State of Connecticut
DIVISION OF CRIMINAL JUSTICE

TESTIMONY OF THE DIVISION OF CRIMINAL JUSTICE

IN OPPOSTION TO:

H.B. NO. 6750: AN ACT EXPANDING THE REQUIREMENT FOR DISCLOSURE OF ARREST RECORDS DURING A PENDING PROSECUTION UNDER THE FREEDOM OF INFORMATION ACT

JOINT COMMITTEE ON GOVERNMENT ADMINISTRATION AND ELECTIONS
February 13, 2015

The Division of Criminal Justice **opposes H.B. No. 6750, An Act Expanding the Requirement for Disclosure of Arrest Records During a Pending Prosecution under the Freedom of Information Act** and respectfully recommends the Committee take **NO ACTION** on this bill.

By its own statement of purpose, this bill seeks to "reverse the recent Connecticut Supreme Court decision in *Commissioner of Public Safety v. FOIC*." What it would really do is expand the statute enacted by this legislature in 1994. For the reasons herein stated, the Division believes this is not necessary or wise, since all that the Supreme Court did was to apply the law properly as enacted by the General Assembly.

The Division understands and appreciates the need for the existing law, which imposes upon the government the obligation to inform the public of the arrest of a citizen. Presently, General Statutes § 1-215 imposes "the exclusive [public] disclosure obligation under the [Freedom of Information A]ct for law enforcement agencies with respect to documents relating to a pending criminal prosecution." *Commissioner of Public Safety v. FOIC*, 312 Conn. 513, 525 (2014). Section 1-215 provides that:

"(a) Notwithstanding any provision of the general statutes to the contrary, and except as otherwise provided in this section, any record of the arrest of any person, other than a juvenile, except a record erased pursuant to chapter 961a, shall be a public record from the time of such arrest and shall be disclosed in accordance with the provisions of section 1-212 and subsection (a) of section 1-210, except that disclosure of data or information other than that set forth in subdivision (1) of subsection (b) of this section shall be subject to the provisions of subdivision (3) of subsection (b) of section 1-210. Any personal possessions or effects found on a person at the time of such person's arrest shall not be disclosed unless such possessions or effects are relevant to the crime for which such person was arrested.

"(b) For the purposes of this section, "record of the arrest" means (1) the name and address of the person arrested, the date, time and place of the arrest and the offense for which the person was arrested, and (2) at least one of the following, designated by the law enforcement agency: The arrest report, incident report, news release or other similar report of the arrest of a person."

In the wake of the *Commissioner of Public Safety* decision, the Division on its own initiative has teamed with the Connecticut Police Chiefs Association to conduct a survey of Connecticut police chiefs regarding compliance with section 1-215. That effort is underway, but not complete. Specifically, the Division is attempting to determine what information, beyond the basic blotter information set forth in 1-215 (b)(1), law enforcement agencies already disclose to the public pursuant to 1-215 (b)(2). The Division is concerned that the existing version of 1-215 (b)(2) may not provide sufficient concrete direction regarding what information beyond the basic blotter information must be made available to the public at the time of an arrest. Based upon the results of the survey, the Division may adopt a policy requiring that, in addition to the basic blotter information relating to an arrest, law enforcement agencies also make publicly available a brief narrative setting forth the circumstances leading up to the arrest.

H.B. No. 6750 seeks to amend section 1-215 by amending subsection (b) to require that, "[i]n addition to the disclosure of any record of arrest of any person required under this section, and notwithstanding the existence of a pending prosecution, any other public record that pertains to the arrest of any person shall be disclosed in accordance with the provisions of section 1-212 and subsection (a) of section 1-210 unless such record is exempt from disclosure pursuant to the provisions of subdivision (3) of subsection (b) of section 1-210." General Statutes § 1-210 (b)(3) is the "law enforcement" exception to the FOIA, which exempts certain records from disclosure under the Act.

The Division respectfully must oppose H.B. No. 6750 for a number of reasons:

The bill suffers from a lack of clarity because it fails to define what is meant by "any other public record that pertains to the arrest of any person ...." The lack of specific language defining this phrase will lead to uncertainty, individual interpretations and a lack of consistency and uniformity in applying the statute. For example, the phrase may arguably include police booking photos (mugshots). Assuming it does, a blanket policy making mugshots publicly available at the time of the arrest is unwise because of the potential corrupting influence that publicizing mugshots may have on subsequent eyewitness identifications. An example may be found in *State v. Johnson*, 312 Conn. 687 (2014), a case in which the defendant moved to suppress his identification by an eyewitness based on the fact that, prior to formally identifying the defendant, the witness had viewed photographs of him on the Internet.

The phrase "any other public record that pertains to the arrest" also may arguably include records that depict or relate to evidence against the accused, such as a confession; photographs of persons, places and things; and the results of scientific tests or forensic analyses. Making this information available publicly at the time of the arrest is unwise because of the potential corrupting influence that publicizing such information may have on a defendant's right to a fair trial free of prejudicial pretrial publicity. Examples of such claims may be found in the pending appeals of death row inmates Steven Hayes and Joshua Komisarjevsky, and in the cases of *State*

v. Kelly, 256 Conn. 23 (2001); *State v. Crafts*, 226 Conn. 237 (1993); *State v. Marra*, 215 Conn. 716 (1990); and *State v. Pelletier*, 209 Conn. 56e (1989). The importance of a criminal defendant's right to a fair trial free of prejudicial pretrial publicity is embodied in Rule 3.6 of the Rules of Professional Conduct, which forbids lawyers generally from disseminating information that will likely impact a litigant's right to a fair trial, and in Rule 3-8, which specifically requires prosecutors to take steps to prevent investigators, law enforcement personnel and employees from disseminating such information. It would be anomalous to have a freedom of information law which mandates that a law enforcement agency make publicly available at the time of the arrest the very same information that a prosecutor would be ethically obligated to prevent the officer from disclosing to the public.

Expanding the public disclosure mandate of 1-215 also is inconsistent with the state's erasure statute, General Statutes § 54-142a et seq., the purpose of which is "to protect innocent persons from the harmful consequences of a criminal charge which is subsequently [resolved in favor of the accused]." *State v. Morowitz*, 200 Conn. 440, 451 (1986). "The consequences of a criminal arrest are wide-ranging and long-lasting, even where an individual is subsequently found not guilty or the charges as dismissed." *Martin v. Hearst Corporation*, ___F.3d___ (2nd Cir. 2015) (2015 WL 347052). For arrested persons who ultimately are not convicted of any crime, the harmful consequences of a criminal charge will be needlessly exacerbated if significant amounts of information regarding the arrest are made available to the public at the time of the arrest. Once such information is disclosed, it is there forever because the erasure statute "cannot undo historical facts or convert once true facts into falsehoods." *Martin*, at*4.

The provision in newly proposed subsection (b), which subjects "any other public record that pertains to the arrest" to the 1-210 (b)(3) law enforcement exception, does not adequately ensure the integrity of a pending prosecution. The two most important exceptions from the point of view of safeguarding the integrity of a pending prosecution are (b)(3)(A) – "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 the threat of intimidation if their identity was made known"; and (b)(3)(D) – "information to be used in a prospective law enforcement action if prejudicial to such action."

One need look no further than *State v. Peeler*, 271 Conn. 338, 349-54 (2004), to find a horrifying reminder of the grave danger potentially faced by any witness to a serious crime. In that case, Leroy Brown, Jr., an eight-year-old witness to a murder was himself murdered in his home in Bridgeport to prevent him from testifying against the defendant. Brown's mother, Karen Clarke, was murdered at the same time simply because she was home. Today's version of 1-210 (b)(3), which exempts from mandatory disclosure the identity of a minor witness, did not exist at the time of *Peeler*, and it is doubtful whether the state could, then or now, have demonstrated that the safety of Brown, and especially Clarke, who witnessed nothing, "would be endangered" if their identities were made public. This remains true today; very few defendants make known in advance their intention to harm, threaten or intimidate a witness, making it difficult, if not impossible in most cases, for the state to prove for purposes of 1-210 (b)(3)(C) that a witness "would be" subject to harm if his or her identity was made known. The same is true with respect to 1-210 (b)(3)(D) – it is difficult, if not impossible, for the state to prove the prejudicial effect that the public disclosure of information would have on a future prosecution, especially given

that such proof must be offered under H.B. No. 6750 at the very early stage of the arrest. In many cases, the arrest does not signal the end of the criminal investigation and it is impossible for the state to predict with accuracy what may occur thereafter.

Subjecting "any other public record that pertains to the arrest" to the 1-210 (b)(3) law enforcement exception at the time of the arrest, while the prosecution is pending, is also likely to be extremely time consuming and resource draining given that it will effectively force prosecutors to intervene in every case in which a request is made for information relating to an arrest that goes beyond the blotter information and basic circumstances that led to the arrest, in order to defend the integrity of a pending prosecution.

The Division also would call the Committee's attention to the potential fiscal impact of the legislation. One can easily surmise that H.B. No. 6750, particularly with the aforementioned vagueness and lack of clarity, would result in additional appeals to the Freedom of Information Commission and the courts at considerable expense to both the state and municipal law enforcement agencies.

In sum, the Division fully recognizes the public's right to receive information regarding the arrest of a citizen. In our view, that right is adequately implemented by 1-215 as presently written which makes public the basic blotter information and some additional information regarding the circumstances that led to the arrest. The disclosure of information beyond this amount should not be mandated by statute and should rest in the hands of law enforcement agencies, who are in the best position to protect the integrity of a pending prosecution and the safety of witnesses.

At best H.B. No.. 6750 is premature, given the ongoing and as yet-incomplete initiative under way by the Division and the Connecticut Police Chiefs Association to document current practices and examine potential areas for refinement. This process at the very least should be given the opportunity to continue and to come to completion. At worst, H.B. No. 6750 is a dangerous attempt to recklessly override a well-reasoned decision of our Supreme Court resulting in potentially deadly consequences.

In conclusion, the Division respectfully requests the Committee take NO ACTION on H.B. No. 6750. We would be happy to provide any additional information or to answer any questions the Committee might have.