STATEMENT OF THE FREEDOM OF INFORMATION COMMISSION ON RAISED SENATE BILL 388, AN ACT IMPLEMENTING THE TASK FORCE ON VICTIM PRIVACY AND THE PUBLIC'S RIGHT TO KNOW

March 10, 2014

The Freedom of Information Commission objects to Raised Senate Bill 388, An Act Implementing the Task Force on Victim Privacy and the Public's Right to Know.

Government records belong to the people. Access to government information is the key way for the public to know what its government is doing; in a democracy, the people have a right to know how their elected or appointed representatives are using the power and authority granted to them. The premise behind the FOIA is that transparency ensures honest and responsive government and fosters trust between the people and those who act on their behalf. The Connecticut legislature understood this principle well when it unanimously enacted our state's FOI Act in 1975 with a preamble that plainly stated: "The legislature finds and declares that secrecy in government is inherently inconsistent with a true democracy; … the people in delegating authority do not give their public servants the right to decide what is good for them to know."

Every exemption to the FOI Act erodes the public's right to know. When we restrict what information the public can access in a free society, we create a society that is less free, particularly when it comes to questioning government authority when things go wrong. Only in the most repressive societies do government decisions and actions remain unexamined.

The FOI Commission objects to Raised SB 388 because it significantly alters our cherished Freedom of Information Act without a demonstrated need to do so. The new restrictions in SB 388 aim to "fix" our right-to-know law, but that law did not cause even one of the problems that the proposed bill aims to change. The FOI Act is not the source of any perceived problems that the proposed bill seeks to remedy.

Never has the FOIC ordered the disclosure of gruesome crime scene images of bodies or body parts. Never has the FOIC ordered the disclosure of highly offensive audio recordings of crimes that have no legitimate public interest. Nor has the Commission ever ordered disclosure of the identity of witnesses of any age where it would be dangerous to do so or where they are victims of sexual assault or crimes against juveniles. And the FOIC does not disregard the rights of any private individual whose interests are the subject of a public record.

SB 388's changes to the FOI Act assumes such disclosures to be the Commission's practice; in fact, the opposite is true.

When gruesome images are sometimes made public, it is not through the FOI Act. Likewise, when identities of minor witnesses are made known, disturbing audio recordings are broadcast, or victims of crime feel exposed, it is not because of the FOI Act. These public disclosures happen NOT due to FOI, but because we live in a democratic society with open courts and a free press. These are our fundamental rights guaranteed by the First Amendment.

For these reasons, the FOI Commission urges the legislature to **reject SB 388**. In the alternative, the Commission highlights below some of the reasons it objects to details of the bill as written:

1. SB 388 proposes 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). SB 388 would continue the exemption for minor witnesses (under the age of 18) but only for crimes of violence – which is undefined --, drug offenses, or sexual offenses.

The FOI Act already contains several exemptions to protect witnesses and juveniles. *See* Conn. Gen. Stat. §1-210(b)(3)(A), (F), and (G). However, if there is a need for greater confidentiality in this area, a more balanced approach would be to reduce the age of the witness to which it applied or qualify its application in some way. Does it make sense to exempt an entire category of witnesses, for all time, solely based on age, and only for certain crimes?

2. Last year, Public Act 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*** of the victim or the victim's surviving family members. By inserting those four words into the FOIA, P.A. 13-311 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)). SB 388 continues the use of the "unwarranted invasion of privacy" standard but expands the privacy inquiry to everyone, not just the victim and the victim's family.

By continuing to include the new standard in SB 388, the legislature would endorse a concept never before recognized under the FOIA in its 38 year existence. The new standard shifts the burden to a person who makes a request for a public record to prove that disclosure is "warranted." With all other FOIA exemptions, the government agency has the burden of proving that a record cannot be disclosed. This new course is a treacherous one for Connecticut to travel. If the legislature enacts SB 388 as written, it would endorse a standard that the Connecticut legislature *considered and rejected* when it passed the FOIA in 1975.

FOIA's current invasion of privacy test has functioned well for the twenty years of its existence. The Connecticut Supreme Court in 1993 set forth the test of invasion of privacy: personnel, medical and similar files are exempt if the government agency proves that there is no legitimate public interest in disclosure and a reasonable person would find disclosure highly offensive. Perkins v. FOI Commission, 228 Conn. 158, 175 (1993). The test has proven to be relatively easy to apply, broadly known and understood, and would work in the context of the records that are the focus of SB 388. Should the legislature wish, it could extend the privacy standard from Perkins to apply to homicide records.

SB 388 no longer limits the privacy inquiry in disclosure of homicide images to the victim or the victim's surviving family and expands the inquiry to everyone. While the Commission appreciates that SB 388 permits 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. The FOI Commission urges the legislature to remove the term "unwarranted

invasion of personal privacy" from SB 388 and from the exemption created by P.A. 13-311 (Conn. Gen. Stat. § 1-201(b)(27)).

3. SB 388 also seeks to exempt 911 calls on homicides and to extend forever the temporary exemption for communications among emergency personnel that was added in P.A. 13-311 but is set to sunset on May 7, 2014. Again, SB 388 imposes the "unwarranted invasion of privacy" standard to these two new exemptions, but neglects to limit the privacy inquiry to any specified persons. The Commission urges the legislature to reject these unnecessary new exemptions because they will forever impede the public's ability to oversee police and emergency response and will make more difficult the public's effort to examine and understand acts of violence and murder. Any records that endanger witnesses, prejudice a prospective law enforcement action, or disclose an unknown investigatory method are already exempt from disclosure. *See* Conn. Gen. Stat. §1-210(b)(3).

4. Sections 2(c) and (d) of SB 388 as written are impractical and unworkable. It imposes a duty on the public agency to "immediately" notify a homicide victim's next of kin before disclosing a copy of a homicide image, and in the case of a request for an audio recording, to "immediately" notify *any person* recorded on such recording. There are many problems with this requirement. With the passage of time, it may become nearly impossible to discover the next of kin's mailing address, or even who the next of kin may be. What is "immediate" notification? How is an agency to identify every person who is recorded on a 911 call, let alone discover how to notify each person? Must the agency "immediately" notify each person every time a request is made, even years after the criminal case has ended? These requirements place an unrealistic and time-consuming burden on law enforcement and unnecessarily impede access to *the public's* records.

5. Section 2(e) states that no public agency shall permit a person to remove, copy or duplicate a homicide image or audio recording. This prohibition as written goes way too far, seeming to sweep into its prohibition disclosure pursuant to use in court as evidence, or pursuant to subpoena, court order, or other legal process.

6. Section 2(f) should give the legislature great pause. Here, SB 388 would impose criminal misdemeanor liability on any person who improperly removes, copies or duplicates a homicide image or audio recording. Consider the situation where a government employee improperly provides an image to a news organization that seeks to print the image in its newspaper. To print the image requires duplication, a criminal activity under the proposed §2(f). Such threat of criminal penalty clearly violates the rule against prior restraint, which prohibits the government from banning or even chilling the expression of ideas prior to publication. If enacted, § 2(f) would almost certainly violate the First Amendment.

7. Section 3 requires 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. 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?). 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.

8. SB 388 imposes a significant financial burden on state and local police departments, as well as the FOI Commission to implement its provisions. The bill would require police departments to devote time and space and personnel to make homicide images and audio recordings available for inspection, to identify and notify next of kin and each person recorded on a 911 audio recording, even years after the criminal case has ended, to develop a notification form and to keep track of any objections returned. The FOI Commission will be required to apply the unwieldy "unwarranted invasion of privacy" inquiry without limit to any person and to notify all people who file an objection to disclosure. (Under current law, the duty to notify any person who may have an interest in the disclosure of a public record rests with the agency that maintains the record). The Commission questions whether it is prudent to require such an investment of agency resources to implement mandates where the need is so dubious.

The FOI Commission urges the legislature to reject SB 388 and to amend Conn. Gen. Stat. §1-210(b)(2)(27) to return to the Perkins standard on invasion of personal privacy.

For further information contact: Colleen M. Murphy, Executive Director and General Counsel or Mary Schwind, Managing Director and Associate General Counsel at (860) 566-5682.