depalma, Klarn	X				
Dunlap, William	X				
Fasano, Len		X			
Hovey, Debra Lee		X			
Kane, Kevin		X			
Knox, Jillian				X	
Koonz, Brian	X				
Mozdzer-Gil, Jodie			X		
Murphy, Colleen	X				
Smith, Jim	X				
Storey, Susan	X				
Woods, Andrew		X			
Arce, Angel		X			
DeCesare, Don	X				
TOTALS	7	8	1	1	0

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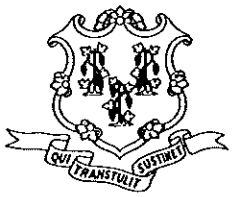

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VOTE TALLY SHEET
Date: Wednesday, December 17, 2013
Legislative Office Building, Room 1B

Chair: DeCesare **Amendment:** Smith **Second:** Murphy

Action: (a) An audio recording of an emergency 9-1-1 call or other call for assistance by a member of the public or interoperative recording among emergency and law enforcement personel in regard to a homicide in Newtown, Connecticut – December 14, 2012 which captures, conveys or relates the impaired physical or mental anguish of the caller or another person; and
(b) a photograph, film, video or digital or other visual image depicting the condition of a body, or any portion thereof, of a victim of homicide in Newtown, Connecticut – December 14, 2012.
The balance occurs in providing, first, that all such records are automatically available for listening and for visual inspection at the agency holding the record without need of any special showing and, second, in protecting from further unrestricted public disclosure those records the disclosure of which would constitute an unwarrrented invasion of personal privacy. In the case of emergency 9-1-1 calls, a transcript of the call is automatically available upon request at a reasonable cost.

	Yea	Nay	Yea *(Voting by Proxy)*	Nay	Abstain
Ambrose, Garvin		X			
Bradford, Reuben		X			
Coleman, Eric				X	
Depalma, Klarn		X			
Dunlap, William		X			
Fasano, Len		X			
Hovey, Debra Lee		X			
Kane, Kevin		X			
Knox, Jillian				X	
Koonz, Brian	X				
Mozdzer-Gil, Jodie				X	
Murphy, Colleen	X				
Smith, Jim	X				
Storey, Susan	X				
Woods, Andrew		X			
Arce, Angel		X			
DeCesare, Don	X				
TOTALS	5	9	0	3	0

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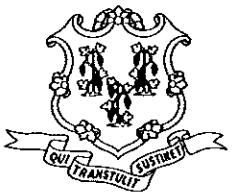

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VOTE TALLY SHEET
Date: Wednesday, December 17, 2013
Legislative Office Building, Room 1B

Chair: DeCesare **Motion:** Fasano **Second:** Hovey

Action: (a) An audio recording of an emergency 9-1-1 call or other call for assistance by a member of the public or interoperative recording among emergency and law enforcement personnel in regards to a homicide which captures, conveys or relates the impaired physical or mental anguish of the caller or another person; and (b) a photograph, film, video or digital or other visual image depicting the condition of a body, or any portion thereof, of a victim of homicide.
The balance occurs in providing, first, that all such records are automatically available for listening and for visual inspection at the agency holding the record without need of any special showing and, second, in protecting from further unrestricted public disclosure those records the disclosure of which would constitute an unwarranted invasion of personal privacy. In the case of emergency 9-1-1 calls, a transcript of the call is automatically available upon request at a reasonable cost.
Please note that, as drafted, the proposal uses the generic phrase "unwarranted invasion of personal privacy" as an example of what might be a workable standard. That phrase was selected because it is used in the federal FOI law and has been construed by the United States Supreme Court in Nat'l. Archives and Records Administration v. Favish, 541 U.S. (2004), as permitting public disclosure of records upon a showing by the requestor that, despite concerns of personal privacy, disclosure of the records is necessary because the record would warrant a belief in a reasonable person that a responsible official acted negligently or otherwise improperly in the performance of his or her duties.
New subsection (27) also gives those persons who are the subject of the record, or their next of kin in cases of death or disability, the right to notice and an opportunity to be heard prior to unrestricted disclosure, and it also affords them 24 hours advance notice before any decision or order calling for disclosure takes effect.

	Yea	Nay	Yea (Voting by Proxy)	Nay (Voting by Proxy)	Abstain
Ambrose, Garvin	X				
Bradford, Reuben	X				
Coleman, Eric	X				
Depalma, Klarn	X				
Dunlap, William	X				
Fasano, Len	X				
Hovey, Debra Lee	X				
Kane, Kevin	X				
Knox, Jillian			X		
Koonz, Brian	X				
Mozdzer-Gil, Jodie			X		
Murphy, Colleen		X			
Smith, Jim		X			
Storey, Susan		X			
Woods, Andrew	X				
Arce, Angel	X				
DeCesare, Don	X				
TOTALS	12	3	2	0	0

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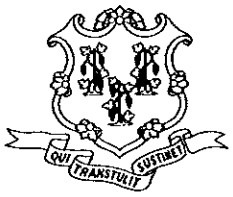

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VOTE TALLY SHEET
Date: Wednesday, December 17, 2013
Legislative Office Building, Room 1B

Chair: DeCesare **Motion:** Hovey **Second:** Fasano

Action: Request of the Legislature's Program and Review and Investigations Committee provide a thorough analysis of the needs of victims and their privacy in all of its aspects.

	Yea	Nay	Yea *(Voting by Proxy)*	Nay *(Voting by Proxy)*	Abstain
Ambrose, Garvin	X				
Bradford, Reuben	X				
Coleman, Eric	X				
Depalma, Klarn	X				
Dunlap, William	X				
Fasano, Len	X				
Hovey, Debra Lee	X				
Kane, Kevin	X				
Knox, Jillian			X		
Koonz, Brian		X			
Mozdzer-Gil, Jodie				X	
Murphy, Colleen		X			
Smith, Jim	X				
Storey, Susan	X				
Woods, Andrew	X				
Arce, Angel	X				
DeCesare, Don	X				
TOTALS	13	2	1	1	0

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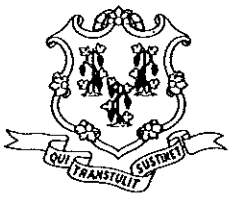

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VOTE TALLY SHEET
Date: Wednesday, December 17, 2013
Legislative Office Building, Room 1B

Chair: DeCesare **Motion:** Smith **Second:** Murphy

Action: Recommend that with respect to local jurisdictions that the material be deposited in the local library or the State Library with respect to the State Police

	Yea	Nay	Yea *(Voting by Proxy)*	Nay *(Voting by Proxy)*	Abstain
Ambrose, Garvin		X			
Bradford, Reuben		X			
Coleman, Eric		X			
Depalma, Klarn		X			
Dunlap, William		X			
Fasano, Len		X			
Hovey, Debra Lee		X			
Kane, Kevin		X			
Knox, Jillian				X	
Koonz, Brian		X			
Mozdzer-Gil, Jodie				X	
Murphy, Colleen		X			
Smith, Jim	X				
Storey, Susan		X			
Woods, Andrew		X			
Arce, Angel		X			
DeCesare, Don		X			
TOTALS	1	14	0	2	0

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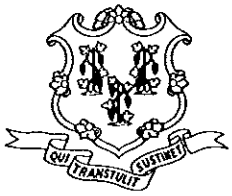

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VOTE TALLY SHEET
Date: Wednesday, December 17, 2013
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Chair: DeCesare **Motion:** Bradford **Second:** Fasano

Action: Recommend to the legislature that it take into account the fiscal implications of the other recommendations already voted by the task force.

	Yea	Nay	Yea *(Voting by Proxy)*	Nay	Abstain
Ambrose, Garvin	X				
Bradford, Reuben	X				
Coleman, Eric	X				
Depalma, Klarn	X				
Dunlap, William	X				
Fasano, Len	X				
Hovey, Debra Lee	X				
Kane, Kevin	X				
Knox, Jillian			X		
Koonz, Brian	X				
Mozdzer-Gil, Jodie			X		
Murphy, Colleen	X				
Smith, Jim	X				
Storey, Susan	X				
Woods, Andrew	X				
Arce, Angel	X				
DeCesare, Don	X				
TOTALS	15	0	2	0	0

APPENDIX B: SUMMARY OF PA 13-311

PA 13-311 exempts from disclosure under FOIA a photograph, film, video, digital, or other visual image depicting a homicide victim, to the extent that the record could reasonably be expected to constitute an unwarranted invasion of the victim's or surviving family members' personal privacy. The record must have been created by a law enforcement or other government agency.

The act also exempts from disclosure under FOIA (1) the portion of a recording or audio tape that describes a homicide victim's condition and (2) law enforcement records, compiled in detecting or investigating crime, that would disclose the identity of witnesses who are minors. The audio recording exemption (1) applies only to law enforcement agencies, (2) does not extend to 9-1-1 or other calls for assistance made by a member of the public to a law enforcement agency, and (3) expires on May 7, 2014. The exemption for a witness who is a minor applies only if disclosure would not be in the public interest. (All witnesses regardless of age are covered by a similar provision in existing law, but that provision limits the withholding to witnesses not otherwise known and to disclosures that would endanger the witness's safety or subject him or her to threat or intimidation.)

Lastly, the act establishes a 17-member task force to make recommendations regarding the balance between victim privacy under FOIA and the public's right to know.

Task Force

The act establishes a 17-member task force to consider and make recommendations regarding the balance between victim privacy under FOIA and the public's right to know. The members are:

1. the executive director of FOIC, chief state's attorney, chief public defender, state victim advocate, and DESPP commissioner;

2. one appointee of the Connecticut Council on Freedom of Information;

3. two gubernatorial appointees, one representing a crime victim advocacy organization and one representing municipal law enforcement;

4. a constitutional law professor jointly recommended by the Yale, Quinnipiac, and UConn law school deans;

5. four appointees of the Connecticut Society of Professional Journalists, one each representing television, radio, print, and electronic media; and

6. the Senate president pro tempore, House speaker, and Senate and House minority leaders or their designees, who must be legislators. (The speaker's designee must be a member of the legislature's Black and Puerto Rican Caucus.)

The act requires the task force appointments to be made by July 1, 2013 and its two chairpersons to schedule the first meeting, which must be held by August 1, 2013. The House speaker and Senate president pro tempore must select the task force's two chairpersons from among its members.

The task force must meet at least monthly through December 2013 and report its findings and recommendations to the legislature's majority and minority leadership by January 1, 2014. The task force terminates on January 1, 2014 or when it submits its report, whichever is later.

APPENDIX C: TASK FORCE MEETING AND PUBLIC HEARING DATES

Minutes and agendas of the Task Force's meetings and public hearings are available on the Task Force website: http://cga.ct.gov/gae/VPTF/taskforce.asp

Each meeting and hearing date is hyperlinked below to the Connecticut Network's (CT-N) video of that meeting or hearing. Videos may also be viewed by entering the meeting or hearing date on CT-N's website: http://www.ctn.state.ct.us/ondemand.asp

Meetings
August 1, 2013
August 21, 2013
September 4, 2013
September 18, 2013
October 2, 2013
October 16, 2013*
October 30, 2013
November 13, 2013
November 27, 2013
December 17, 2013
January 24, 2014

All meetings were held at the Legislative Office Building in Hartford.
*The meeting portion begins at 4:55:45 on the video.

Public Hearings
October 1, 2013 (Phillips Metropolitan CME Church, Hartford)
October 9, 2013 (City Hall, Bridgeport)
October 16, 2013 (Legislative Office Building, Hartford)

CT-N will maintain videos of the meetings and hearings on its website for up to two years. For information about purchasing DVDs from CT-N, please contact it directly. Additionally the State and Legislative libraries will archive DVDs of the Task Force's meetings and hearings. Please contact either of the libraries for further information about borrowing or viewing the DVDs. Please note that, due to technical issues, DVDs are not available for the August 21, 2013 meeting and the first four hours of the October 16, 2013 meeting and public hearing.

APPENDIX D: RESEARCH MATERIALS AND OTHER SUBMISSIONS

Research materials and submissions are hyperlinked below, except where noted. The hyperlinked materials and submissions may also be accessed from the Task Force's website: http://cga.ct.gov/gae/VPTF/taskforce.asp

LEGISLATIVE COMMISSIONERS' OFFICE MEMO

The Intersection of the Connecticut Freedom of Information Act and the Invasion of Personal Privacy

OFFICE OF LEGISLATIVE RESEARCH REPORTS

1. *Changes to Law Enforcement Records Disclosure Requirements* (2013-R-0401)
2. *Comparison of Proposals Submitted to Task Force on Victim Privacy and the Public's Right to Know* (2013-R-0470)
3. *Crime Victims* (2013-R-0360)
4. *Criminal Discovery Rules* (2013-R-0433)
5. *Definition of the Term "Minor" Under Connecticut Law* (2013-R-0382)
6. *Freedom of Information Laws and the First Amendment* (2013-R-0439)
7. *Interviewing Minors and Restrictions on Disclosure of Juvenile Records* (2013-R-0406)
8. *Laws Allowing Records to be Inspected but Not Copied* (2013-R-0435)
9. *Laws in Other New England States Concerning the Disclosure of Witnesses' Identities* (2013-R-0417)
10. *Other States' FOI Exemptions Protecting Personal Privacy* (2013-R-0384)
11. *Release of Death Certificates* (2013-R-0389)
12. *States' Laws on Disclosing Crime Scene Photographs, Autopsy Reports, and 911 Tapes and Transcripts* (2013-R-0364)
13. *Summary of National Archives v. Favish* (2013-R-0358)

OTHER SUBMISSIONS

Connecticut Foundation for Open Government, *Privacy and the Public's Right to Know (White Paper)*

James H. Smith, *Response to OLR on the First Amendment and FOI*

PRESENTATIONS

September 4, 2013
Department of Emergency Services and Public Protection*
Freedom of Information Commission*
Office of the Victim Advocate*
Professor William V. Dunlap*

September 18, 2013
Office of Legislative Research and Legislative Commissioners' Office
Representative Angel Arce*

October 16, 2013
Office of Legislative Research

PUBLIC HEARING TESTIMONY

Claude Albert, Connecticut Council on Freedom of Information
Kim Bassett, Sandy Hook
Shari Burton, para-educator at Sandy Hook
Rosanna Cavanagh, executive director, New England First Amendment Coalition
Michelle S. Cruz, former state victim advocate
David Cuillier, president, Society of Professional Journalists
Jim Cutie and John Dankosky, WNPR
Mayor Bill Finch, Bridgeport
Robert Fromer
David Godbout
Nicole Hockley, mother of a Sandy Hook victim*
David G. Jacob, licensed clinical social worker
Jonathan Kellogg, *Waterbury Republican-American* and New England Society of News Editors
Coleen Marren, Connecticut Broadcasters Association and FOXCT
Sheila Matthews, co-founder, Ablechild.org
David McGuire, American Civil Liberties Union
Mitchell W. Pearlman, lecturer in law and journalism, University of Connecticut
Dean Pinto, father of a Sandy Hook victim
Rev. Robert L. Rafford, professional genealogist
Morgan Rueckert, Shipman & Goodwin (counsel for 22 Sandy Hook families)
Michael P. Ryan, Connecticut Broadcasters Association
Bill Sherlach, husband of a Sandy Hook victim*
Chris VanDeHoef, president, Connecticut Daily Newspaper Association
Becky Virgalla, Sandy Hook

TASK FORCE MEMBERS' WRITTEN PROPOSALS

November 27, 2013
Representative Angel Arce
Klarn DePalma
Senator Leonard A. Fasano
Kevin T. Kane

December 17, 2013
Garvin G. Ambrose and Kevin T. Kane

*No record submitted

APPENDIX E: TASK FORCE MEMBER STATEMENTS

Don DeCesare, President & General Manager, WLIS-AM, Old Saybrook & WMRD-AM, Middletown, Co-chair, Task Force on Victim Privacy and the Public's Right to Know.

It has been my privilege to be a Co-chair of the Connecticut Task Force, as created by PA 13-311, on Victim Privacy and the Public's Right to Know. Throughout the six months of its term I have treated my responsibilities most dutifully and hope my efforts will have contributed to the vital public policy debate which was instigated by the murders at Newtown in December, 2012.

The Task Force report, which precedes this Statement, contains our recommendations to the Legislative leadership. These recommendations are strong, as the votes on them were overwhelmingly affirmative. No one, however, should underestimate the intense negotiation and the true spirit of compromise which were required to achieve the recommendations contained in the report. No one should presume they would have been the same had we voted on alternatives, either towards the privacy side or the public information side. Indeed the Task Force's recommendations are truly the product of many weeks of discussion and negotiation. They represent the best that both sides could achieve through mutual agreement.

For myself I am most pleased that -- overwhelmingly -- the Task Force not only reaffirms the public's right to inspect and review all official documents and materials, both audible and visual, associated with homicides, but to do so in a timely manner. Beyond that, our recommendations provide a prospective framework to allow the public access without risking unauthorized duplication or distribution of the materials. The working journalists on the Task Force voted for these recommendations despite the proposed necessity for materials review to take place within a repository, established at the custodial agency. I do not doubt that the journalist members wrestled, as did I, with the instinct to reject something which places conditions upon access. However, it should be remembered, the conditions we recommend do maintain the principle of full public availability, yet provide a balanced, direct response to the public's revulsion at the prospect of the release and subsequent dissemination of horrifying photos and videos.

Like me, the working journalists among us would, I am sure, have preferred a simpler means by which to gain access to these public materials. However, mindful of the sensitivity surrounding the gruesome nature of some materials, particularly those from the scenes of multiple homicides, a large majority of the Task Force came to believe that guaranteed public access, albeit without immediate general distribution, was preferable to no public access at all, which is what PA 13-311 provided. We tried to protect against potential governmental malfeasance by inserting a reasonable appeal process, which

could provide full public release through the already existing FOIC and, if necessary, the courts. Adopting these recommendations into law, as we have written them, should again place Connecticut at the forefront in providing public access to official documents, photos, and videos, something which the State lost under PA 13-311.

The Task Force's recommendations with regard to visual and audible homicide evidence apply solely to materials initiated by or collected within Connecticut by state and municipal, law and/or justice authorities. We do not address, nor should we have addressed, materials enterprised or collected independently by the citizenry at large. Whatever one may think of the propriety of publication or distribution of such materials, clearly, under the First Amendment, they are subject only to the judgment of the person or persons who created them, as are any comments issued in relation to them. The Task Force properly avoided any consideration of materials created, collected, or owned independent of the State or its municipalities. Our recommendations do not apply in any way to the First Amendment rights of any citizen.

The Task Force's recommendations also address Section 1 of PA 13-311, which in five words --"the identity of minor witnesses" -- created an entire class of citizens who might never be accountable for statements they made, signed or unsigned, to the authorities. We debated this clause strenuously and, in the end, agreed, again overwhelmingly, to limit it. I am disappointed that more members could not see the real danger of allowing, even encouraging, potentially untruthful statements. I, and others on the Task Force, felt we should recommend striking Section 1 altogether. After the lengthy debate I became convinced that specific limitations are preferable to the unlimited sweep of the Public Act's existing language. And so, jointly with my co-chair, then joined by other members of the Task Force, we proposed the limited exemptions, which then passed overwhelmingly and became the Task Force's recommendation. I was among those voting for it. Nevertheless, I do believe this topic -- noting the lamentable loss of innocence among so many of our youth -- deserves further discussion and consideration by the Legislature. In the meantime, the Task Force's recommendation can achieve for law enforcement and the justice system all of what we perceived to be needed to protect minors and encourage witnesses at the same time.

There is one further Task Force recommendation deserving of highlight: that associated with Section 4 of PA 13-311. By this recommendation we urge the Legislature, to study deeply -- through public committee hearings, forums, commissions, submissions, or any other appropriate means, including potentially another Task Force -- the broader public policy questions associated with victim privacy in an information age. Connecticut's Freedom of Information Law, now forty years old and already revised numerous times, seems too often, as one of our members said, to be gauged both the villain and the savior, depending on who is addressing it, when complicated and sensitive public policy issues are raised. New exemptions to it -- even the ones we are recommending here -- only serve to frustrate the public's belief that government should have nothing to hide. From my perspective, given the history of the law and the complexity of interpreting its numerous amendments, revisions, and exemptions, it would

seem prudent to undertake a thorough review with the dual aim of simplifying and clarifying it for all, yet preserving its intent.

With the preceding report, the "Task Force on Victim Privacy and the Public's Right to Know" has forthrightly addressed vital issues of public policy, which required deeper study than was available to lawmakers at the end of the last legislative session. Our recommendations provide a framework which fulfills our charter: to find a balance between the privacy rights of homicide victims (and their families) and the public's right to know what its government is doing and has done on the public's behalf. Clearly the issues which we debated are of sufficient consequence that our recommendations, even if made law intact, cannot nor should not end the considerations we have begun.

January 20, 2014

Jodie Mozdzer Gil Statement on Task Force Recommendations

A revision to the state's FOI act approved by the Connecticut General Assembly in 2013 added unnecessary restrictions to the release of public information regarding crimes. When asked to appoint four members to the task force, the Connecticut Pro Chapter of the Society of Professional Journalists (CTSPJ) did so with the hope of regaining all of the transparency that was lost.

The CTSPJ board appointees ultimately supported a compromise. I want to make clear that I supported the compromise because I believed the option to be the lesser of two evils.

My first choice would have been to repeal Public Act 13-311 and revert the FOI Act to its existence prior to June 2013. I supported a compromise because it allows review -- albeit under burdensome circumstances -- and provides a window into possible release.

The Task Force was stacked with members who indicated they wanted to see MORE restrictions on the release of public records. FOI and press advocates were in the minority. It became clear the best chance at getting movement away from a bad law would be to meet in the middle.

The Task Force held public hearings -- an important step that was ignored during the crafting and approval of Public Act 13-311. After hearing broad and balanced testimony, the Task Force came to the consensus that the law needs to be changed.

Public Act 13-311 is not appropriate. It lacks the transparency required in our democracy. While not ideal, the compromise is a shift in the right direction -- one supported by even those on the board who initially wanted more restrictions.

The following are my main concerns with the current recommendations:

- The standard for release should be *Perkins*, not *Favish*. The burden should not be on the public to prove a record should be public, as the *Favish* standard requires. Both Public Act 13-311 as it exists, or the task force's proposed use of the *Favish* standard bring Connecticut to the bottom half of the state FOI spectrum in regards to openness and transparency.

- The addition of 911 calls to the Task Force recommendation is a bad idea. The legislature wisely left 911 calls out of the original act.

I hope this Task Force recommendation is a first step toward a widespread conversation about the need for open government and a move back to the respected FOI Act our state has long had.

Statement of Colleen M. Murphy, Executive Director and General Counsel, Connecticut Freedom of Information Commission, and Member of the Task Force on Victim Privacy and the Public's Right to Know

Background:

Government records belong to the people, not to the government. Every exemption to the Connecticut Freedom of Information Act ("FOIA") chips away at the public's right to know. Even the most well-intentioned exceptions, which are borne out of unimaginable tragedy, loss and horror, can lead to unintended results and consequences, if not crafted in a careful, thoughtful and balanced manner and in a way which will hold up over time. When we start restricting what information the public can and cannot have access to in a free society (even when it is understandable why we want to do it), we create a society that is less free, particularly when it comes to questioning government authority when things go wrong. This may not be apparent today, just over one year after the events of December 14, 2012, but it will become more evident over time; and the exemptions passed during the 2013 legislative session, coupled with the recommendations by the task force majority, will likely be used to further chip away at our collective right to know.

As is well documented, exemptions to the FOIA for crime scene records and legislation to create the Task Force on Victim Privacy and the Public's Right to Know were passed in the waning hours of the 2013 legislative session, without a public hearing or public input (P.A. 13-311). The urgency for the legislation was based only upon a false rumor (that a noted filmmaker sought to obtain and publish photos). The task force was hobbled from the start – since it came into existence after legislation had already passed and it was essentially asked to consider (in hindsight) whether the legislature got it right.

However, even under these circumstances, it was an honor to serve on this task force. I felt the weight of its charge every day. It struck me from the beginning, however, that the privacy proponents on the task force wanted to do two things: 1) scale back Connecticut's FOIA as a way to mitigate the pain of the horrific events of December 14, 2012, and the pain felt generally by other crime victims; and 2) legislate good judgment or appropriate taste. The problem with the former is that not a single example was brought forward evidencing how a disclosure under the FOIA had yielded a harmful result. The problem with the latter is that legislating appropriate taste is an impossible and illusory task. Therefore, it is my belief that scaling back the FOIA will not achieve either goal sought by the proponents.

Regrettably, I am unable to support the bulk of the recommendations (Recommendation 4 is the exception) approved by the task force as a whole, for the reasons outlined below.

Recommendation 1:

The proposed recommendation is to further define the exemption for the identity of minor witnesses that was passed in P.A. 13-311. See Conn. Gen. Stat. §1-210(b)(3)(B). The recommendation is to continue the exemption for minor witnesses (under the age of 18) but only for crimes of violence, drug offenses, or sexual offenses. The issue with the new exemption passed in P.A. 13-311, as well as the revised version recommended by the task force majority, is its assumption that the young age of a witness is equivalent to innocence and the need for protection. Sadly, we must recognize that this is not always the case. More and more it seems we hear terrible stories where children are the perpetrators of horrendous crimes (including newspaper accounts today stating that a 12 year old allegedly shot two fellow middle school students in New Mexico). We must honestly ask ourselves whether it makes sense to exempt an entire category of witnesses, for all time, solely based on age.

The reasons expressed as to the need for this exemption (fear of intimidation or potential harm to a witness) are already covered by an existing exemption in the FOIA for "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." See Conn. Gen. Stat. §1-210(b)(3)(A). The FOIA contains another exemption for signed statements of witnesses. See Conn. Gen. Stat. §1-210(b)(3)(C).

If there is a need for greater confidentiality in this area, it would have been better to reduce the age of the witness to which it applied or qualify its application in some way. For, what if the information provided is false and intentionally so? False witness testimony, regardless of the age of the witness, can cause serious harm to the livelihood and reputation of others. Under this new exception, the witness's identity is shielded forever, regardless of the passage of time or any extenuating circumstances. There is no balance in this approach. The Chief Public Defender proffered some excellent examples regarding the need for access to witness information, particularly by defense counsel, but those points did not take root with the task force majority.

Recommendation 2:

P.A. 13-311 created a new exemption for crime scene photographs of a homicide, if disclosure of such photographs would constitute an ***unwarranted invasion of privacy***. By inserting those four words into the FOIA, the legislature did something dramatic. It imported a new standard restricting disclosure that derives from a broadly-read exemption contained in the federal FOIA (5 U.S.C. §552(b)(7)(C), as interpreted in National Archives and Records Administration v. Favish, 541 U.S. 157 (2004)). And in creating this exemption, the legislature endorsed a standard that had been entertained and rejected by the Connecticut legislature when it passed the FOIA in 1975.

By codifying the new standard in P.A. 13-311, the legislature has opened the door to a concept never before recognized under the FOIA in its 38 year existence. And in doing so, it shifts the burden to a person who makes a request for a public record to establish that disclosure is "warranted." Regarding all other FOIA exemptions, the government agency has the burden of proving that a record cannot be disclosed. This new course is not a good one for Connecticut to travel. Examples were provided as to how the standard under the federal law has been used by the federal government in some startling and unsettling ways (e.g., the case of Terry Anderson, whose requests under the federal FOIA to the FBI were initially rejected, in part, because Anderson needed to get a notarized letter of authorization to release information from the terrorists who had held him captive for nearly seven years in Lebanon).

Now, the task force wants to open the door further than the legislature did in P.A. 13-311. The majority's recommendation is to expand the application of this standard beyond homicide photographs and to add: film, video or digital or other visual images depicting a homicide victim, as well as 911 calls or "interoperative" recordings pertaining to homicides.

This is the type of chipping away that we all should fear. What records will be the next to be considered under this "unwarranted invasion of privacy" standard in the future? Will the burden eventually always be on the requester to establish that there is a sufficient reason for disclosure or negligence on the part of government officials in order to obtain access to public records previously in the public domain?

While it is appreciated that the recommendation permits for inspection or access to such records, with the right to obtain a copy ***if*** the requester can overcome his burden of proof and establish that disclosure is warranted, the incorporation and expansion of the so-called Favish standard into the FOIA is objectionable.

A better approach would have been to utilize a standard that is already contained in the FOIA, relative to personnel, medical and similar files. (See Conn. Gen. Stat. §1-210(b)(2), providing that nothing in the FOIA shall require the disclosure of personnel, medical and similar files, the disclosure of which would constitute an invasion of privacy). That standard provides for confidentiality of public records ***only if***: disclosure of the contents of the records would be highly offensive to a reasonable person; and if there is no legitimate interest in the information. See, Perkins v. Freedom of Information Commission, 228 Conn. 158 (1993).

This invasion of privacy test has been in existence for twenty years – it is relatively easy to apply, broadly known and understood, and would work in the context of the records that were the focus of the task force. Several task force members were opposed to utilizing the existing standard claiming that it only works in relation to public employees (and their personnel, medical and similar files). However, that argument is flawed. If the legislature wanted to, it could extend the exemption in existing law (i.e., Conn. Gen. Stat. §1-210(b)(2)), to apply to crime scene records. By rejecting this

approach, the task force majority is, in effect, saying that it doesn't want the public's interest and the sensitivity of the records to be considered in an objective way under the Perkins rationale.

The task force majority report also incorporates additional language that was contained in a December 17, 2013 proposal put forward by the Victim Advocate and The Chief States Attorney but was not voted upon by the task force as a whole. The task force clearly and purposefully only endorsed concepts. (See items 5 through 10 under Task Force Recommendation 2, page 13, as well as the Vote Tally Sheet, page 28 of the January 6, 2014 draft, describing the action of the task force). The report erroneously includes several items that were contained only in draft legislative language that was not voted upon by the task force.

For example, there are several references to a new exemption 27 in the FOIA that would provide specific types of notice under specific time periods to the subjects or the records or their next of kin. Likewise, there are provisions referenced that would make the copying of a public record, without prior authorization, a Class D felony (equivalent to strangulation, promoting prostitution and robbery, among other crimes, punishable by up to five years in prison). These provisions should not be included in the recommendations contained in the report. As a counterpoint, it is noted that under current law, a public official's failure to comply with an order of the FOI Commission is merely a Class B misdemeanor. See Conn. Gen. Stat. §1-240.

Recommendation 3:

This recommendation urges the legislature to ask the legislature's Program Review and Investigations Committee to further study the issue of victim privacy in all of its aspects. Further study of this kind is likely to be ineffective for the following reasons. First, Senator Coleman (a member of such committee) indicated at the December 17, 2013 task force meeting that the committee only takes up a few requests directed to it each session. And, he indicated that thereafter, the legislature doesn't take up the committee's recommendations very often.

Moreover, the scope of the inquiry is too broad – what is meant by "victim privacy in all of its aspects" (under freedom of information, the first amendment, court processes?). The task force itself had an extremely difficult time defining the issues and the appropriate balance under its very limited assignment. If the Program Review and Investigations Committee (or another entity, such as another task force) were to examine this topic at all, its scope must be limited and refined. It must also be directed to take into account the actual scope and breadth of existing privacy law, as enunciated in other statutes and interpreted by our courts.

Recommendation 4:

This recommendation urges the legislature to consider the fiscal implications to state and municipal agencies of implementing the recommendations of the task force. I voted in favor of this recommendation.

There may be significant fiscal implications to state and municipal police (who, pursuant to the recommendations will be required to designate a secure viewing area and personnel to monitor the public's access to the records covered under the proposed exemptions). In addition, there will likely be fiscal implications for the FOIC, which will be required to hear and decide appeals from requestors: 1) seeking copies of public records covered under the proposed exemptions: 2) alleging denials of access to the subject records for listening or viewing purposes; and 3) alleging denials of access to requests for transcriptions. All of these implications should be considered in connection with the recommendations put forward by the task force majority before additional changes are made to the FOIA.

Official statement of Task Force member James H. Smith, president of the nonprofit Connecticut Council on Freedom of Information.

Crime is a problem in the United States and in Connecticut. A big problem.

The people hire police and other first responders to protect them from crime. It is clear in the deliberations of this Task Force that law enforcement personnel have become too entangled with victims and the families of victims *after* crimes, horrendous crimes, are committed.

Aside from the duty to investigate and solve crimes, it is not the job of police to expend resources on victims and their families. The people pay the staff of the Office of the Victim Advocate to assist the families of victims. All the police personnel and time spent there, is time and resources not spent protecting the public – all the people – whom they are paid to protect. It is a disturbing trend to see police posted outside the homes of victims' families, or to hear threats from officials that news reporters' vehicles will be ticketed or jaywalking statutes will be strictly enforced.

Now, with this vote recommending more secrecy in law enforcement actions, the people the police are supposed to serve will be denied information they deserve to know about crimes and how they are solved or not solved.

The General Assembly leadership and the governor appointed this 17-member Task Force with a built in 9-member majority favoring privacy and secrecy. Although there was much expert testimony and many written submissions presented on the people's right to know, there was very little analysis given to, or evaluation of that testimony and those viewpoints beyond a few questions asked of some of those testifying.

It is historic fact that police, particularly the state police, consistently violate the state's Freedom of Information laws by refusing to release nonexempt information about ongoing criminal investigations. There are specific exemptions: signed statements of witnesses, investigatory techniques not otherwise known, uncorroborated allegations, for example. Otherwise, documents are presumed to be public, but the FOI Commission docket is clogged with complaints from citizens and the press seeking public information the police routinely withhold.

If the legislature adopts the recommendations of this Task Force, it will make it easier for law enforcement to keep secret what the people in a free and open society should know. In the name of sympathy for those families who have suffered from crimes against them, too many public servants are opting to deny the public its right to fully understand the violence being committed. It often has been the families of victims who need FOI access to law enforcement records to show malfeasance or misfeasance and to find justice.

We should not have to make judgments on public policy based on half-truths or partial truths or emotions. It is better to solve society's ills knowing the whole truth or as much of the truth as we can know. So, for example, when this Task Force recommends putting 911 tapes off limits, tapes that have always provided first-hand knowledge to the public about criminal activity, it is a move away from accountability, away from understanding, and away from trying to solve the problems of violence in our culture.

The proponents of "privacy" have offered a small window into what historically has been open to the public – a place in a police department where someone can look at crime scene photos and listen to 911 tapes, but not copy them except through a long and laborious process. The task force has even taken the outrageous step – a first for FOI laws, proposing that it be a felony, punishable by imprisonment, if those records are copied without permission.

The FOI statutes could use tougher fines against those officials who violate the law. Perhaps we should change the law to include felony convictions and prison sentences for officials who break FOI law by refusing to release public information. Do you see the lunacy in the proposal?

The Task Force has proposed permanent harm to Connecticut's historically highly regarded FOI laws. It has turned the system on its head, for the first time pushing the burden of proof from the government to the people. It has always been in this democracy that the government must show why a document can remain hidden from the public. Now it is proposed that the people must show why it should be released to them. The Task Force recommends eschewing our long-held "Perkins" test in favor of the watered down federal "Favish" standard. An "unwarranted invasion of privacy," (Favish) is a standard that makes it easier to keep something secret than our traditional two-pronged test (Perkins) requiring the government to show that the information sought is "highly offensive to a reasonable person AND does not pertain to a matter of legitimate public concern" in order to be withheld from public scrutiny.

I will venture to say, though I will let them speak for themselves, that the SPJ appointees voting with the majority did so to preserve at least that little crack of openness provided in the "compromise." I cannot imagine they approved of the shift of burden of proof or the lower bar in the "unwarranted invasion of privacy" standard.

The federal FOI system has been recognized for decades as being inferior to Connecticut's. Republican state Sen. Lewis B. Rome, rising to support passage of our FOI statue in 1975, called it "landmark legislation." He observed that, "It is unfortunate that the atmosphere in Washington is . . . such that they would not consider adopting the very same kind of language . . . I hope that we would unanimously support the legislation as witness (to) our good intentions and good faith in the idea that government belongs to the people."

Sen. Rome got his wish. The General Assembly unanimously approved our FOI statue and Gov. Ella Grasso, who had campaigned for FOI legislation with statements like "people are tired of a state government that hides its acts behind a curtain of secrecy," signed it into law. She promised a government that is "open, honest, vital and concerned." She won the election, the first woman in the United States ever elected in her own right to be a governor, by some 204,000 votes, the second highest margin of victory in the state up to that time.

The legislature should still heed Mr. Rome and Mrs. Grasso and reject the recommendations of this Task Force.

Office of Chief Public Defender
State of Connecticut

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Statement of Attorney Susan O. Storey, Chief Public Defender

The process by which **P.A. No. 13-311,** ***An Act Limiting the Disclosure of Certain Records of Law Enforcement Agencies and Establishing a Task Force Concerning Victim Privacy Under the Freedom of Information Act,*** was passed is disturbing, even though well intentioned to protect the families of Newtown and others who had endured unspeakable horror and grief. This legislation was far too important to the general public and their right to have access to information to formulate the legislation in private and to engage a Task Force after the fact for an issue that should have had a full public hearing before a vote was taken. Additionally, some of the members of the Task Force, including legislators, prosecutors, and law enforcement were those that drafted the legislation. This membership gave the Task Force the appearance of being politically imbalanced and too emotionally invested to independently debate the issues and make further recommendations.

P.A. No 13-311 and the recommendations made by the majority of the Task Force further restrict the public's ability to obtain certain law enforcement information and interfere with the due process and 6th amendment constitutional rights of defendants and the legitimate defense obligation to fully investigate and defend individual client's liberty interests.

The role of the public defender is to make sure that the constitutional rights of all indigent children and adults charged with crimes in Connecticut are zealously exercised and that their liberty interests are protected. Zealous and informed defense advocacy is a critical part of the justice system without which Connecticut could have no faith and confidence in our court system to administer justice fairly. One of the most important constitutional obligations that criminal defense counsel owes a client under the 6th amendment is to

independently and thoroughly investigate the facts and circumstances of the case. While this responsibility includes formal requests for "Discovery" from the prosecution according to the Connecticut Practice Book rules, defense counsel relying entirely on the limited materials obtained through the discovery process or even through a prosecutor's "open file" potentially places a client's liberty interest in jeopardy.

The American Bar Association Criminal Justice Standards define this criminal defense function in the following manner **(emphasis added)**:

ABA Part IV – Defense Function
Standard 4-4.1 Duty to investigate

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore **all avenues** leading to the facts relevant to the merits of the case and the penalty in the event of conviction. **The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities.** The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

Further limiting an attorney's ability to obtain information through FOI regarding witnesses hampers the required defense function to investigate through "all avenues." Defense counsel's independent investigation requests for law enforcement information through FOI have revealed instances where prosecutors have withheld exculpatory evidence from defense counsel either non-intentionally or intentionally resulting in the arrest, prosecution and conviction of innocent persons. In some cases, important law enforcement documents are not forwarded to the prosecutors by the police and therefore parties are unaware of their existence. Task Force members were made aware of just such a case where a public defender obtained exculpatory information about a minor witness through FOI, brought it to the prosecutor's attention and the serious charges were dropped against the accused.

Just recently, a petitioner seeking federal habeas relief was granted such relief due to the Judge's finding that the prosecution had suppressed exculpatory evidence that resulted in his conviction for a double homicide. **See -*Scott Lewis v. Commissioner of Corrections,*** US District Court, District of Connecticut decision - December 16, 2013. Furthermore, the Court in ***Gregory v. United States***, 369 F.2d.185 (D.C. Cir1966) emphasized that,

"A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which truth may be determined." The Court went on to state that there was "unquestionably a suppression of the means by which the defense could obtain evidence."

The Task Force majority has proposed recommendations that would shift the burden of proof for the need to know from the government to the public. The legislature should have real concerns that the law that was passed and the recommendations that are proposed will allow undue secrecy by law enforcement and further erode public confidence in Connecticut's criminal justice system.

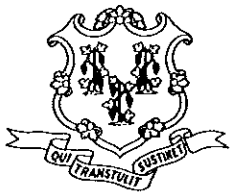
The Connecticut General Assembly

Task Force on Victim Privacy and the Public's Right to Know

Co-Chairs:

Rep. Angel Arce, State Representative, Hartford

Don DeCesare, President and General Manager of
WLIS-AM in Old Saybrook
and WMRD-AM in Middletown



Legislative Office Building, Room 2200
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Tuesday, December 17, 2013, 9:30 am, Legislative Office Building, Room 1B Meeting of:

Task Force on Victim Privacy and The Public's Right to Know

Members present: Rep. Angel Arce, Co-Chair; Don DeCesare, Co-Chair; Garvin Ambrose; Reuben Bradford; Sen. Eric Coleman; Klarn DePalma; William Dunlap; Sen. Len Fasano; Kevin Kane; Antoinette Webster (associate of Commissioner Bradford); Brian Koonz; Colleen Murphy; Jim Smith; Andrew Woods; Rep. Debra Lee Hovey; Susan Storey; Jillian Knox

Member absent: Jodie Mozdzer-Gil

I. Co-Chair DeCesare convened meeting at 9:50 am. Noted absence of Jodie Mozder-Gil due to her being ill with the flu, wished her well. Brian Koonz will vote Jodie Mozder-Gil's proxy. Atty. Ambrose has Jillian Knox's proxy, she is delayed due to traffic.

II. Motion to approved minutes of November 27, 2013 meeting by Sen. Fasano, seconded by Atty. Kane.

III. Discussion re: Sections 2 & 3 of Mr. Ambrose' Overview of Conceptual Recommendations Regarding FOI law. Discussion also included 4 proposals already submitted and condensed in a comparative study by OLR.

Rep. Hovey offered a motion, seconded by Sen. Fasano, to accept language of the November 17, 2013 draft, re: Section III B – the identification of a minor witness.

Comments by Susan Storey; Kevin Kane; Professor Dunlap and Sen. Fasano. Concern voiced by Professor Dunlap that law would restrict ability of defense lawyers to obtain information. Chair DeCesare stressed that goal is to look for a path of agreement.

Mr. Smith commented that state should not pass laws that are unconstitutional. Sen Fasano responded that this is not an unconstitutional law; law that was passed states that the identification of a minor is protected.

Chair DeCesare reminded members that Task Force is only making recommendations not law.

Atty. Storey proposed amendment that would allow for identification of a minor witness to be made available at the request of counsel.

Five minute recess was granted by Chair to allow discussion among members.

Discussion followed on Atty. Storey's amendment, which was seconded by Mr. Smith. Motion is to add to Section III B: identification of a minor witness be made available at the request of counsel for a defendant in a criminal case, delinquency action, or habeas corpus.

Atty. Kane said there already are exceptions in FOI. Main purpose is to protect witnesses. Prisoner might get information this way and not be restricted.

Mr. Smith said that the Constitution gives the right to have a witness face a defendant.

Further discussion from Atty. Kane and Colleen Murphy.

Roll call on Storey amendment:
2 Yeah
15 Nay
Motion Failed

Professor Dunlap offered an amendment which would change the language to age at the time the witness made a statement, not when event occurred. Seconded by Mr. Koonz.

Discussion: Rep. Hovey; Atty. Webster; Amendment edited to read "declaration" instead of "statement".

Further discussion. Clerk called roll:
3 Yeah
14 Nay
Amendment failed.

Sen. Fasano offered an amendment changing "crime" with "declaration". Seconded by Rep. Hovey. Friendly amendment: "who at the time of the crime or declaration…"

Discussion: Mr. Koonz; Atty. Webster

Vote on original motion by Rep. Hovey with friendly amendment by Sen. Fasano.
Clerk called roll:
14 Yeah
3 Nay
Motion passed as amended.

Sections II and III will be treated together in further discussion.
Chair thanked OLR for all of its research.

IV. Discussion re: crime scene photos, videos and intraoperative audio created on-scene by first responders communication with each other.

Re: Repository: CT would create a place or vehicle by which materials would repose for public view, not distribution.

Atty. Murphy said that in contested cases records are transferred to FOI and records are usually copies.

Discussion: Rep. Hovey; Chair DeCesare. Question of expanding beyond "homicide".
Discussion: Atty. Webster; Mr. Smith

Majority of states have rejected Favish ruling which gives most protection to victims. Chair DeCesare said the press for the most part has been responsible for years.

Atty. Kane said that there is a wide variety of homicides. No restriction on viewing information and materials.

Sen. Fasano stated that it is not unique for CT to be passing this law.

Atty. Storey questioned how a repository would work.

Mr. DePalma stated that at Ch. 3 TV public can make an appointment to view whatever records they wish to see; copies on public file can then be purchased.

Mr. Smith said that the Perkins test is CT's standard or good balance. Favish standard is not a good balance.

Mr. Koonz defended the media saying the 911 tapes from Sandy Hook were handled respectfully and in a well-controlled fashion. Mr. Smith said the concern of FOI is to present society as it is.

Atty. Kane said that photos infringe on people's privacy, government must be sensitive to how photos and tapes are used, i.e. unwarranted invasions of privacy. Task Force is trying to strike a balance.

Chair DeCesare offered a lunch break at 12:10 pm after which the issue of inter operative audio will be discussed.

Meeting resumed at 1:15 pm.

Discussion re: inter operative situations where law enforcement officers and first responders are speaking with one another.

Atty. Kane suggested that 911 calls and inter operative calls be treated the same.

Discussion: Mr. Smith, Rep. Hovey.

Atty. Kane offered that the repository would not really change the procedures at all.

Discussion: Commissioner Bradford, Atty. Webster who offered willingness to be a repository at State Police Headquarters but said it would require funding.

Mr. Smith proposed that issue be about the Newton/Sandy Hook tragedy only. Mr. DeCesare said there needs to be more study about other crimes.

Discussion: re: Perkins standard; Atty. Kane, Sen. Fasano said there needs to be a good reason to obtain information from the repository or keeper of records.

Comments: Mr. Smith, Professor Dunlap, Atty. Kane and Rep. Hovey.

Mr. DePalma suggested taking a vote on the issue of repository. Discussion: Atty. Kane, Mr. Ambrose re: 911 calls. 911 Calls depicting suffering of victims is the same as photos.

Sen. Fasano said there are websites which are horrible. Discussion: Professor Dunlap, Rep. Hovey.

Atty. Kane offered motion that concepts introduced in numbers II and III be adopted as written.

Chair declared recess at 2:40 pm.

Meeting resumed at 2:50; Mr. Kane withdrew motion.

Professor Dunlap offered motion, seconded by Mr. Smith that age be determined to be factor at time of request not time of crime.

Discussion followed.

Clerk called roll for vote on motion.
8 Yeah
9 Nay
Motion failed.

Sen. Fasano introduced motion; seconded by Atty. Ambrose.

Chair agreed to brief recess.
Recess at 3:30
Reconvened at 3:37

Motion and seconded withdrawn by Sen. Fasano and Atty. Ambrose.

Vote on Mr. Smith's amendment to refer to homicide in Newton exclusively; seconded by Atty. Murphy.

Clerk called roll
5 Yea
12 Nay
Motion failed

Jodie Modzer-Gil emailed Mr. Koonz after the vote and expressed that she wished to have her vote recorded in the affirmative on the aforementioned motion.

Atty. Kane offered motion; seconded by Commissioner Bradford, to accept paragraphs II and II as originally written. Sen. Fasano offered a friendly amendment to insert after "public" or inter operative recordings, among emergency and law enforcement personnel.

Discussion followed: Professor Dunlap, Atty. Kane, Atty. Webster and Mr. DePalma.

Atty. Murphy questioned what consensus referred to regarding the legislative process in drafting the bill. Sen. Fasano responded that it included legislators and lawyers. He also responded that he would request a fiscal note for expenses incurred by keepers of record, specifically, the State Police.

Atty. Murphy stated her feelings of resentment as the inference that FOI was following anything but proper protocol. Mr. Smith offered that in the history of CT people calling police for help have never been made secret. FOI has been weakened since 1975, this is wholesale destruction of FOI. Mr. Smith says he understands about Newtown, but is astounded at the scope of the motion. He expressed feeling that the Task Force is stacked.

Sen. Fasano noted that Alaska, North Dakota, North Carolina among many prohibit or restrict broadcasting of 911 calls, Minnesota as well.

Recess at 4:07
Meeting reconvened at 4:15
Recess at 4:15; reconvened at 4:24

Motion and second withdrawn by Atty. Kane and Atty. Ambrose.

Sen. Fasano offered motion to keep existing language in overview; second by Rep. Hovey. Friendly amendment by Atty. Ambrose to add "crime of violence or sexual offense" to "homicide"; seconded by Atty. Kane.

Discussion: Professor Dunlap, Sen. Coleman, Sen. Fasano, Andrew Woods, Chair DeCesare and Rep. Hovey.

Atty. Ambrose withdrew amendment.
Clerk called roll.
14 Yeah
3 Nay
Motion passed.

Rep. Hovey offered motion to request Program Review to do thorough analysis of victims needs and privacy. Seconded by Sen. Fasano.

Comments by Sen. Coleman who is a member of Program Review and cautioned there is no guarantee issue would be taken up by Review Board.

Clerk called roll.
14 Yeah
3 Nay
Motion passes.
Comments: Atty. Story and Sen. Fasano.

V. Chair announced there will be a final report written by OLR to be approved by Task Force members but individuals will be able to submit options.

Mr. Smith recalled that Task Force had voted to issue a majority report and a minority report plus individual reports. Discussion followed. Atty. McCarthy explained that OLR in conjunction with Legislative Counsel will create a narrative on motions on sections of the Overview, with recorded votes. Will include narrative of pro and con votes.

Any member may add opinion to be attached to report.

Comments: Mr. Smith, Sen. Fasano, Commissioner Bradford.

Mr. Smith questioned OLR staff as to whether this task can be accomplished. Reply was they believe it can be done.

Chair DeCesare stated every effort will be made to produce report in time allotted; can go to January 1, 2014. Thanked members and clerks.

VI. Meeting adjourned at 5:34 pm., by motion of Rep. Arce, seconded by Sen. Fasano.

Respectfully submitted:

Ken Neal
Clerk

Barbara Gordon
Asst. Clerk