



## USE OF *PERKINS* TEST IN OTHER JURISDICTIONS

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### **PERKINS TEST**

Under the *Perkins* test, the disclosure under FOIA of a personnel, medical, or similar file held by a public agency constitutes 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.

### **QUESTION**

Discuss Freedom of Information (FOI) and tort law cases in other jurisdictions that use a test similar to Connecticut's *Perkins* test to determine whether the disclosure of crime scene photographs or 9-1-1 recordings would be an invasion of personal privacy. Also, do other jurisdictions use a different test to determine whether to release these records?

### **SUMMARY**

The *Perkins* test was established by the Connecticut Supreme Court in *Perkins v. Freedom of Information Commission*, 228 Conn. 158 (1993). The case addressed a provision in Connecticut's Freedom of Information Act (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 § 1-210\(b\)\(2\)](#)). Adopting a standard used in common law tort cases, the 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.

We did not find any FOI-related court cases in other jurisdictions that used a test similar to *Perkins* to determine whether to disclose crime scene photographs or 9-1-1 recordings. Although at least two states (Georgia and Washington) use a similar test for requests to disclose certain types of documents under an FOI law, we did not find any cases in those jurisdictions that applied those similar tests to crime scene photographs or 9-1-1 recordings. Generally, other jurisdictions with personal privacy FOI exemptions use a balancing test to determine whether to

disclose such records. These exemptions (1) often require that the invasion of privacy be “unwarranted” and (2) may also provide a person with privacy interests that exceed the privacy protections established in common law.

*Perkins* is derived from the tort of invasion of privacy for giving unreasonable publicity to another’s private life. Thus, the *Perkins* test (as it is known in Connecticut) has been used in numerous tort lawsuits to determine whether the publication of certain records or information invaded somebody’s privacy. We discuss the tort and provide a selection of these cases below. However, tort lawsuits often involve considerations (e.g., the First Amendment) that are not present in FOI cases. It is thus unclear to what extent these tort law cases are analogous to FOI cases.

### **PERKINS TEST**

In *Perkins*, the Connecticut Supreme Court held that the disclosure of a personnel, medical, or similar file under FOIA 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.

In establishing the test, the court noted that although it had ruled on several cases involving personnel, medical, and similar files, it had yet to articulate a comprehensive definition of “invasion of personal privacy.” In *Perkins*, the court determined that the time was right to establish such guidance: “We have, in effect, imposed a burden of proof on a claimant for an exemption without providing guidelines as to what such a claimant must show in order to obtain relief” (*Perkins*, supra at 169).

The court noted that, absent express statutory guidance, technical words and phrases that have acquired a peculiar and appropriate meaning in the law must be construed and understood accordingly ([CGS § 1-1\(a\)](#)). It then stated that “invasion of personal privacy” was appropriately construed according to its common law meaning:

As a common-law matter, the privacy concerns embedded in the “invasion of personal privacy” exemption from the FOIA mirror developing notions of protection for personal privacy that have emerged in a variety of legal contexts since the latter part of the nineteenth century. Although the precise definition of a right to privacy varies with the particular context in which the right has been recognized, the statutory exemption finds its most persuasive common-law counterpart in the tort of invasion of privacy, particularly

in that aspect of the tort of invasion of privacy that provides a remedy for unreasonable publicity given to a person's private life...the tort action provides a private remedy to implement a public policy that closely approximates the public policy embedded in [FOIA's personal privacy exemption] (id., at 170-172).

The court went on to state that the analogy between the tort action and the statutory exemption is "close and compelling" (id., at 173). It also emphasized that it was not establishing a balancing test. Under *Perkins*, a record must be disclosed if it pertains to a legitimate matter of public concern, regardless of whether disclosure would be highly offensive to a reasonable person.

## **FOI CASES IN OTHER JURISDICTIONS**

We did not find any FOI-related court cases in other jurisdictions that used a test similar to *Perkins* to determine whether to disclose crime scene photographs or 9-1-1 recordings. At least two states, Georgia (Ga. Code. Ann. § 50-18-72(a)(2)) and Washington (Wash. Rev. Code §§ 42.56.050, .210, and .240) use a similar test for requests to disclose certain types of documents under an FOI law. However, in Georgia the test applies to medical or veterinary records and similar files. In Washington, the test applies to several records, including certain law enforcement records, but we did not find any cases that applied the test to crime scene photographs or 9-1-1 recordings.

States that have FOI exemptions for an invasion of personal privacy generally use a balancing test to determine whether to release a public record. For example, the Iowa Supreme Court observed that, if a legislature does not define personal privacy or delineate the types of records that are considered private, then "the courts most often will apply general privacy principles, which examination involves a balancing of conflicting interests—the interest of the individual in privacy on the one hand against the interest of the public's need to know on the other." (*DeLaMater v. Marion Civil Service Commission*, 554 N.W.2d 875 at 879 (Iowa 1996), quoting Andrea G. Nadel, Annotation, *What Constitutes Personal Matters Exempt from Disclosure by Invasion of Privacy Exemption Under Freedom of Information Act*, 26 A.L.R.4th 666, 670–71 (1983)).

Similarly, the Kentucky Supreme Court stated that:

[G]iven the privacy interest on the one hand and, on the other, the general rule of inspection and its underlying policy of openness for the public good, there is but one available mode of decision, and that is by comparative weighing of the antagonistic interests... Moreover, the

question of whether an invasion of privacy is “clearly unwarranted” is intrinsically situational, and can only be determined within a specific context (*Kentucky Bd. of Examiners of Psychologists v. Courier-Journal & Louisville Times Co., Ky.*, 826 S.W.2d 324, at 327-328 (1992)).

Two privacy-related FOI cases illustrate the use of balancing tests. Both cases involved records that pertained to legitimate matters of public concern, but the courts balanced these interests with individuals’ privacy interests, with differing results.

In *McCambridge v. City of Little Rock*, 298 Ark. 219 (1989), the Arkansas Supreme Court held that the government interest in disclosing certain crime scene photographs outweighed the plaintiff’s privacy interests. The case involved a murder-suicide in which a stockbroker killed his wife and two daughters and then himself. The plaintiff sued to block disclosure of several records, including photographs of the bodies. In ordering disclosure of the photographs, the court noted that the plaintiff had a privacy interest in the photographs and that disclosing them would be highly offensive. However, it ruled that this interest was outweighed by a highly valued governmental interest in depicting how the murders occurred and why the police consider the case closed.

Conversely, in *N.Y. Times Co. v. City of N.Y. Fire Dept.*, 4 N.Y.3d 477 (2005)., the New York Court of Appeals held that although there was a public interest in disclosing certain 9-1-1 audio recordings, it was outweighed by surviving family members’ privacy interests. The case involved a request by the *New York Times* for transcripts and audio recordings of 9-1-1 calls from the September 11 attacks. The court noted the legitimate public interest in evaluating the performance of the 9-1-1 system but held that surviving family members’ privacy interests outweighed the public’s interest in disclosure. It emphasized that its ruling applied only to the September 11 9-1-1 calls and not 9-1-1 calls in general.

For a discussion of other FOI cases, please see the Legislative Commissioners’ Office memorandum: [\*The Intersection of the Connecticut Freedom of Information Act and the Invasion of Personal Privacy\*](#)

### ***Unwarranted Invasion of Personal Privacy***

The Iowa Supreme Court noted that many state FOI privacy exemptions are patterned after the privacy exemptions in the federal FOIA, which uses the phrase “unwarranted invasion of personal privacy” (*DeLaMater*, supra at 878). According to

the U.S. Supreme Court, "The term 'unwarranted' requires us to balance the family's privacy interest against the public interest in disclosure" (*National Archives and Records Administration v. Favish*, 541 U.S. 157, 171 (2004)).

Thus, the prevalence of balancing tests in other jurisdictions is likely due to those jurisdictions' use of the phrase "unwarranted invasion of personal privacy." Conversely, the Connecticut statute to which *Perkins* applies uses the phrase "invasion of personal privacy" and, as stated above, the court in *Perkins* specifically rejected the use of a balancing test.

### ***Privacy Interests Under FOI Laws***

In addition to using a balancing test to determine whether to disclose certain records, FOI laws in other jurisdictions may also provide a person with privacy rights that exceed the privacy rights established by common law. One example is the federal FOIA. According to the Seventh Circuit Court of Appeal:

Although the common law doctrine of privacy may assist analysis, the privacy exemption under FOIA is not designed to prevent what would be tortious at common law. Congress intended that the privacy interest protected under FOIA extend beyond the common law... A separate body of privacy law has developed under FOIA in which courts seldom look to the common law for more than an analytical framework (*Marzen v. Department of Health and Human Services*, 825 F.2d 1148, 1152-1153 (1987)).

The U.S. Supreme Court echoed this concept when it noted that, "The question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution" (*Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, at 762, n. 13 (1989)). It also observed that, "the statutory privacy right...goes beyond the common law and the Constitution" (*Favish*, supra at 170).

### **COMMON LAW TORT OF INVASION OF PRIVACY**

The invasion of privacy tort contains four categories: (1) unreasonable intrusion upon the seclusion of another, (2) appropriation of another's name or likeness, (3) unreasonable publicity given to another's private life, and (4) publicity that unreasonably places the other in a false light before the public (*Restatement (Second) of Torts* (1977), cited in *Goodrich v. Waterbury Republican American*, 188

Conn. 107, 127-128 (1982)). Because the *Perkins* test is based on the third category, unreasonable publicity given to another’s private life, this section will focus on that category.

Below we discuss the tort in more detail and provide a selection of cases. We also discuss considerations in tort lawsuits that are not present in FOI cases.

***Unreasonable Publicity Given to Another’s Private Life***

Under § 652D of the *Restatement (Second) of Torts*, “One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his [or her] privacy, if the matter publicized is of a kind that (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.”

Several comments in the *Restatement* provide further explanation of the tort. A selection of those comments is shown in Table 1.

**Table 1: Unreasonable Publicity Given to Another’s Private Life**

<b>Comment</b>	<b>Description</b>
b. Private Life	<p>The <i>Restatement</i> identifies several activities as private matters, including sexual relations; family arguments; unpleasant, disgraceful, or humiliating illnesses; intimate personal letters; details of one’s home life; and certain past history.</p> <p>“When...intimate details of [a person’s] life are spread before the public gaze in a manner highly offensive to the ordinary reasonable [person], there is an actionable invasion of his [or her] privacy, unless the matter is one of legitimate public interest.”</p>
c. Highly Offensive Publicity	<p>Privacy protections “must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his [or her] neighbors and fellow citizens.”</p> <p>For example, the <i>Restatement</i> notes that an ordinary reasonable person is not offended by newspaper reports about his or her mundane daily activities, or even reports of events of minor or moderate annoyance (e.g., clumsily breaking a leg). A cause of action arises only when the publicity “is such that a reasonable person would feel justified in feeling seriously aggrieved by it.”</p>
d. Matter of Legitimate Public Concern	<p>According to the <i>Restatement</i>, “When the matter to which publicity is given is true, it is not enough that the publicity would be highly offensive to a reasonable person. The common law has long recognized that the public has a proper interest in learning about many matters. When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy.”</p>

**Table 1 (continued)**

<b>Comment</b>	<b>Description</b>
f. Involuntary Public Figures	Involuntary public figures include crime victims and witnesses, victims of accidents or catastrophes, or those involved in events that attract public attention. According to the <i>Restatement</i> , “publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them.” The authorized publicity could include facts about the person that would otherwise be private.
h. Private Facts	Permissible publicity is not limited to the events that aroused the public’s interest. According to the <i>Restatement</i> , the limitation is one of common decency. “The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he [or she] had no concern.”

**Cases**

Table 2 shows a selection of tort cases that involved a claim of unreasonable publicity given to another’s private life. In each of these cases, the record at issue was a photograph (or multiple photographs) of a dead person.

Please note that, in most of these cases, the plaintiff(s) raised other tort law claims, some of which were adjudicated differently than the claims involving unreasonable publicity given to another’s private life. However, the table addresses only the unreasonable publicity claims.

**Table 2: Selected Unreasonable Publicity Cases**

<b>Case</b>	<b>Challenged Action</b>	<b>Holding</b>
<i>Abernathy v. Thornton</i> , 263 Ala. 496 (1955)	A newspaper published a photograph of a murder victim with a bullet protruding from his head.	No invasion of privacy: the victim was on parole from a federal crime and thus had become a public figure, making the photograph a legitimate matter of public interest.
<i>Armstrong v. H &amp; C Communications, Inc.</i> , 575 So. 2d 280 (Fla. Dist. Ct. App. 1991)	A television station broadcast a video showing the skull of a child who had been abducted and murdered.	No invasion of privacy: the discovery of the child’s remains was a legitimate matter of public interest.
<i>Bremmer v. Journal Tribune Pub. Co.</i> , 76 N.W.2d 762 (1956) (Iowa)	A newspaper published a photograph of the decomposing and mutilated body of an 8-year old boy who had been missing for a month.	No invasion of privacy: the discovery of the body was newsworthy (i.e., was a legitimate matter of public concern).

**Table 2 (continued)**

<b>Case</b>	<b>Challenged Action</b>	<b>Holding</b>
<i>Catsouras v. Cal. Highway Patrol</i> , 181 Cal. App. 4th 856 (2010)	Employees of the California Highway Patrol sent pictures of an 18-year old woman decapitated in a car accident to their friends for Halloween. The pictures were widely disseminated, posted on over 2,500 Internet websites and the family of the deceased teenager received multiple e-mails with the pictures attached.	The plaintiffs stated a cause of action for invasion of privacy by publication of private facts; dissemination of the photographs was without legitimate public interest and reflected pure morbidity and sensationalism.
<i>Green v. Chicago Tribune</i> , 286 Ill.App.3d 1 (Ill.App.Ct.1996)	A newspaper took and published unauthorized photographs of a murder victim as he (1) underwent emergency surgery for a bullet wound and (2) lay in a private hospital room after passing away. The newspaper also published statements made by the victim's mother to her dead son.	Plaintiff's allegations were sufficient to state a cause of action for public disclosure of private facts.
<i>Reid et al. v. Pierce County</i> , 136 Wn 2d 195 (Washington 1998)	Employees of medical examiner's office took autopsy photographs home, made scrapbooks, and showed them at cocktail parties.	Plaintiffs' allegations were sufficient to state a cause of action for public disclosure of private facts.
<i>Showler v. Harper's Magazine Foundation</i> , 222 Fed. Appx. 755 (2007, 10th Cir. U.S. Ct. App., Okla.)	A newspaper reporter took an unauthorized photograph of a deceased serviceman's body lying in an open casket at his funeral, which about 1,200 people attended.	No invasion of privacy: (1) publication of the photograph did not constitute public disclosure of private facts and (2) because the funeral was a newsworthy event, it was of legitimate concern to others.

***Differences Between Tort and FOI Cases***

As stated above, the *Perkins* test (as it is known in Connecticut) has been used in numerous tort lawsuits to determine whether the publication of certain records or information invaded somebody's privacy. However, tort lawsuits often involve considerations (e.g., the First Amendment) that are not present in FOI cases. It is thus unclear to what extent these tort lawsuits are analogous to FOI cases.

FOI and tort lawsuits arise under different circumstances. In FOI cases, one party seeks disclosure of a record that a public agency wishes to withhold from disclosure. In a tort lawsuit, the record or information at issue has already been publicized; one party seeks to hold the other party liable for publicizing that record or information.

Thus, tort lawsuits frequently implicate First Amendment rights, which are not at issue when requesting records under FOI laws (see below). Writing about the tort's historical development, the California Supreme Court stated that:

[D]efining an actionable invasion of privacy has generally been understood to require balancing privacy interests against the press's right to report, and the community's interest in receiving, news and information.

Indeed, the danger of interference with constitutionally protected press freedom has been and remains an ever-present consideration for courts and commentators struggling to set the tort's parameters, and the requirements of tort law and the Constitution have generally been assumed to be congruent (*Shulman v. Group W Productions, Inc.*, 18 Cal.4<sup>th</sup> 200 at 215-216 (1998)).

***Legitimate Matter of Public Concern.*** Under both *Perkins* and the common law, there is no invasion of privacy if the record or publication pertains to a legitimate matter of public concern. However, the analysis required to make such a determination may be different in tort cases than it is in FOI cases.

In tort lawsuits, an analysis of newsworthiness is often used to determine whether a publication pertains to a legitimate matter of public concern. As stated by the California Supreme Court:

Lack of newsworthiness is an element of the 'private facts' tort...[T]he dissemination of truthful, newsworthy material is not actionable as a publication of private facts. If the contents of a broadcast or publication are of legitimate public concern, the plaintiff cannot establish a necessary element of the tort action, the lack of newsworthiness (*id.*, at 215).

According to the court, an analysis of newsworthiness:

incorporates considerable deference to reporters and editors, avoiding the likelihood of unconstitutional interference with the freedom of the press to report truthfully on matters of legitimate public interest. In general, it is not for a court or jury to say how a particular story is best covered. The constitutional privilege to publish truthful material “ceases to operate only when an editor abuses his broad discretion to publish matters that are of legitimate public interest” (id., at 224-225, citations omitted).

However, in FOI cases, the legitimate matter of public concern often involves the government’s accountability to the public, and requests for records under FOI laws typically do not implicate constitutional rights. As the U.S. Supreme Court wrote in a recent opinion, it “there is no constitutional right to obtain all the information provided by FOIA laws” (*McBurney v. Young*, 133 S.Ct.1709, 1718 (2013)). Similarly, in *Houchins v. KQED*, 438 U.S. 1 (1978), both the plurality opinion and concurrence held that neither the First nor the Fourteenth amendments “mandates a right of access to government information or sources of information within the government's control” (id., at 15) (see OLR Report [2013-R-0439](#)).

For example, if a media organization were sued for publishing a photograph of a murder victim, the organization’s First Amendment rights would be considered in the analysis of whether the photograph pertained to a legitimate matter of public concern. However, if that same organization filed an FOI lawsuit seeking disclosure of such a photograph by a police department, the organization would not have a First Amendment right to obtain the photograph.

## **ADDITIONAL RESOURCES**

Legislative Commissioners’ Office: [\*The Intersection of the Connecticut Freedom of Information Act and the Invasion of Personal Privacy\*](#)

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