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Good morning ladies and gentlemen,

Thank you for allowing me to speak on this matter of national importance, and I appreciate the time and care you are taking. My heart goes out to everyone in Connecticut having to relive that terrible tragedy.

I come to you today from Tucson, Arizona, wearing two hats. One as national president of the Society of Professional Journalists, the largest organization of journalists in the country. My other hat is as a scholar who teaches and researches freedom of information. I feel my scholarly role might be more useful to you, and I notice a lot of journalists involved here, but really, this is not a “press” issue. Journalists care about these issues because they see first-hand the benefit of open records in making the world better. It has nothing to do with selling papers or getting ratings. Indeed, only 6 to 14 percent of public record requests are submitted by the media.¹ This is an issue of importance to businesses, non-profits, and the general public.

First, I want to say that clearly these records are extremely sensitive by their nature and I understand the pain they cause victims, their families, and the community. In national surveys I have found the general public is generally opposed to these sorts of records being open – they don’t see the benefits.² And citizens have become more protective of their privacy over the past 30 years. I get that. Your task is difficult.

An important element in this discussion is the definition of privacy invasion. The typical legal definition in many state public record laws is that a person’s right to privacy is invaded only if disclosure about the person (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.³ Both prongs must be met, and it is incumbent upon the person seeking privacy to demonstrate they are met. The presumption in state and federal FOIA is that government records are public unless there is a reason that they be closed, and deference is given toward the public having access. This is what has been deemed in the best interest to society as a whole, and is what separates the U.S. from dictatorships and unstable secretive regimes.

Understanding that, it’s crucial to consider the long-term public benefits of these records remaining open – the “legitimate public concern” in the privacy test. Clearly, a major shooting – or any death of unnatural cause – is of legitimate public concern. That’s why we chip in our taxes to pay police, coroners, and other experts to investigate those deaths and let us know what happened. All unnatural deaths are of legitimate interest to the public – for our continued safety. Also, and somewhat ironically, by making these records transparent the state prevents further victims – the government protects the many in Connecticut who could be victimized in the future. In America, problems exposed are problems solved. Here are a few examples of how these public records save lives:

- **These public records free the wrongfully imprisoned.** This week I conferred with a TV reporter from Tampa who got an innocent woman out of prison by accessing these types of records.⁴ There are countless “justice projects” or “innocence projects” throughout the

nation – often law school students who find information through these records leading to the release of those wrongfully imprisoned. The Medill Justice Project at Northwestern University, for example, has freed many people from prison through these types of records.⁵

- **These public records help victims' families find justice.** The Tampa reporter mentioned above also used 911 audio tapes to investigate a botched murder investigation. The actual audio recording, not a transcript, was crucial to the case because of background voices analyzed by experts. He also used autopsy photos to expose problems in the Army's death investigation of one of its recruits.⁶ There's a case in Georgia right now where parents of a dead teen are trying to get photos to see if he was murdered in a school gym wrestling mat. There are more than 40,000 professional journalists in the country who depend on these types of records to help victims' families in their communities.⁷
- **These public records expose problems in society.** These records go beyond criminal activity. For example, Toyota had known for some time of a problem with some of its vehicles' accelerators getting stuck, yet the company was criticized for taking inadequate steps to fix the problem. In 2009 an off-duty state trooper in California was driving with three passengers when his accelerator got stuck and his car drove into an SUV at 120 mph, flipped and rolled, killing all in the car. The 911 tape was made public and posted on the Internet. In the tape, a passenger explains the situation and listeners can hear screams as the vehicle crashes. There was so much public outrage because of the horrific audio recording that Toyota had little choice but to recall vehicles immediately, potentially saving others worldwide from a similar fate.⁸
- **These public records preserve the integrity of our justice system.** When it comes down to it, open government is about preserving democracy.⁹ More than any other kind of public record, criminal justice proceedings have traditionally been open to ensure an honest system, so we do not allow the government to abuse its power as we see in third-world nations. We must remain vigilant or we will slide into a secret police state. Already we have started down that path. Just look at the federal government's use of rendition – imprisoning and torturing people, including U.S. citizens, and then hiding it, using the legal justification of protecting the privacy of prisoners and victims. I've seen local police agencies starting to use this reasoning to hide abuses. Is that what we want?

Ultimately, you have two choices, and either way you will hurt someone – there is no way around it. You may choose to close these records categorically to protect the victims and families from the potential pain and discomfort of seeing these photos and hearing these 911 tapes, either in traditional media or online. But if you do, you will create future victims of murder, rape, police brutality, false imprisonment, and consumer product malfeasance, in addition to eroding the public trust in government. You must weigh whether it is worth killing and hurting people in the future to protect the feelings and sensitivities of current victims and their families. This is not an easy place to be – you are faced with a difficult conundrum.

Some have sought compromise – ways of protecting victim privacy while still allowing the public access to information for preventing future victims. I applaud the intentions but unfortunately, based on what I've seen nationwide, I do not see them as workable. Categorical exemptions will not serve the public, and including the word “unwarranted” in the exemptions will not help. Research shows that records custodians err on the side of secrecy and will automatically keep the records secret, whether that secrecy is warranted or not.¹⁰ Indeed, about

three-quarters of police agencies nationwide, on average, illegally deny requesters' access to simple police reports, even without an exemption.¹¹ Another proposed compromise is to allow people to view photos or listen to 911 tapes but not get copies unless an independent arbiter rules them public. This will require someone to decide whether or not copies should be made. Who is to do this? Courts are expensive and intimidating to the average person. Ombudsman systems are cumbersome and take too much time for issues that demand immediate attention.¹² Ultimately, the result is essentially the same as blanket secrecy, and ultimately more people will be harmed. Some have recommended allowing access for just journalists, but how do you define a "journalist" today?¹³ And why exclude genealogists, historians, victim advocates, the ACLU and others who rely on these records to help the public? I also would not set an age for protection for the very reasons I outlined above. If one seeks to protect children from those records then the state will create more child victims of domestic violence, murder in the care of child protection, and more victims of school violence. I cannot fathom creating law that would knowingly victimize more children. I also would not create a system that lets families hide records that could save future lives. Some states allow notification of victims and families when records are released to the public,¹⁴ but families should not be able to dictate whether the records should or should not be released. Family members should not have the power to allow the victimization of more people.

A last point I would like to make is that from a big-picture perspective, Connecticut is heading down a dark path. My research indicates that this state is becoming one of the more secretive in the nation, which is surprising given the long tradition of the FOI Commission and the status Mitch Pearlman and others have had nationally and internationally. Every state has parts of its laws that are more transparent and parts that are more secretive. When you aggregate and look at the big picture, as I did by looking at a dozen different ratings of state transparency, Connecticut has ranked smack in the middle – 25th in the nation, to be exact. Now with these provisions it sinks into the more secretive part of the country. It's now what I call a dark state. The law here is worse, overall, than New York and New Jersey. And I certainly wouldn't look to federal statutes and case law for guidance. In fact, more than 40 nations have more progressive public record laws than ours, including Serbia, Azerbaijan, Liberia, and Mexico.¹⁵ The U.S. used to be a leader in transparent government. Not any longer, and we are losing it little by little. Like frogs in a slowly boiling kettle of water. We're headed for soup.

Ultimately, making these records secret won't make Connecticut better, or protect citizens. Not in the long run. The horrific, terrible events of December 14 will never go away, especially for the victims and their families. For that I am truly sorry. But hiding these records from the public will only cause more pain, more victimization, for more people. I know it is difficult, especially given the emotions and sensitivities from this horrific national tragedy, but to best serve the entire population of Connecticut, transparency is the the best long-term policy. Some of the worst laws are created with the best of intentions following the worst of circumstances. That appears to be the case here. I would hate to be in your shoes – to balance the needs of the few for the many, but essentially, whether it's comfortable or politically feasible, that's what needs to be done.

Thank you, and best wishes.

David Cuillier, Ph.D.

Endnotes

¹ See a 2001 study by the Heritage Foundation, “Few Journalists use the Federal Freedom of Information Act,” <http://www.heritage.org/Press/MediaCenter/FOIA.cfm>; and “Frequent Filers: Businesses make FOIA their Business,” by the Coalition of Journalists for Open Government, <http://www.spj.org/rrr.asp?ref=31&t=foia>

² For studies examining public attitudes toward freedom of information, see David Cuillier, *Access Attitudes: A Social Learning Approach to Examining Community Engagement and Support for Press Access to Government Records*, 85 JOURNALISM & MASS COMM. Q. 549 (2008); David Cuillier, *The Public’s Concern for Privacy Invasion and its Relationship to Support for Press Access to Government Records*, 25 NEWSPAPER RES. J., 95 (2004); Joseph Phelps & Matthew D. Bunker, *Direct Marketers’ Use of Public Records: Current Legal Environment and Outlook for the Future*, J. OF INTERACTIVE MARKETING, Winter 2001, at 33; Suzanne J. Piotrowski & Gregg G. Van Ryzin, *Citizen Attitudes Toward Transparency in Local Government*, 37 AM.REV. OF PUB. ADMIN. 306 (2007); David Cuillier & Suzanne J. Piotrowski, *Internet Information Seeking and its Relation to Support for Access to Government Records*, 26 GOV. INF. Q. 441 (2009) (found positive relationship between Internet use and support for access).

³ See, for example, the Revised Code of Washington (state), 42.56.050, with this definition for privacy invasion.

⁴ See “Small Town Justice” by Doug Smith of WTVT-TV, Tampa, Florida, at <http://vimeo.com/29489646>.

⁵ See <http://www.medilljusticeproject.org/>

⁶ 911 audio records were crucial in an investigation, based on voices in the background that weren’t on the transcript, see <http://www.youtube.com/watch?v=t0GmdWu0yIc>.

For autopsy photos being helpful to investigate an Army recruit’s death, see another investigation by Smith at <http://www.myfoxtampabay.com/story/18043376/father-furious-over-armys-snake-story>

⁷ See examples of how increased secrecy has impeded journalistic reporting by Robert McClure, *A Flawed Tool: SEJ Study Finds FOIA Little Used, Plagued by Delays*, 15 SE J. (Society of Environmental Journalists) 5 (2005), http://www.sejarchive.org/site/sejournal/past/sej_fa05.pdf (last visited Feb. 22, 2010); Jennifer LaFleur, *The Lost Stories: How a Steady Stream of Laws, Regulations and Judicial Decisions have Eroded Reporting on Important Issues*, Reporters Committee for Freedom of the Press (2003), <http://www.rcfp.org/loststories/> (last visited Feb. 22, 2010); Charles Lewis, *Freedom of Information Under Attack in the Name of ‘Homeland Security,’ the Work of Journalists is Made Harder*, 56 NIEMAN REP. 84 (2002); Pete Weitzel, *Beware of Regulatory Creep as Secrecy Shrouds Records*, THE IRE J., Nov.-Dec. 2004, at 15; Ben Welsh, *Privacy, Security Block Access to Data*, UPLINK, Jan.-Feb. 2006, at 8.

⁷ For an explanation of different state models, see Harry Hammitt, *Mediation Without Litigation*, http://www.nfoic.org/hammitt_mediation_without_litigation (last visited Feb. 22, 2010); Daxton R. Stewart, *Managing Conflict Over Access: A Typology of Sunshine Law Dispute Resolution Systems*, Presented at the Association for Education in Journalism and Mass Communication annual conference (2008), Chicago.

⁸ See news coverage, for example, at <http://www.nbcnews.com/id/33077383/>; The audio 911 recording is still posted on YouTube at <http://www.youtube.com/watch?v=03m7fmnhOOI>.

⁹ See Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 LAW & SOC. INQUIRY 521 (1977), pages 609-610, who argues that “the First Amendment may require that journalists have access as a general matter to some records...”; also for further readings on the importance of access to information as a check on government, see HAROLD L. CROSS, *THE PEOPLE’S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS* (Columbia University Press 1953); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (Harper 1948); Aimee C. Quinn, *Keeping the Citizenry Informed: Early Congressional Printing and 21st Century Information Policy*, 20 GOV’T INFO. Q. 281 (2003); TED GUP, *NATION OF SECRETS: THE THREAT TO DEMOCRACY AND THE AMERICAN WAY OF LIFE* (Doubleday 2007); Peter Hemon, *Government Information Policy in a Time of Uncertainty and Change*, in *FEDERAL INFORMATION POLICIES IN THE 1990S: VIEWS AND PERSPECTIVES* (Peter Hemon, Charles R. McClure & Harold C. Relyea eds., Ablex Publishing 1996); ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* (Cambridge 2006).

¹⁰ Michele Bush Kimball, *Law Enforcement Records Custodians’ Decision-Making Behaviors in Response to Florida’s Public Records Law*, 8 COMM. L. & POL’Y 313 (2003).

¹¹ David Cuillier, *Honey v. Vinegar: Testing Compliance-Gaining Theories in the Context of Freedom of Information Law*, 15 Comm. L. & Pol’y 203-229 (2010).

¹² Daxton R. Stewart, *Managing Conflict Over Access: A Typology of Sunshine Law Dispute Resolution Systems*, 1 J. Media Law & Ethics 49 (2009).

¹³ For an excellent law review paper out this month about the difficulty of defining “journalist,” see “People who Aren’t Really Reporters at all, who have no Professional Qualifications: Defining a Journalist and Deciding who may claim the Privileges,” by Jonathan Peters and Edson C. Tandoc, Jr., *New York University Journal of Legislation and Public Policy*, <http://www.nyujlpp.org/wp-content/uploads/2013/03/Peters-Tandoc-Quorum-2013.pdf>

¹⁴ See, for example, Washington state’s law that permits agencies to take extra time to process a public records request in order to contact “third persons or agencies affected by the request.” (“Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request...” RCW 42.56.520).

¹⁵ For the complete ranking of FOIA laws in the world, see http://rti-rating.org/country_rating.php. The United States ranks 45th, after Nigeria, Nicaragua and Kyrgyzstan, for example.