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**Testimony of Attorney Susan O. Storey, Chief Public Defender
Judiciary Committee Public Hearing
March 10, 2014**

***Raised S.B No. 388 - An Act Implementing the Recommendations of the Task Force on Victim
Privacy and the Public's Right to Know***

The Office of Chief Public Defender opposes S.B. No. 388, ***An Act Implementing the Recommendations of the Task Force on Victim Privacy and the Public's Right to Know***. As a statutory member of the Task Force reviewing P.A. No. 13-311 and making further recommendations, this Office was opposed to the majority of recommendations voted on by members of the Task Force. The Report reflects the Agency's position that P.A. No. 13-311 should be repealed, and that Connecticut's FOI laws be restored for the public's right to access information. The fact that OCPD voted to approve the Report itself should not be interpreted as a vote to approve the recommendations within the Report. The sole reason that this Agency voted to approve the Report was that the Co-Chairs of the Task Force asked members for a final vote on whether the Report was an accurate account of prior votes on the issues and opinions of Task Force Members, not whether they approved of the recommendations.

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 due to acts of violence. 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

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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 contained in S.B. No. 388, 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 ethical duty of criminal defense counsel 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

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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 corpus 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 (Haight, J.). 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. Raised Bill 381, which is identical to this proposal, is being heard at a public hearing today before the Government, Administration and Elections Committee. This agency has submitted this testimony in opposition to Raised Bill 381. 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.

Therefore, this office urges this Committee not to act favorably on this bill but to offer substitute language which repeals P.A. No. 13-311 and restore Connecticut's FOI laws for the public's right to access information.