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TESTIMONY of Daniel J. Klau
Media and the Law Section

IN OPPOSITION TO

SB 388, AN ACT IMPLEMENTING THE RECOMMENDATIONS OF THE TASK FORCE ON VICTIM PRIVACY AND THE PUBLIC'S RIGHT TO KNOW

Judiciary Committee
March 10, 2014

Senator Coleman, Representative Fox, members of the Judiciary Committee:

The Media and the Law Section of the Connecticut Bar Association (the "Section") is charged with bringing together bar association members practicing in the fields of Freedom of Information, First Amendment, privacy and other areas, with members of Connecticut's print, radio, and television media to discuss current issues affecting these radically and rapidly developing subject areas, and to foster a more positive relationship between Connecticut Bar Association members and Connecticut's media.

For the reasons set forth below, the Section ***objects*** to SB 388.[1]

[1] A number of other organizations object to SB 388, including the state Freedom of Information Commission, the Connecticut Council on Freedom of Information, the American Civil Liberties Union of Connecticut and the Connecticut Daily Newspapers Association. The Section shares the objections of those organizations. Rather than restate those objections herein, the Section respectfully further the members of the Committee to the Statements filed by those organizations.

I. The *Presumption* of Public Access to Government Records.

The proposition that openness and transparency are essential to the proper functioning of our democratic institutions is well-established. As former United States Supreme Court Justice Louis B. Brandeis said nearly a century ago, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Simply put, openness and transparency go hand-in-hand with good government. The Connecticut General Assembly understood and appreciated the truth of that proposition when it enacted the state's Freedom of Information Act ("FOIA") in 1975 and included a preamble stating that "[t]he legislature finds and declares that secrecy in government is inherently inconsistent with a true democracy."

Our nation's and our state's commitment to government transparency is reflected in a *presumption* that is deeply embedded in the law, namely, the presumption in favor of public access to government documents. The question is not whether or why a member of the public "needs" access to government information. Rather, the question is whether the government has a compelling reason for non-disclosure that trumps the public's presumptive right to know. Ours is a "right to know," not a "need to know," society.

II. Public Act P.A. 13-311 and SB 388 Are Solutions In Search Of A Problem.

A corollary to the presumption of public access to government information is this: before a legislative body votes to restrict public access, it must demand of the persons favoring the restrictions that they meet a heavy burden of establishing not just any reason, but a *compelling* reason, for overcoming that presumption. Moreover, the compelling reason must be based on facts and evidence, not speculation or conjecture.

The Section opposes SB 388 (and P.A. 13-311, the existing Public Act that the bill would amend) because they are solutions to a non-existent problem. They would undermine the presumption in favor of public access to documents in the absence of any evidence at all, much less compelling evidence, that limits on disclosure are necessary to protect members of the public from embarrassment or humiliation.

Not a single person who appeared before the Task Force on Victim Privacy and the Public's Right to Know presented testimony or evidence of a past disclosure of a government document, pursuant to an FOIA request, that actually resulted in the widespread dissemination, via the traditional media or the Internet, of: 1) graphic crime scene photographs; 2) embarrassing or humiliating 911 calls, or 3) documents identifying witnesses that put the witness at risk of harm or caused embarrassment or humiliation. The legislature should not curtail the public's cherished right to access to government documents based on conjecture and speculation.

The Section is aware of the arguments that amendments to the FOIA are necessary to reflect the realities of the Internet in the 21st century, including the speed with which information can be transmitted around the world and the "permanence" of information once it is uploaded to the Internet. The fears reflected in these arguments are understandable but unfounded.

To be sure, the mass murder of 22 school children and 6 adults (plus the deaths of Adam Lanza and his mother) at the Sandy Hook Elementary School on December 14, 2012 is the most horrific mass-shooting event that our state, and arguably our nation, has experienced. But, it is not the first horrific event in this state to result in the creation of graphic crime scene photographs. Crime scene photographs have been subject to disclosure under the FOIA since 1975. Yet, the Section has been unable to find ***a single instance*** in our state of such a photograph being disclosed to the public and then being published in a newspaper or on the

Internet as the result of an FOIA request**.**

Three examples underscore this point. First, before Sandy Hook Connecticut witnessed a tragedy in Cheshire, CT in which three members of the Petit family were brutally murdered in their home on July 23, 2007. Dr. Petit was very seriously injured, but managed to escape from his burning house. The police took many photographs of the crime scene, including photographs of the victims. ***All of those photographs were public records and, therefore, subject to disclosure under the FOIA upon request***. Any member of the public or the legislature can do a Google search and find some crime scene photographs from the Cheshire murder scene on the Internet. ***But there are no photographs of any of the homicide victims*****.** Additionally, the pictures available on the Internet are of photographs that were introduced in evidence at the trials of Steven Hayes and Joshua Komisarjevsky. ***The appearance of those pictures on the Internet has nothing to do with the FOIA and everything to do with the fact that the public has a First Amendment right of access to court proceedings and documents, including trial exhibits*****.** For anyone who has concerns about the public disclosure of trial exhibits and their dissemination on the Internet, the "problem" is not the FOIA; it is the First Amendment.

Second, on August 3, 2010, a mass shooting at Hartford Distributors in Manchester, CT resulted in the deaths of eight innocent people before the shooter took his own life. The police took photographs of the crime scene, including graphic photographs of the eight homicide victims. All of those photographs were made available to the public, including the media, for inspection and copying, yet no graphic victim photographs from that event have ever been published by the media, or by anyone else over the Internet.

Third, on March 6, 1998, a disgruntled worker murdered four employees at the Connecticut State Lottery Headquarters in Newington, CT. Again, police took crime scene photographs of the victims. Again, those photographs were available for public disclosure under the FOIA. Again, no one ever published those graphic photographs.

Finally, many members of the legislature are no doubt aware of emotionally powerful testimony by Representative Angel Arce, who was a co-chair of the Task Force on Victim Privacy. He testified about the media's repeated running of a security camera video of his father being hit on Park Street in Hartford–the victim of a hit and run driver. He described the pain he constantly feels whenever he sees that video. He cited his experience as a basis for amending the FOIA.

Representative Arce's pain and anguish are real. ***But the FOIA had nothing to do with the problem he described.*** The police released the video, not in response to an FOIA request, but because they hoped that its release to the public would help them identify the driver of the hit and run vehicle and bring him to justice. ***If the FOIA did not exist at all, the police still could have done what they did.*** The concerns that Representative Arce expressed in his testimony reflect the costs of living in a country that has a First Amendment. Unless this body is prepared to pass a law that forbids the police to release to the public information, including videos, that they believe may help them solve a crime—and such a law would be seriously ill-advised and counterproductive to effective law enforcement—the possibility will always exists that information the police release will be republished. No amendment to the FOIA can address this concern.

The Section fully appreciates that freedom of speech and of the press can entail a social cost. But our nation decided long ago that, on balance, the benefits of free speech and a free press outweigh those costs. The same is true of freedom of information: the benefits of disclosure outweigh the costs except in the very rarest of circumstances. The existing exemptions in the FOIA are more than sufficient to address those circumstances. Further exemptions are unwarranted and unnecessary.

In sum, absent *any* evidence that the FOIA has been used to obtain and then publish graphic crime scene photographs, highly embarrassing or humiliating 9-1-1 emergency calls or witness-identification information that put a witness in danger, or at serious risk of harassment, there is no compelling reason for the legislature to amend the FOIA to restrict public access to such information, which can play a critical role in helping the public evaluate the performance of state law enforcement functions. The Section therefore objects to SB 388 and, further, supports the repeal of P.A. 13-311.

III. There Should Be No Restrictions On Access To 911 Recordings Or Emergency Personnel Communications.

One of the "bright spots" in P.A. 13-311 is that it did not exempt 911 calls from disclosure under the FOIA. Even in the wake of the Sandy Hook tragedy, the legislature recognized the value of having 911 calls subject to public disclosure, even as some—particularly the Danbury State's Attorney—argued that the release of the Sandy Hook 911 calls would result in the public hearing the dying cries of teachers and children who had been shot by Adam Lanza.

Remarkably, the State's Attorney made these arguments ***without having actually listened to the 911 calls himself***.[2] And the legal arguments that he made to avoid disclosure of the 911 calls were so weak that a Superior Court judge described them as "bordering on the frivolous." More importantly, when the 911 calls were ultimately released, they revealed to the public not the cries of dying teachers and children, but the extraordinary professionalism of the police dispatchers, the bravery of First Responders and the heroism of individuals like the custodian at the Sandy Hook Elementary School, who provided with police with valuable, "real time" information as the tragedy was unfolding.

Of course, it is possible that the public disclosure of 911 calls relating to some future event will reveal serious problems with the police response to, and handling of, an event.[3] Disclosure of the calls in those instances is even more important, as it provides the public with critical information that it needs to evaluate the performance of law enforcement officials.

Incredibly, even with this body of evidence about the value of public disclosure of 911 calls, SB 388 would impose significant limitations on their release. The Section respectfully urges the legislature to reject the proposed limitations in their entirety and to allow the provisions in P.A. 13-311 concerning calls involving communications with emergency responders to sunset.

[2] The Danbury State's Attorney testified in a hearing before the Freedom of Information Commission, and a subsequent hearing before the Superior Court, that he had not listened to the Sandy Hook 911 calls.

[3] The Section reminds members of the legislature that very significant questions remain unanswered about the response of the Cheshire Police Dept. to the murders of Dr. Petit's wife and daughters.

IV. SB 388 Improperly Shifts The Burden To The Public To Justify The Disclosure Of Government Documents.

Even if the proponents of SB 388 had produced actual evidence of a problem with the FOIA, as it relates to the disclosure of crime scene photographs, 911 calls and witness-identification information, the procedures that the bill establishes are far in excess of what is required to strike the appropriate balance between public disclosure and privacy.

In particular, the Section objects to the provision in the bill that requires anyone seeking to copy crime scene photographs or certain 911 calls and emergency responder communications to prove that disclosure is "warranted." This burden-shifting provision is at odds with the presumption in favor of public access and, indeed, was considered *and rejected* by this body when it enacted the FOIA in 1975. Assuming that this body votes only to allow the public to inspect certain types of photographs and recorded communications in the first instance, and to then request a copy, once the request is made the burden must remain on the government agency to prove that further disclosure is unwarranted.

Moreover, and again assuming that the legislature votes to allow inspection only in the first instance, the substantive standard for determining whether further disclosure is "warranted" should be the standard our state Supreme Court adopted in 1993 in *Perkins v. FOI Commission*, 228 Conn. 158. Under that standard, certain types of documents (presently, personnel, medical and similar files) are exempt from disclosure under the FOIA *if and only if*: 1) the government agency proves that there is no legitimate public interest in disclosure, and 2) that disclosure would be *highly* offensive to a reasonable person, not to the person whose information is at issue. The "unwarranted invasion of privacy" standard that P.A. 13-311 added to the FOIA, and which SB 388 would continue, is a giant step backward for a state that has traditionally been a freedom of information leader.

V. The Imposition Of Criminal Penalties For The Copying Of Crime Scene Photographs Is Virtually Unprecedented And Raises Serious First Amendment Issues.

SB 388 would make Connecticut one of a very small handful of states that impose sanctions on persons who make copies of certain government records. Specifically, the bill would make it a misdemeanor for a person to copy certain documents, such as crime scene photos, which are subject only to inspection in the first instance. To avoid criminal liability, the person would have to go through an elaborate administrative procedure to obtain permission to make copies.

Making it a crime to copy government records—except perhaps in cases where national security is threatened—is abhorrent in a democracy. And even in such cases, like the famous "Pentagon Papers" case (*New York Times v. United States*, 403 U.S. 713 (1971)), there are very serious First Amendment issues with criminally punishing someone for copying and publishing public records.

The Section also notes the fundamental unfairness and inequity of imposing criminal penalties on members of the public who make copies of certain government records, while state and local agencies routinely flout the FOIA with impunity. (The Section does not suggest, however, that agency personnel should be subject to criminal penalties when then fail to comply with the FOIA.)

In sum, the Section objects to the inclusion in SB 388 of any provision that would impose criminal penalties on persons who copy government records.

VI. Conclusion

It is natural for any community, in the wake of a tragedy like Sandy Hook, to reexamine laws that balance freedom of information and privacy. But if history has taught us anything, it is that substantive changes to longstanding laws governing freedom of information, freedom of speech, freedom of press, and individual liberty should only be made after a period of calm reflection and deliberation and only if actual evidence—not fear, rumors, conjecture, speculation or political expediency—presents a *compelling* reason for changing the law.

Public Act 13-311 was not the result of calm reflection or deliberation, and SB 388 is not based on actual evidence of a problem with the FOIA. The legislature now has the opportunity to ensure that reason prevails over emotion. The Media and the Law Section of the Connecticut Bar Association urges the legislature to reject SB 388 and to repeal P.A. 13-311.