

# Task Force on Victim Privacy and the Public's Right to Know

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# Outline

- Definitions of “crime victim” under Connecticut statutes
- Connecticut statutes concerning disclosure of certain records
- Connecticut common law
- *Favish* case and federal law
- Other states’ laws
- Federal and state cases
- Post-Columbine records requests

# “Crime Victim”

Definition Under Connecticut Law

# Connecticut Constitution

## Rights of Crime Victims

The constitution grants a victim, as the General Assembly may define by law, a number of rights in criminal proceedings, including the right to:

- be treated with fairness and respect
- be reasonably protected from the accused throughout the criminal justice process
- notification of court proceedings
- attend court proceedings the accused has the right to attend, except under certain cases when the person is to testify
- communicate with the prosecution
- object to or support a plea agreement
- make a statement to the court at sentencing
- restitution
- information about the arrest, conviction, sentence, imprisonment, and release of the accused

*Constitution of the State of Connecticut, Article First, Section 8(b)*

# Connecticut General Statutes

There are two primary statutory definitions:

- General definition
- Victim services definition

The statutes use these definitions, with variations, for different purposes.

# General Definition

“Victim of crime” or “crime victim” means an individual who suffers direct or threatened physical, emotional, or financial harm as a result of a crime and includes:

- immediate family members of a minor, incompetent individual, or homicide victim
- a homicide victim’s designated decision maker

## Applies:

- throughout the statutes unless another definition applies (CGS § 1-1k)
- to peace officer’s duty to render assistance and refer crime victim to the Office of Victim Services (OVS) (CGS § 54-222a)

# General Definition – Variation #1

“Victim of crime” or “crime victim” means an individual who suffers direct or threatened physical, emotional, or financial harm as a result of a crime and includes:

- the legal representative of such person
- immediate family members of a minor, incompetent individual, or deceased victim
- a homicide victim’s designated decision maker

Applies to:

- victim notification of judicial proceedings by state’s attorneys (CGS § 51-286e)
- victim testimony at a Board of Pardons and Paroles pardons session (CGS § 54-130d)

# General Definition – Variation #2

“Victim of crime” or “crime victim” means an individual who suffers direct or threatened physical, emotional, or financial harm as a result of a crime and includes:

- the legal representative of such person
- immediate family members of a minor, incompetent individual, or deceased victim
- a deceased victim’s designated decision maker

Applies to:

- testimony of victim (1) before acceptance of plea agreement, (2) at sentencing hearing, and (3) at parole hearing (CGS §§ 54-91c & 54-126a)



# Victim Services Definition

“Victim” means a person who is injured or killed as a result of:

- an attempt to prevent a crime or apprehend a suspect, or aiding or attempting to aid a police officer to apprehend a suspect
- another person’s commission or attempt to commit a crime (specific provisions apply to certain motor vehicle violations, risk of injury to a child, and sex offenses)
- any federal crime involving international terrorism

Applies:

- generally to victim services provided by OVS and for certain other purposes (CGS § 54-201(1))

# Victim Services Definition

## Variation #1

“Victim” means a person who is injured or killed as a result of:

- an attempt to prevent a crime or apprehend a suspect, or aiding or attempting to aid a police officer to apprehend a suspect
- another person’s commission or attempt to commit a crime (specific provisions apply to certain motor vehicle violations, risk of injury to a child, and sex offenses)
- any federal crime involving international terrorism

Also includes:

- the legal representative of such person
- a member of the deceased victim's immediate family

Applies to:

- notifications related to offender applications for release or other relief, scheduled release dates, and certain sex offender releases (CGS §§ 18-81e & 54-226)

# Victim Services Definition

## Variation #2

“Victim” means a person who is injured or killed as a result of:

- an attempt to prevent a crime or apprehend a suspect, or aiding or attempting to aid a police officer to apprehend a suspect
- another person’s commission or attempt to commit a crime (specific provisions apply to certain motor vehicle violations, risk of injury to a child, and sex offenses)
- any federal crime involving international terrorism

Also includes:

- any person who has suffered pecuniary loss as a result of the victim’s personal injury and is responsible for the maintenance of the victim
- the dependents of a deceased victim, including any dependent child of a homicide victim who was killed by the other parent
- any person who has suffered pecuniary loss, including funeral expenses, as a result of the victim’s death

Applies to:

- victim compensation (CGS § 54-208)

# Victim Services Definition

## Variation #3

“Victim” means a person who is injured or killed as a result of:

- an attempt to prevent a crime or apprehend a suspect, or aiding or attempting to aid a police officer to apprehend a suspect
- another person’s commission or attempt to commit a crime (specific provisions apply to certain motor vehicle violations, risk of injury to a child, and sex offenses)
- any federal crime involving international terrorism

Also includes:

- family members of child abuse victims
- family members of sexual assault victims
- family members of domestic violence victims
- family members of homicide victims
- children who witness domestic violence, including, children who are not related to the victim

Applies to:

- victim restitution services (CGS § 54-216)

# Connecticut Statutes and Common Law Concerning Disclosure of Certain Records

# Connecticut Statutes

- PA 13-311 exempts from disclosure under FOIA certain (1) photographs and other images of homicide victims and (2) audio recordings
- State statutes do not address transcripts of 911 calls
- Certain law enforcement records are exempt from disclosure
- Autopsy reports may be disclosed only to certain requesters

# Images of a Homicide Victim

- PA 13-311 exempts from disclosure under FOIA a photograph, film, video, digital, or other visual image depicting a homicide victim, to the extent that the record could reasonably be expected to constitute an unwarranted invasion of the victim's or surviving family members' personal privacy (CGS § 1-210(b)(27))
- The record must have been created by a law enforcement or other government agency

# Images of a Homicide Victim

- Survivor privacy was not previously recognized in Connecticut
- Invasion must be “unwarranted” - there may be cases where an invasion of privacy is warranted (and thus the image would be disclosable)
- Applicability of *Perkins* test- unclear if this test would be used in cases involving images of a homicide victim



# Audio Recordings

- PA 13-311 exempts from disclosure under FOIA the portion of a recording or audio tape that describes a homicide victim's condition
- The exemption (1) applies only to recordings held by law enforcement agencies, (2) does not extend to 911 or other calls for assistance made by a member of the public to a law enforcement agency, and (3) expires on May 7, 2014

# Law Enforcement Records

## CGS § 1-210(b)(3)

- Under FOIA, certain law enforcement records are exempt from disclosure
- The records must have been compiled in connection with the detection or investigation of crime
- Exemption applies if disclosure would not be in the public interest due to one of eight specified reasons

# Law Enforcement Records

## CGS § 1-210(b)(3)

A law enforcement record is exempt if disclosure would reveal:

1. the identity of informants or witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known;
2. the identity of witnesses who are minors;
3. witnesses' signed statements;
4. information to be used in a prospective law enforcement action if prejudicial to the action;

# Law Enforcement Records

## CGS § 1-210(b)(3)

A law enforcement record is exempt if disclosure would reveal:

5. investigatory techniques not otherwise known to the general public;
6. arrest records of a juvenile, including any associated investigatory files;
7. the name and address of the victim of (a) sexual assault or (b) risk of injury to a minor, or of an attempt thereof; or
8. uncorroborated allegations subject to destruction.

# Prospective Action

## CGS § 1-210(b)(3)(D)

- Disclosure may be required even if the investigation is not closed
- “Additionally, the statute is not satisfied and, consequently, information is not exempted from disclosure by the mere good faith assertion that the matter to which the information pertains is potentially criminal...there must be an evidentiary showing that the actual information sought is going to be used in a law enforcement action and that the disclosure of that information would be prejudicial to that action.” (*Dept. of Public Safety v. Freedom of Information Commission*, 51 Conn. App. 100 (1998))

# Autopsy Reports

- Governed by CGS § 19a-411 and the Commission on Medicolegal Investigations' regulations (Conn. Agencies Reg. § 19a-401-12)
- May be requested only from the Office of the Chief Medical Examiner
- Disclosable only to certain entities
- The chief medical examiner or a state's attorney may apply for a court order to limit disclosure to the extent that they show a compelling public interest against disclosure

# Autopsy Reports - Access

- May be provided upon request to any state's attorney, police chief, or other law enforcement official if he or she deems it necessary for the performance of his or her official duties
- Access cannot be denied to a person with a legitimate interest in the records
- No person can be denied access to records concerning a person who died while in state custody (i.e., in the custody of the departments of Children and Families, Correction, or Developmental Services)

# Autopsy Reports - Legitimate Interest

A person with a legitimate interest includes:

- Next of kin
- Defense counsel of record and pro se litigants
- Attorneys acting on behalf of an estate
- Insurance claims agents
- Treating physicians



# Autopsy Reports - Research Purposes

- May be provided to public authorities; professional, medical, legal, or scientific bodies; universities; or similar research bodies
- Access is at the commission's discretion and upon such conditions and payment of such fees as it prescribes
- The conditions must include a requirement that the identity of the deceased individuals remain confidential and not be published

# Connecticut Common Law

# Invasion of Privacy Tort

- Unreasonable intrusion upon the seclusion of another
- Appropriation of another's name or likeness
- Unreasonable publicity given to another's private life
- Publicity that unreasonably places the other in a false light before the public (Restatement Second Torts)

## *Galvin v. FOIC*, 201 Conn. 448 (1986)

- "The legislature might reasonably have considered the information contained in autopsy reports to be sufficiently sensitive to warrant the imposition of disclosure restrictions not applicable to other records of public agencies.
- "We note, for example, that autopsy reports could contain information which, if disclosed, might cause embarrassment and unwanted public attention to the relatives of the deceased."

*National Archives and Records  
Administration v. Favish*

541 U.S. 157 (2004)

# Facts

- Vince Foster, a deputy White House counsel in the Clinton administration, committed suicide in Fort Marcy Park in Virginia in July 1993
- Favish, a private citizen, requested crime scene photos that the U.S. Park Police took
- The government denied the request, citing exemption 7(C) of the federal Freedom of Information Act

# Federal FOIA - Exemption 7(C)

- Exemption applies to “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy.” (5 U.S.C. § 552(b)(7)(C))

# Supreme Court Decision

- The Court ruled unanimously that releasing the photos would be an unwarranted invasion of the surviving family members' privacy under exemption 7(C)



# *Favish* - Personal Privacy under Exemption 7(C)

- The federal FOIA recognizes surviving family members' right to personal privacy with respect to death scene images of their close relatives
- The term “unwarranted invasion” requires a balancing test between privacy and the public's interest in disclosure

# *Favish* - Balancing Test

- “Where the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure.
- “First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake.
- “Second, the citizen must show the information is likely to advance that interest.
- “Otherwise, the invasion of privacy is unwarranted.”

# *Favish* - Public Interest

- “In the case of photographic images and other data pertaining to an individual who died under mysterious circumstances, the justification most likely to satisfy Exemption 7(C)’s public interest requirement is that the information is necessary to show the investigative agency or other responsible officials acted negligently or otherwise improperly in the performance of their duties.”

# *Favish* - Burden of Proof When Asserting Negligence or Improper Actions

- “We hold that, where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure.
- “Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.”

# Other States' Laws Concerning Disclosure of Certain Records

# Scope of Research

- Laws specifically addressing (1) crime scene photographs, (2) autopsy reports, and (3) 911 tapes and transcripts
- We included only those statutes that directly address the disclosure of the above records
- We excluded general exemptions that these records may fall under (e.g., investigatory records)

# Number of States with Laws Directly Addressing the Specified Records

<b>Record</b>	<b>Number of States</b>
<b>Crime scene photographs</b>	<b>9</b>
<b>Autopsy reports</b>	<b>26</b>
<b>911 recordings</b>	<b>16</b>
<b>911 transcripts</b>	<b>7</b>

# Other States' Laws

- Generally, the laws restrict the disclosure of the above records to certain entities (e.g., next of kin)
- In some cases, particularly for autopsy reports and 911 transcripts, they specify that the records are available to the public, with certain restrictions
- Some laws give an agency discretion to release the record to entities other than those specified in the statute
- May provide for balancing tests



# Florida - Crime Scene Photographs

- A photograph or video or audio recording that depicts or records the killing of a person is generally confidential and exempt from disclosure.
- A court, upon a showing of good cause, may issue an order authorizing any person to view or copy a photograph or recording that depicts or records the killing of a person and may prescribe any appropriate restrictions or stipulations (F.S.A. § 406.136).

# Florida - Crime Scene Photographs

In determining good cause, the court must consider:

1. whether disclosure is necessary for the public evaluation of governmental performance;
2. the seriousness of the intrusion into the family's right to privacy and whether disclosure is the least intrusive means available; and
3. the availability of similar information in other public records, regardless of form.

# Georgia - Crime Scene Photographs

- Crime scene photographs and video recordings, including photographs and video recordings created or produced by a state or local agency or a perpetrator or suspect at a crime scene, which depict or describe a deceased person in a state of dismemberment, decapitation, or similar mutilation...shall not be subject to disclosure (Ga. Code Ann. § 45-16-27(e))

# Georgia - Crime Scene Photographs

- Uses same balancing test as Florida
- Allows “bona fide credentialed members of the press” to view the photographs and recordings
- The member of the press must agree to refrain from copying, duplicating, or distributing the materials (Ga. Comp. R. & Regs. § 92-5-.01)

# North Dakota - 911 Tapes and Transcripts

- A public agency may deny access to 911 tapes
- A person may, upon request, (1) listen to the tape, but not copy or record it, and (2) receive a written transcript (ND Stat. § 57-40-.6-07(4))

# California - Autopsy Reports

Disclosure of autopsy reports for children younger than 18 killed as a result of a criminal act is generally restricted if the family requests that they be sealed

A sealed report can be disclosed to:

1. law enforcement or social service agencies, child death review teams, or the hospital that treated the child immediately before death;
2. the defendant and defense team in criminal or related habeas proceedings;
3. civil litigants in a cause of action related to the victim's death, with a court order upon a showing of good cause; and
4. victims, their authorized representatives, and insurance carriers (Cal. Civ. Proc. Code. § 130).

# Federal and State Cases

# Tort Law

## Invasion of Privacy Not Found

- *Showler v. Harper's Magazine Foundation*, 222 Fed. Appx. 755 (2007, 10th Cir. U.S. Ct. App., Okla.)- photo of a deceased person is not enough
- *Bremmer v. Journal Tribune Pub. Co.*, 76 N.W. 2d 762 (1956, Iowa)- newsworthiness

## Family Members Have a Reasonable Privacy Interest

- *Reid et al. v. Pierce County*, 136 Wash. 2d 195 (1998)
- *Catsouras v. Cal. Highway Patrol*, 181 Cal. App. 4<sup>th</sup> 856 (2010)



# FOI- Related Cases

## Disclosure Ordered

- *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W. 2d 909 (1989)-stronger governmental interest in disclosure
- *State of Florida v. Rolling*, (unreported) 1994 WL 722891-limited disclosure ordered

## Highly Publicized Tragic Events - Records Shielded

- **9/11:** *NY Times Co. v. City of NY Fire Dept.*, 829 N.E.2d (2005)
- **Rhode Island nightclub fire:** *Providence Journal Co. v. Town of West Warwick*,(unreported) 2004 WL 1770102

# Federal Case

- *Marsh v. County of San Diego*, 680 F.3d 1148 (9<sup>th</sup> Cir. 2012)
- Recognized a substantive due process right to non-interference with family's remembrance of a decedent

# Post-Columbine Records Requests

# Colorado Public Records Laws

- Colorado has two statutory schemes concerning access to public records: the Colorado Open Records Act (CORA) and the Criminal Justice Records Act (CJRA)
- Autopsy reports fall under CORA
- Law enforcement records fall under CJRA

# CORA

- Autopsy reports are subject to disclosure under CORA
- CORA allows a public records custodian to withhold disclosure of a public record if he or she determines that disclosure “would do substantial injury to the public interest”
- Upon making this determination, the custodian must apply to a court for an order to restrict or prohibit disclosure, with the burden of proof on the custodian (C.R.S. § 24–72–204(6)(a))

# Requests for Victims' Autopsy Reports

- The county coroner sought and received a court order that permitted him to withhold the reports from disclosure
- The state's Court of Appeals upheld the order (*Bodelson v. Denver Publishing Co.*, 5 P.3d 373 (Colo. App. 2000))

# Court of Appeals Decision

- The substantial injury exemption “is to be used only in those extraordinary situations which the General Assembly could not have identified in advance”
- Substantial injury must be determined on a case-by-case basis
- Decision did not create a categorical exemption for autopsy reports

# CJRA

- Applies to records maintained by criminal justice agencies
- Records of official actions generally must be disclosed
- Other criminal justice records may be disclosed by the records custodian
- An applicant denied access can apply to a district court for a show cause order (C.R.S. §§ 24–72–303 to 305)



# CJRA Balancing Test

Agencies must balance:

1. the privacy interests of affected individuals,
2. the agency's interest in keeping the information confidential,
3. the agency's interest in not compromising ongoing investigations,
4. the public purpose to be served in allowing inspection, and
5. any other pertinent consideration relevant to the particular circumstances (*Harris v. Denver Post Corp*, 123 P.3d 1166, Colo. (2005))

# Conclusion

- Before PA 13-311, Connecticut law did not address any of the specified records except for autopsy reports
- In the states that have laws directly addressing the specified records, the laws generally restrict disclosure to certain entities (e.g., next of kin)
- Decisions on disclosure often involve a balancing test

Questions  
&  
Answers