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

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The Intersection of the Connecticut Freedom of Information Act and the Invasion of Personal Privacy

The struggle between the freedom of the press to publish stories of interest to the public has always been at war with the right of privacy, or the right of the individual to keep certain personal information private. The advent of the Internet or information highway has aggravated the traditional clash between the public's right to access public records and the right of individuals to shield certain personal information from public view. Information or images once posted on a website are practically impossible to suppress, which has made some courts more reluctant to disclose gruesome death scene photographs and other images.

Connecticut recently passed public act 13-311, which in section 2 of the public act allows public agencies to deny the disclosure of certain photographs, film, video or digital or other images "depicting the victim of a homicide, to the extent that such record could reasonably be expected to constitute an unwarranted invasion of the personal privacy of the victim or the victim's surviving family members". Section 3 of the public act allows public agencies to deny disclosure of audio tapes where the speaker is describing the condition of a homicide, unless the tape is an emergency 911 call or other call for assistance made by an individual to a law enforcement agency. Proponents of the public act have stated that the act attempts to balance the public's right to obtain certain information with the family members' right to keep certain information private.

This memo does not purport to represent a comprehensive summary of all of the pertinent case law, but only a sampling of some of the relevant case law that a court interpreting this new law may look to for guidance on its meaning.

Connecticut case law on privacy

The concept of privacy is not a new one. Beginning in the early 20th century, courts began to recognize the invasion of privacy tort. There are four different categories of the cause of action for invasion of privacy: (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 Torts cited in *Goodrich v. Waterbury Republican American*, 188 Conn. 107, 127-128 (1982)). Connecticut did not recognize the tort of invasion of privacy until 1959, with the case *Korn v. Rennison*, 21 Conn. Supp. 400 (1959), which concerned the use of a photograph without the plaintiff's consent for advertising purposes. *Korn* was a superior court case and the Connecticut Supreme Court first recognized the cause of action for invasion of privacy in 1982 in the case of *Goodrich, supra*, which involved a libel action against a newspaper regarding certain statements made by a developer. *Id.*

Regarding autopsy reports, Connecticut had a fairly long history of making autopsy reports public. The office of Coroner was established in 1883 by a public act which required the Coroner to keep records but was silent on who could have access to the records. 1883 Public Acts of Conn., Ch. 118, An Act Concerning Coroners. In *Daly v. Dimmock*, 55 Conn. 579 (1888), a man indicted for murder in a death investigated by the coroner's office brought a writ of mandamus for access to the coroner's records. The court held that since the statute was silent, it would interpret that to mean that there was no restriction and that anyone could see the records. In 1935, the legislature validated the court finding and amended the statute to state that all coroner's records "shall be public records and open to inspection at all reasonable times". Supp. to Conn. Gen. Stat. Jan. Sess. 1935, Ch. 14, section 48c. This was the case until 1970, when the legislature created the Office of Medicolegal Investigations (later known as the Office of the Medical Examiner) and deleted reference to autopsy reports so that such reports were no longer public records. 1969 Conn. Pub. Acts. No. 69-699, sec. 40.

The issue of how autopsy records are treated under the Freedom of Information Act was resolved in *Galvin v. FOIC*, 201 Conn 448 (1986). *Galvin* held that autopsy records are not public records under the Freedom of Information Act, that there is not unconditional access to them and that the agency needs to follow the process for conditional disclosure as set forth in the applicable statute, section 19a-411 of the

Connecticut General Statutes.

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. *Id.* at 461.

The court in its decision referenced the exception for personnel or medical files and similar files, the disclosure of which would constitute an invasion of personal privacy and stated that neither section 1-210 or any other provision of the FOIA:

...provides a mechanism whereby a deceased person's family may invoke a right to privacy before the Freedom of Information Commission. In cases such as the one before us, the family members of the deceased have no standing to receive notice of an FOIC hearing let alone to object or otherwise be heard at the hearing. Their interests must be represented by the official body seeking to oppose disclosure...whose standing to invoke their claims of privacy is questionable... *Id.* at 461-62.

In another case, the Connecticut Supreme Court recognized the interplay between the Connecticut Freedom of Information Act and privacy law. The court looked to tort law for guidance on its interpretation of a different exemption under the Connecticut Freedom of Information of Act. *Perkins v. FOIC* concerned the sick leave records of a board of education employee, and required the court to analyze the FOIA exemption for "personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy". *Perkins*, 228 Conn 158 (1993). The standard that the court used to determine whether information should be disclosed was explicitly not a balancing test. The court analyzed what the term "invasion of personal privacy" meant and made an analogy to the tort of invasion of privacy and looked to the Restatement Second Torts for guidance. The court adopted the Restatement's standard: "the invasion of personal privacy exception...precludes disclosure, therefore, only when the information sought by a request does not pertain to legitimate matters of public concern and is highly offensive to a reasonable person." *Id.* at 175. In order for a record to be shielded from disclosure, both prongs would need to be met. *Id.*

Connecticut has yet to recognize survivor privacy, otherwise known as relational privacy, where the person whose privacy was infringed has died, and the surviving relatives bring suit on behalf of the deceased. However, a few jurisdictions have found that surviving relatives have a privacy interest of their own to protect, apart from the deceased's.

Common law invasion of privacy actions upheld in other jurisdictions

In *Reid et al. v. Pierce County*, 136 Wn 2d 195 (1998, Washington), a consolidated case where, among other things, employees of medical examiner's office would take autopsy photographs home, make scrapbooks of them and show them at cocktail parties, the court recognized a common law of invasion of privacy action in Washington.

We fail to see how autopsy photographs of the Plaintiffs' deceased relatives do not constitute intimate details of the Plaintiffs' lives or are not facts Plaintiffs do not wish exposed "before the public gaze". *Id.* at 210.

and the court held :

We hold the immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent. That protectable privacy interest is grounded in maintaining the dignity of the deceased. *Id.* at 212.

In a California case, *Catsouras v. Cal. Highway Patrol*, 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 family sued based on the public disclosure of private facts category of the invasion of privacy tort which consists of (1) public disclosure, (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern. *Id.* at 868. The court found that there was no legitimate law enforcement purpose for the dissemination, that it was just gossip and did not concern public interest or freedom of press. *Id.* at 874. The court discussed various precedents for finding personal privacy right and cites *Favish, infra*, for the principle that family members have a privacy right in death images. *Id.* at 872-73. The court held that the family members had sufficient interest in the accident scene photographs to maintain the invasion of privacy action. *Id.*

at 874. The court also found that e-mailing the photographs with the intention of causing distress to the decedent's family members would support a claim for the tort of intentional infliction of emotional distress but that the California Highway Patrol would be immune from liability because of the 11th amendment to the U.S. Constitution and the doctrine of sovereign immunity. *Id.* at 892.

Newsworthiness

A common element in the cases where courts have decided that information is not protected on invasion of privacy grounds is newsworthiness. In *Bremmer v. Journal Tribune Pub. Co.*, 76 N.W.2d 762 (1956) (Iowa), the decomposing and mutilated body of an 8-year old boy who had been missing for a month was found and the newspaper ran a photograph showing the place where the boy was found and the body could be seen in the picture. The boy's parents sued for the tort of invasion of privacy and the court held that the discovery of the body of a local missing boy was newsworthy and thus could not be the violation of anyone's right to privacy. The court felt that since the body was clothed and no organs or private parts were shown, there was no violation of a right to privacy. *Id.* at 766. Quoting another decision which it found apropos the court said:

The plaintiff says the picture is simply sensational, which it also is, but the courts are not concerned with the canons of good taste, and pictures which startle, shock, and even horrify may be freely published, provided they are not libelous or indecent, if the subject of the picture consents or if the occasion is such that his right of privacy does not protect him from the publication. The right is, of course, variable and in some cases it may dwindle almost to the vanishing point, as where an individual, perhaps involuntarily, becomes involved in some newsworthy event or some situation in which the public has a legitimate interest. *Id.* at 768.

The court was not overly sympathetic to the parents' plight, simply stating:

There are many instances of brief and human suffering which the law cannot redress. The present case is one of those instances. Through no fault of the petitioner or her deceased child, they became the objects of widespread public interest. *Id.* at 766.

Bremmer represents an older case, of course pre-*Favish*, but there have been other more recent cases that have followed this line of reasoning. A post-*Favish* case where a court did not find an invasion of privacy cause of action is *Showler v. Harper's Magazine Foundation*, 222 Fed. Appx. 755 (2007, 10th Cir. U.S. Ct. App., Okla.). In *Showler* a newspaper reporter took a photograph of a deceased serviceman's body lying in an open casket at his funeral, which about 1200 people attended. The photograph was not authorized by the family. The court found that "The fact that the photograph was of a deceased's body is not, standing alone, outrageous, even if it was unauthorized." *Id.* at 761. The father of the deceased had said that the body looked fine and it was seen by 1200 people. The court distinguished *Favish*, *infra*, as follows:

Favish is inapplicable to this analysis because it relies on a statutory privacy right under the FOIA, not a cause of action for invasion of privacy. In fact, the Supreme Court observed in *Favish* that "the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution" *Id.*

The court also distinguished *Favish* by saying:

Indeed, all of the cases cited by the Court in support of its acknowledgement that the common law has recognized a family's right to control the death images of the deceased, involve death images that are gruesome and none involve images displayed at a public funeral. *Id.* at 762.

The court quoted *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989), as authority for the proposition that the meaning of privacy under FOIA is different than the questions of whether there is a claim of action for invasion of privacy or whether there is a constitutional privacy interest. *Showler*, *supra* at 762.

Therefore, under this rationale, perhaps the most pertinent cases to this discussion are cases that involve challenges under state or the federal Freedom of Information Acts.

Freedom of Information Act related case law

A well-known case often cited for the proposition that the public interest outweighs family members' desire to shield death image photos is *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989). *McCambridge* was a murder-suicide case where a stockbroker killed his wife and two daughters and then himself. Mercedes

McCambridge was an Academy award-winning actress and the mother of the stockbroker. She sued to block disclosure of the photographs of the bodies as well as some letters and a diary. She argued the photographs were personal and that it would violate her constitutionally protected right to privacy to release them. The court found that the records did involve personal matters, but found the governmental interest in disclosure outweighed her privacy interest in nondisclosure.

The court recognized that the photographs were "horrible and sickening, as are all such multiple murder photographs" and that the appellant would be "naturally sensitive" to the photographs but balanced "the government's strong interests in depicting how the multiple murders occurred, why the police consider the case closed as a triple murder-suicide matter, and why no further action should be taken. This is a highly valued governmental interest", which the court felt outweighed the appellant's interest in shielding the photographs from public view. *Id.* at 231.

At times the courts will attempt to find a compromise between full disclosure and denying the public access to documents. In an unreported case regarding the killing of college students in Gainesville, Florida, *State of Florida v. Rolling*, 1994 WL 722891 (1994), the records at issue were photographs and a video of multiple murder victims at the murder scenes and in the autopsy room, showing the naked and mutilated bodies of victims, some of which were used in the trial of the accused. The court found the records to be public records created as part of an investigation. *Id.* at 2. The court discussed whether a survivor privacy right existed and looked at case law in which a few courts recognized a derivative right of privacy. *Id.* at 3-4. The court found that the relatives did have a privacy right in trying to avoid the trauma, sorrow and humiliation of the public display of intimate and possibly embarrassing photographs of their children, but that the photographs also had some value to the public because they could help to evaluate how public law officials carried out their duties:

Photographs are less subjective than are written descriptions of crime scenes and disclosure of the photographs might permit the public to evaluate the impact of the photographs on the jurors and to evaluate the adequacy of the crime reports themselves. *Id.* at 5-6.

The court's remedy was to allow the public and the media to examine the photographs, but not to be allowed to remove or copy them so that the relatives would be spared seeing them. The court also stated that the public or media could later move

for full disclosure if such limited disclosure was not enough to enable them to evaluate governmental accountability. *Id.* at 6.

Case law involving highly publicized tragic events

Other jurisdictions have found that certain tragic events that are the subject of widespread news coverage deserve more protection on privacy grounds because the disclosure of the information will result in the family being confronted with a bombardment of images or recordings of their loved ones.

Columbine

Bodelson v. Denver Publishing Co., 5 P.3d 373 (2000), concerned a request for the autopsy reports of the victims and perpetrators of the Columbine high school shooting which reports fell within the substantial interest to the public interest exception to the Colorado Freedom of Information Act. The court found that the release of the autopsies would "provide graphic detail concerning the nature of the injuries and that the mechanics of death would clearly be 'very hurtful and harmful for the families of these deceased persons'" and "to the public at large." *Id.* at 378. The court also found that the newspaper did not have adequate support for its claim of what would be gained from the release of the autopsies since there would probably be no homicide prosecution and there was no suggestion of investigating the actions of public officials. *Id.* at 378. The court was also heavily persuaded by the fact that the petition was presented only 5 weeks after the incident and that this case was not a permanent bar to disclosure. *Id.* at 378.

September 11th

Another case, which involved the Sept 11th attack on the World Trade Center, was *N.Y. Times Co., v. City of N.Y. Fire Dept.*, 829 N.E.2d 266 (2005). The newspaper requested disclosure of audio tapes and transcripts of 911 calls, including dispatch calls and interviews with firefighters under the New York Freedom of Information law. Similar to Connecticut, New York has a privacy exception for records that "would constitute an unwarranted invasion of personal privacy...". Public Officers Law sec. 87(2). The court rejected the argument that the privacy exception does not protect the dead; it found that surviving relatives have an interest in keeping private the affairs of the dead. *Id.* at 269. "The desire to preserve the dignity of human existence even when life has passed is the

sort of interest to which legal protection is given under the name of privacy. We thus hold that surviving relatives have an interest protected by FOIL in keeping private the affairs of the dead." *Id.* Regarding the 911 calls, the court distinguished these 911 calls from other 911 calls by saying :

(1) Many 911 callers are not in as desperate straits as those who called on September 11th.

(2) These calls are part of an event that "has received and will continue to receive enormous-perhaps literally unequaled-public attention... Thus it is highly likely in this case-more than in almost any other imaginable-that if the tapes and transcripts are made public, they will be replayed and republished endlessly, and that in some cases they will be exploited by media seeking to deliver sensational fare to their audience." *Id.* at 270.

The court agreed that there is a legitimate public interest in the 911 calls but that the family's privacy interest outweighed it, so that except in the case where the family expressed a desire to release the 911 calls, the department did not have to disclose the calls. *Id.* Regarding the dispatch calls which are considered intra agency materials, the New York FOI law prevents disclosure unless they are statistical or factual tabulations or instructions to staff that affect the public. The court ordered the disclosure of the dispatch calls, but with the redaction of any nonfactual material such as opinions and recommendations of the firefighters. *Id.* at 271.

Rhode Island nightclub fire

A third case involved the nightclub fire in Rhode Island that killed 100 people, *Providence Journal Co. v. Town of West Warwick*, (unreported) 2004 WL 1770102. The newspaper requested records consisting of various 911 and dispatch calls. The court stated that while the calls are public records, it cited *Favish, infra*, as authority for the proposition that the communications should be shielded to avoid a highly intrusive interference with the victims' or family members' privacy entitlement:

To allow access to victim/family calls would be at variance with the purpose of APRA which recognizes the desirability of preserving individual dignity. This Court cannot conceive a greater affront to such dignity than permitting others to listen to the anguish that is embodied in such communications. *Id.* at 3. (APRA

is Rhode Island's FOI act.)

Federal case law

Connecticut courts have consistently found that it is appropriate for Connecticut to look to the federal Freedom of Information Act (FOIA) for guidance, because in many cases the purposes of the federal and Connecticut's law are virtually identical. *See Woodstock Academy v. FOIC*, 181 Conn. 544 (1980). The term "unwarranted invasion of personal privacy" is not a new one, but is used in FOIA as a basis for exempting certain records from disclosure. Exemption 6 of FOIA exempts "personnel and medical files and similar files the disclosure which would constitute a clearly unwarranted invasion of personal privacy" and Exemption 7(C) under the federal act exempts "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. sec. 552(b)(6) and (b)(7)(C).

Pre-Favish

In *Katz v. National Archives & Records Administration*, 862 F.Supp. 476 (1994), an author wanted access to the autopsy photographs and x-rays of President Kennedy held in the national archives. The court found that the records were not subject to the FOIA because they were a gift and exempted under the Assassination Records Collection Act of 1992 and that even if they did come under FOIA, they would fall under Exemption 6 for invasion of privacy. *Id.* at 482-83. The x-rays were not graphic but showed the results of a high-powered rifle shot to the head. *Id.* at 483. Some of the photographs had already been previously published, but there was testimony that claimed that the unreleased ones were more shocking and lurid. *Id.* at 485. The court held that "the Kennedy family has been traumatized by the prior publication of unauthorized records and that further release of the autopsy materials will cause additional anguish" and that "allowing access to the autopsy photographs would constitute a clearly unwarranted invasion of the Kennedy family's privacy." *Id.* at 485-86.

In *New York Times Company v. National Aeronautics and Space Administration*, 782 F. Supp. 628 (1991), The New York Times sued for access to the voice communications tape-recorded on the Challenger space shuttle prior to the explosion. The tape concerned only technical information, but the court found that it was not what they said

but the actual voices on the tape that constitute "intimate detail." *Id.* at 631. "Exposure to the voice of a beloved family member immediately prior to that family member's death is what would cause the Challenger families pain." *Id.* The court held that the family members of the astronauts had a substantial privacy interest because "[t]hey may be subjected not just to a barrage of mailings and personal solicitations, but also to a panoply of telephone calls from media groups as well as a disruption of their peace of mind every time a portion of the tape is played within their hearing." *Id.* The court agreed that the public had an interest in learning about NASA's conduct before, during, and after the Challenger disaster, but that the tape would not really serve that interest and that NASA had already provided a transcript of the tape that would serve that purpose. *Id.* at 633.

Favish

National Archives and Records Administration v. Favish, 541 U.S. 157 (2004), is the seminal federal case that "gave the green light to judges across the country to recognize family members' privacy rights over the images of their dead loved ones beyond the narrow confines of FOIA access disputes." Clay Calvert, *The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture*. 26 Loy. L.A. Ent. L. Rev. 133 (2005-2006). In *Favish*, the requester sought the disclosure of death-scene photographs of the body of the President's deputy counsel, whose death was the subject of five investigations, all of which determined the death to be a suicide. The United States Supreme Court found that the family members had a right to privacy distinct from any claim for the deceased's right to privacy: "Foster's relatives...seek to be shielded by the exemption to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility, not for the sake of the deceased." *Id.* at 166. The Court found that Congress intended such an interpretation: "we think it proper for conclude from Congress' use of the term 'personal privacy' that it intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions." *Id.* at 167. The Court found that the family's privacy interest outweighed the public interest in disclosure because Favish had failed to show any evidence to support his belief that the images would show that there was government misconduct. *Id.* at 174-75.

Post-Favish

In *Prison Legal News v. Executive Office for U.S. Attorneys*, 628 F.3d 1243 (2011), a

publisher wanted access to the videotape depicting the aftermath of prison murder and autopsy photographs of the victim, Joey Estrella, who was killed by his cell mates, the Sablan brothers. The court analyzed the unwarranted invasion of privacy exemption to the federal law. The photographs and videotape showed injuries to Estrella's body and the court found that the privacy interest was higher than the photographs in *Favish, supra*, because these images involved grotesque and degrading depiction of corpse mutilation and some of the video shows the mutilation as it occurs. *Id.* at 1248. The plaintiff argued that Estrella was a prisoner and had no expectation of privacy. The court found that Estrella's expectation of privacy had nothing to do with the family's privacy interest in not having gruesome images of his body public disseminated, that their interests were independent interests, not derivative of Estrella's privacy interest and that his status as a prisoner could only affect his own privacy interests. *Id.* at 1248-49. The plaintiff also argued that the trial where the photographs and video were shown in open court constituted a waiver by Estrella's family. The court held that the government cannot waive an individual's privacy interests under FOIA and that the failure of the family to object at the trial is not a waiver and that the only waiver would be if they took some affirmative action to place the images in the public domain. *Id.* at 1249. The court found that even though the fact that the photographs were shown in court impacted the family's expectation of privacy, the disclosure was limited and they still had a strong privacy interest. *Id.* When weighing the public interest in disclosure, the plaintiff also argued that disclosure would help the public to evaluate the Bureau of Prison's performance of its duty to protect prisoners, and to help to understand the prosecutor's decision to seek death penalty against perpetrators. *Id.* at 1250. The court disagreed, stating that the video did not show any Bureau of Prison conduct prior to Estrella's death, that the portion regarding the guards' interaction with the perpetrators had been released, and that the images already were shown at the trial and were viewed and reported on by the media so that little more would be known from release. *Id.* The court also held that the family had a privacy interest in the audio recordings of the perpetrators describing what they were doing as they mutilated his body and that the audio added little or nothing to the public knowledge about the crime and the government response. *Id.* at 1251-52.

There is one federal case that appears to go farther than any other in finding a constitutional basis for common law invasion of privacy claims. *Marsh v. County of San Diego*, 680 F.3d 1148 (2012) was a civil rights action concerning a prosecutor who photocopied the autopsy photographs of a 2-year old who died of severe head injuries

and, after his retirement, gave a copy of a photograph to a newspaper and television station. The mother of the deceased sued the county alleging that the copying and dissemination of the photographs violated her 14th amendment due process rights. The court acknowledged that this was "the first case to consider whether the common law right to non-interference with a family's remembrance of a decedent is so ingrained in our traditions that it is constitutionally protected" and the court held that such a right exists. *Id.* at 1154.

The court found that "a parent's right to control a deceased child's remains and death images flows from the well-established substantive due process right to family integrity." *Id.* at 1154. The court acknowledged the mother's fear of being confronted with images of her dead son on news websites, blogs and social media websites was reasonable and stated that "[t]his intrusion into the grief of a mother over her dead son, without any legitimate governmental purpose, 'shocks the conscience' and therefore violated Marsh's substantive due process right. *Id.* at 1155. However, the court ultimately found that the prosecutor was entitled to qualified immunity because this area of the law is so new and he would not have been on notice that his conduct was unlawful. *Id.* at 1159. It remains to be seen whether this case is an outlier or whether other jurisdictions will follow this reasoning.

Conclusion

This memo represents just a sliver of the large body of law regarding the right to privacy that has been built over the last century in the federal and state courts. It remains to be seen what interpretation Connecticut courts will give to public act 13-311, and whether they will adopt any of the reasoning of the long line of state and federal cases on this topic.