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November 22, 2013

Dear Fellow Task Force Members:

Over the past few months, we have struggled with the complicated and emotional policy issues found at the intersection of individual privacy and open government. We have listened to heartbreaking testimony from crime-victims who, through no fault of their own, have been pulled into the public spotlight. We have also heard from media executives, publishers and journalists who rely on public records to fulfill their duty to hold those in power accountable.

No one asks to be a victim of crime, but those who are victimized often find their personal dignity and details of their private lives invaded by investigative government agencies. Through a simple twist of fate, victims' lives are rendered part of the public record.

We can probably all agree that when our state first adopted the Connecticut Freedom of Information Act in 1975, the media landscape looked much different than it appears today. The Internet did not yet exist; the term "blogger" had no meaning; and the first 24-hour cable news channel would not be launched for another six years. Americans still received most of their news from network television, radio, print newspapers and magazines. Today, private details about crime-victims and witnesses often become instantly and permanently available on the Internet.

Constituents of urban districts, such as the one I represent, are more likely to be victimized by crime but they are also more susceptible to police abuse and mistreatment. We must have public oversight of law enforcement agencies and the criminally accused must have the capability to obtain information needed for their defense. I recognize that this is best accomplished through public disclosure of government records. I am confident that a balance can be struck in which we protect the dignity, privacy and safety of crime-victims and witnesses, but preserve the tools that are necessary to hold government accountable.

In that spirit, I have attached proposed recommendations on the issues we have discussed over the past few months; I am offering them for the consideration of the task force. I hope to use these proposals as a starting point for our discussion going forward and I welcome amendments and debate from all of you.

We will no doubt disagree on some issues as we move forward. I am hopeful, however, that we will be able to find areas of consensus and recommend a reasonable and balanced approach to the legislature by our statutory deadline.

Sincerely,

Angel Arce
Co-Chair, Task Force on Victim Privacy and the Public's Right to Know
State Representative, 4th Assembly District

Attachments

EXECUTIVE SUMMARY OF PROPOSED RECOMMENDATIONS

Crime Scene Images

- Maintain the current Freedom of Information Act ("FOIA") exemption for any crime-scene image of a homicide victim if the image could reasonably be expected to constitute an unwarranted invasion of privacy. Codify the *Favish* standard, and define an invasion of privacy as being "warranted" if a requestor produces evidence sufficient to warrant a belief by a reasonable person that:

    1. A government official acted negligently or otherwise improperly in the performance of his or her duties; and

    2. the image requested is likely to be probative of such negligence or impropriety.

- Require any public agency claiming such exemption to permit any member of the public to view, in-person, the exempted crime-scene image, subject to reasonable restrictions on the method of such review.

- In the event a crime-scene image of a homicide victim is ordered to be released, require 24 hours' notice to the victim's surviving family.

Audio Recordings

- Repeal or decline to extend Section 3 of Public Act 13-311, to the extent it provides a FOIA exemption for audio transmissions of emergency personnel in which the condition of a deceased victim of homicide is described.

- Exempt recordings of emergency 911 calls from FOIA, subject to the following exceptions:

    1. Require any public agency in the possession of such a recording to provide a written transcript of the call to any member of the public upon request;

    2. Require any public agency in the possession such a recording to permit any member of the public to listen, in-person, to the call, subject to reasonable restrictions on the method of such review;

    3. Require any public agency in possession of such a recording to provide a copy of the actual audio, upon request, to the person who made the call.

- Require the audio of any emergency 911 call to be released if a requestor produces evidence sufficient to warrant a belief by a reasonable person that (1) a government official acted negligently or otherwise improperly in the performance of his or her duties; and (2) the audio is likely to be probative of such negligence or impropriety.

- In the event the audio is ordered to be released, require 24 hours' notice to the caller.

EXECUTIVE SUMMARY OF PROPOSED RECOMMENDATIONS

Witness Identity

- Maintain the current FOIA exemption protecting the identity of minor witnesses, but clarify that the exemption applies to the identity of any person who was a minor at the time they made a statement or provided information to a law enforcement agency.

- Define "minor" as any person 18 years of or younger, but require any law enforcement agency claiming the exemption for a witness 16 years of age or older to make a reasonable attempt to obtain the permission of the witness or the witness' parent or guardian to release the witness' identity.

- Permit the accused in a criminal case, or their attorney, to obtain the identity of minor witnesses when needed for their defense, provided that the identity may still be withheld if the minor would be endangered or subject to threat or intimidation due to such disclosure.

Death Certificates

- Continue the state's longstanding public policy in favor of the disclosure of death certificates.

PROPOSED RECOMMENDATION FOR CRIME SCENE IMAGES

A. Discussion

The disclosure of government records serves an important public interest, and our state has a longstanding policy in favor of the open conduct of government and free public access to government records, including graphic crime-scene images.[1] Equally important is the state's power to investigate crimes and compile information for law enforcement purposes. When, however, the state uses its inherent investigative and law enforcement power to invade the privacy and dignity of crime-victims and their families, the general policy in favor of disclosure must be weighed against the interest of victims and their families "to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility."[2]

In recognition of the delicate balance between individual privacy and public oversight of government, section 2 of Public Act 13-311 creates a new exemption from the Connecticut Freedom of Information Act for any visual image depicting the victim of a homicide, but only "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." (Emphasis added). This new exemption to our freedom of information statutes was clearly modeled on the federal Freedom of Information Act, which exempts from disclosure "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."[3] As construed by the United States Supreme Court in the case *Nat'l Archives and Records Admin. v. Favish*, the federal exemption "recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images."[4]

As one advocate for victims of violent crime testified during a public hearing, the use of the term "unwarranted" invasion of personal privacy implies that there is such a thing as a "warranted" invasion of privacy.[5] Congress, however, has failed to articulate under what circumstances an invasion of privacy would be "warranted," and has left the matter to the discretion of federal courts. The issue of what constitutes a "warranted" invasion of personal privacy is crucial, as it lies at the precise intersection of individual privacy and the public's right to know. Consequently, this term is too important to be defined by administrative or judicial fiat. To do so constitutes an abdication of legislative function, and risks an overly broad definition that invites government secrecy in inappropriate circumstances. In order to avoid such ambiguity, we

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[1] *Hartford v. Freedom of Information Commission*, 201 Conn. 421, 430 (1986); *Wilson v. Freedom of Information Commission*, 181 Conn. 324, 328 (1980); *Cf. Smith v. Commissioner, State of Connecticut Department of Public Safety,* Conn. Freedom of Info. Comm'n., FIC # 2008-245 (no general exemption for crime scene photos).

[2] *Nat'l Archives and Records Admin. v. Favish,* 541 U.S. 157, 158 (2004).

[3] 5 U.S.C. § 552 (b) (7) (C).

[4] *Favish*, 541 U.S. at 157.

[5] 10/16/2013 public testimony of Morgan Rueckert, attorney for 22 families of victims of the shooting at Sandy Hook Elementary School.

recommend that the legislature define under what circumstances an invasion of victim privacy is "warranted." This would be best accomplished by codifying and refining elements of the *Favish* decision in a manner that appropriately balances individual privacy against the need for public oversight of government. Specifically, we recommend that, where a death scene photo has been requested and privacy concerns are present, the legislature should define an invasion of privacy as being "warranted" if a requestor produces evidence sufficient to warrant a belief by a reasonable person that (1) government officials acted negligently or otherwise improperly in performance of their duties and (2) the record requested is likely to be probative of such negligence or impropriety. Because of the disturbing effect the release of photos can have on families, we recommend that if photos are ordered to be released, a reasonable attempt must be made to give surviving family members 24 hours' notice.

There will likely be instances in which evidence of government impropriety is in the crime-scene images themselves and not available elsewhere. For this reason, a requestor must be able to view death-scene photos in order to determine whether there is evidence of improper conduct contained within the photos. Again, this must be balanced against the interest of surviving family members against unwanted publicity and unnecessary dissemination of death-scene photos of their loved ones. As such, we recommend that the legislature permit members of the public to conduct an in-person review of exempted death-scene photos, subject to reasonable restrictions on the method of such review.

B. Recommendation

We recommend that the legislature maintain the current FOIA exemption for crime scene images of homicide victims, but codify the standard established by the U.S. Supreme Court in *Favish* by defining an invasion of privacy as being warranted if a requestor produces evidence sufficient to warrant a belief by a reasonable person that (1) a government official acted negligently or otherwise improperly in the performance of his or her duties, and (2) the image requested is likely to be probative of such negligence or impropriety. In order to aid in the determination of whether such negligence or impropriety exists, we recommend that the legislature require public agency's to permit in-person review of crime scene images by members of the public, subject to reasonable restrictions on the method of such review. Such restrictions are needed to ensure that photos are not needlessly taken and used to cause harm or pain to surviving family members.

In order to protect against the disturbing effect of the surprise release of gruesome photos, we further recommend that, when the release of photos is found to be warranted, a reasonable attempt must be made to give the surviving family members 24 hours' notice prior to release.

PROPOSED RECOMMENDATION FOR AUDIO COMMUNICATION

A. Discussion

Section 3 of Public Act 13-311 provides a one- year exemption from disclosure under the Freedom of Information Act for audio recordings in which the condition of a homicide victim is described. This exemption does not cover emergency 911 calls, which remain subject to disclosure under the Act, subject to existing exemptions.

As such, there are two primary areas for discussion with regard to public disclosure of audio communication in the possession of government agencies:

(1) Emergency 911 calls; and

(2) Recordings of communication between emergency personnel.

1. Emergency 911 calls

The purpose of the emergency 911 service is to enhance public safety by providing an effective communication system for the delivery of emergency services.[1] The fact that information is recorded during 911 calls is only incidental to this purpose. When a private citizen calls 911 to report an emergency, it is often-times a result of circumstances beyond the caller's control. Emergency 911 calls capture otherwise private individuals during times of great stress and vulnerability. Through a turn of bad luck, intensely private and traumatizing moments become instant fodder for public consumption and exploitation. Individual 911 callers can be re-victimized by disclosure of their 911 call, and they have a valid privacy interest in protecting themselves from unwanted publicity.[2]

There also exists a concern that the unchecked disclosure of emergency 911 calls undermines the public safety purpose of the emergency response system because members of the public may be deterred from reporting emergencies for fear that their call for help will be misused. In fact, during public testimony, several people who called 911 from Sandy Hook Elementary School during the 2012 shootings reported that, given the level of unwanted attention and public scrutiny they received in the wake of the shootings, they would reconsider calling 911 in the future.[3] There is also concern that residents of high crime areas may be afraid of calling 911 for fear of retaliation if their call is replayed on television news. Our own capitol city, Hartford, has adopted an anonymous phone line for reporting criminal activity. This anonymous phone line is setup to encourage "members of the community to assist local law enforcement agencies in

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[1] Federal Communications Commission, Public Safety and Homeland Security Bureau, *9-1-1 Service*, available online at http://transition.fcc.gov/pshs/services/911-services/; see also Wireless Communication and Public Safety Act of 1999, Public Law 106–81, 106th Congress.

[2] 10/16/2013 public testimony of David G. Jacob, clinical social worker; 10/9/2013 public testimony of Becky Virgalla, 911 caller during the shooting at Sandy Hook Elementary School.

[3] 10/9/2013 public testimony of Kim Bassett, 911 caller during the shooting at Sandy Hook Elementary School.

the fight against crime by overcoming the two key elements that inhibit community involvement: fear and apathy."[4]

At the same time, it cannot be denied that information recorded during 911 calls can provide valuable information about the official response to public emergencies, and disclosure of such information sometimes serves the public interest. For instance, Andrew Julien, news editor of the Hartford Courant, highlighted an investigative series the newspaper conducted in which 911 calls were used to shed light on lagging response times to certain medical emergencies. That is one of many examples of instances in which 911 calls have been used to hold government accountable and served a valuable public good.

We are confident legislation can be drafted that protects both the individual privacy of 911 callers and the public interest in holding government accountable. While the actual audio of an emergency 911 call is the portion that is most susceptible to sensational and exploitive misuse, the substance of the call (including what is said, by whom and when) is the aspect most likely to be useful for holding government accountable. In order to balance these interests, we recommend that the legislature require public agencies to make available transcripts of any emergency 911 call upon request of any member of the public.

We are also mindful that, in order for government to be held truly accountable, the media and other interested parties must be able to independently verify the accuracy of transcriptions. As such, we recommend that the legislature require public agencies to make the audio of emergency 911 calls available for in-person inspection by members of the public.

Additionally, it is not unforeseeable that some occasion may arise where it is in the public interest to release copies of the audio portion of an emergency 911 call. Because of this, any exemption for audio should not be absolute. In our discussion of visual images, we recommended that the legislature define the circumstances in which an invasion of privacy is warranted. Such a standard protects individual privacy but also promotes government accountability. We recommend that the legislature adopt a similar standard with regard to the audio of emergency 911 calls. Specifically, we recommend that the legislature require the disclosure of audio where a requestor produces evidence sufficient to warrant a belief by a reasonable person that (1) government officials acted negligently or otherwise improperly in performance of their duties and (2) such audio is likely to be probative of such negligence or impropriety. In order to protect 911 callers, we also recommend that, public agencies be required to attempt to provide 24 hours' notice to a 911 caller prior to the release of the audio of their call.

Finally, as discussed above, the privacy interest at stake belongs to the individual who makes an emergency 911 call. Therefore, it logically follows that the person who makes an emergency 911 call has a right to the full record of their own phone call, including the audio portion. In keeping with this principle, we recommend the legislature require that the audio recording of an emergency 911 always be released upon request of the person who made the call.

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[4] Hartford Crime Stoppers, available online at http://metrohartford.crimestoppersweb.com/index.aspx.

2. Communication between emergency personnel

Section 3 of Public Act 13-311 provides a one-year exemption for audio recordings in which "the individual speaking on the recording describes the condition of a victim of homicide. . . ." This section is scheduled to sunset on May 7, 2013. We recommend that the legislature repeal section 3 to the extent that it permits a public agency to withhold audio recordings of communication between government employees.

The reason that we recommend repealing the above protection is simple: All of the FOIA exemptions recommended by us are grounded in the concept of individual privacy, and how that is balanced against the public's right to know. It is difficult to see what individual privacy interest is protected by exempting the communications of government actors from disclosure. However unpleasant such communications may be, such unpleasantness does not outweigh the strong presumption in favor of public disclosure.

B. Recommendation

In order to safeguard the public safety purpose of the emergency 911 system and the privacy of 911 callers, we recommend that the legislature exempt the audio portion of emergency 911 calls from disclosure under the Freedom of Information Act, subject to several exceptions designed to protect the need for government oversight. First, we recommend that the legislature require any public agency in the possession of a recording of a 911 call, upon request, to provide a written transcript of the call to any member of the public. Second, we recommend that the legislature require any public agency in possession of a recording of a 911 call to permit any member of the public to listen to such call in person, subject to reasonable restrictions on the method of such review. Third, we recommend that the audio 911 calls always be made available to the person who made the call.

Finally, because there may be circumstances in which the release of the actual audio of an emergency 911 is warranted and in the public interest but the caller has not consented to release, we recommend that the legislature require the release of such audio if a requestor produces evidence sufficient to warrant a belief by a reasonable person that (1) a government official acted negligently or otherwise improperly in the performance of his or her duties, and (2) the audio is likely to be probative of such negligence or impropriety.

We recommend that the legislature either repeal or decline to extend the temporary exemption for audio recordings of government personnel describing the condition of a homicide victim.

PROPOSED RECOMMENDATION FOR WITNESS IDENTITY

A. Discussion

Innocent bystanders often become witnesses to criminal activity by mere happenstance; they are simply in the wrong place at the wrong time. Such individuals are interviewed by law enforcement officials and, through no fault of their own, their identity, statements and details of their personal lives become matters of public record, subject to disclosure under our freedom of information laws.

When the Connecticut Freedom of Information Act was first enacted in 1975, the world was a much different place than it is today. The Internet did not exist and most of the public received its news from mainstream television networks, radio, newspapers and magazines. Given an increasingly sensational media landscape, witnesses deserve protection not only from physical danger, but also from undue public intrusions into their private lives. Individuals who serve as witnesses and agree to be interviewed for police reports are entitled to a small measure of privacy, and this is particularly true for minors.

The concerns outlined above are compounded when dealing with child-witnesses. Our state has deemed the public protection of minors to be important to the development of our society. This is evidenced by the many areas of law which distinguish between how adults and minors are treated. The public's interest in the protection of minors is illustrated by our numerous child protection laws, including anti-bullying laws, child labor laws, laws shielding minors from delinquency, laws requiring regular attendance to school, state sponsored curfews, laws prohibiting the consumption of alcohol by minors, laws that criminalize the corruption of children, and the creation of an executive branch agency, the Department of Children and Families, dedicated to the safety and well-being of children.

As an example, the Juvenile Court System is grounded in a presumption that children have an innate degree of innocence and lack the same level of mental acuity present in adults. For this reason, the statements of a child-defendant under the age of 16 are not admissible in a delinquency proceeding unless the child makes the statement in the presence of his or her parent or guardian. Even for child-defendants over the age of 16, statements are only admissible if the official interviewing the child makes reasonable efforts to contact the child's parent or guardian.[1]

Under our current freedom of information statutes, agencies are permitted to withhold juvenile arrest records from disclosure, including investigatory files. Under certain circumstances, juvenile arrest records are required to be destroyed. Even the records used in juvenile court proceedings are subject to protection against disclosure.

It is incongruous that the privacy of juvenile offenders is afforded a greater degree of protection against public disclosure than a child who simply acts as a witness. By exempting the identity of child- witnesses from disclosure under the Freedom of Information Act, Public Act 13-311 furthers the state's recognition the special status of children.

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[1] *Interviewing Minors and Restrictions on Disclosure of Juvenile Records*, Office of Legislative Research, 2013-3-0406. OLR Research Report - Interviewing Minors and Restrictions on Disclosure of Juvenile Records.

The statute is ambiguous, however, with regard to whether the exemption applies to the identities of individuals who were minors at the time they made a statement or gave information to law enforcement, or to the identities of witnesses who are minors at the time a request is made. We believe that the special protection afforded to minor witnesses and the public policy behind such protection would be rendered meaningless if the identity of a child-witness could become public when that child reaches the age of majority. As such, we recommend that the legislature clarify the statute to make clear that it exempts from disclosure the identities of individuals who were minors at the time the time they made a statement or gave information to law enforcement.

We do, however, recognize that the public interest in protecting minor-witnesses must be balanced against the public interest in disclosing government records. As currently drafted, a public agency claiming the exemption bears the burden of proving that the witness was a minor. We recommend that the legislature adopt a parental consent requirement consistent with the rules governing the admissibility of statements by minors in delinquency proceedings. Specifically, we recommend that for witnesses 16 of age or older, a public agency claiming the exemption should be required to make a reasonable attempt to obtain consent to disclosure either from the witness or their parent or guardian.

Finally, we recognize the important public and constitutional interests in providing criminal defendants with the means to present an effective defense and to confront witnesses against them. The Rules of Criminal Practice already codify important safeguards that protect the ability of criminal defendants to gather information for their defense. The Freedom of Information Act, however, is also an important tool for the accused and, in furtherance of the constitutional rights of criminal defendants, we recommend the accused in a criminal case or their attorney be permitted to obtain the identity of minor witnesses when needed for their defense, provided that the identity of a minor may be withheld if the minor would be endangered or subject to threat or intimidation due to such disclosure.

B. Recommendation

The legislature should clarify that the minor-witness exemption is applicable to the identity of individuals who were minors at the time they gave a statement or information to police. We further recommend that the legislature require a public agency claiming the exemption for witnesses age 16 or older to make a reasonable attempt to obtain the consent of either the witness or their parent or guardian to disclose the witness' identity. Finally, we recommend that the legislature enact safeguards in order to ensure that the accused in criminal proceedings have access to information needed for their defense.

PROPOSED RECOMMENDATION FOR DEATH CERTIFICATES

A. Discussion

Several legislative proposals in the 2013 General Assembly sought to exempt death certificates from public disclosure.[1] These proposals have led to general concern among members of the public, as well as the media and academic and medical research community, as to whether the legislature will exempt death certificate from public disclosure in the future. The State of Connecticut Vital Records Office resides within the Department of Public Health. The Vital Records Office provides access to and maintains a registry of all births, marriages, civil unions, deaths and fetal deaths that have occurred in Connecticut since July 1, 1897. In addition to the centralized office of vital records, each municipal registrar is responsible for maintaining the records of all births, marriages, civil unions, deaths and fetal deaths that occur within the municipality. The Connecticut State Library also maintains and provides access to vital records documents which also extend back to as far as 1897. The state and its municipalities have a long history of maintaining and facilitating access to vital records which predates our state constitution. The same societal interest in providing access to vital records remains today.[2]

Death certificates provide factual information regarding a person's death, and the language used to describe the manner of death is usually clinical in nature and purposefully designed to be as inoffensive as possible.[3] The information obtained in death certificates provides insight to researchers in various disciplines to help make advances in science and to learn more about our society. It also provides basic information regarding mortality to the public. In furtherance of Connecticut's long history of providing vital records, we agree with the decision of the legislature to maintain public access to death certificates.

B. Recommendation

We recommend no changes to Connecticut's laws concerning death certificates.

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[1] E.g. proposed House Bill 5421, *An Act Exempting Death Certificates of Minors From Disclosure for a 6-Month Period* (2013 session); proposed House Bill 5733 *An Act Concerning Access to Death Certificates* (2013 session).

[2] Connecticut Department of Public Health, State Vital Records Office, available online at http://www.ct.gov/dph/cwp/view.asp?a=3132&q=388130.

[3] February 25, 2013 public testimony before the Government Administration and Elections Committee of Wayne Carver, MD, Chief Medical Examiner for the State of Connecticut.