



## **Connecticut's Police Reform Bill and Access to Police Records**

**December 10, 2020**

**1:00 p.m. – 2:30 p.m.**

**CT Bar Association**

**Webinar**

**CT Bar Institute, Inc.**

CT: 1.5 CLE Credits (General)  
NY: 1.5 CLE Credits (AOP)

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## **LAWYERS' PRINCIPLES OF PROFESSIONALISM**

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

### **Civility:**

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client's transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party's opportunity to respond.

### **Honesty:**

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;

- I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
- I will not file frivolous motions or advance frivolous positions;
- When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

**Competency:**

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client's interests is critical to the lawyer's function in their community. As such,

- I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
- I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
- I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

**Responsibility:**

I recognize that my client's interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

- Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the Court (or other tribunal) and my adversary of any likely problem;
- I will make every effort to agree with my adversary, as early as possible, on a voluntary exchange of information and on a plan for discovery;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- I will be punctual in attending Court hearings, conferences, meetings, and depositions;
- I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
- In civil matters, I will stipulate to facts as to which there is no genuine dispute;
- I will refrain from causing unreasonable delays;
- Where consistent with my client's interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
- While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.

**Mentoring:**

I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

**Honor:**

I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
- I will, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer's conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.

# Connecticut's Police Reform Bill and Access to Police Records (EML201210)

## Agenda

00:00 – 15:00	Introduction and Background Discussion of Connecticut's Freedom of Information Act
15:00 – 25:00	Discussion of legislative/policy history preceding Police Reform Bill and its amendment to FOIA
25:00 – 30:00	Discussion of lawsuit seeking injunction against invalidation of provision in Police Reform Bill amending FOIA
30:00 – 60:00	Discussion of amendment's anticipated impact on FOIA from both a legal and a practical (i.e., journalistic) perspective
60:00 – 90:00	Question & Answer/Open Discussion

# Faculty Biographies

## Matthew Kauffman

Matthew Kauffman has been a reporter at The Hartford Courant since 1986 and is assigned to the paper's investigative desk. He also specializes in computer-assisted reporting and his blog, The Scoop, covers investigative and data-driven journalism. In 2007, Kauffman was a finalist for the Pulitzer Prize in Investigative Reporting for a series he co-authored on mentally ill troops sent to war. He has also received a Polk Award, the Selden Ring Award, the Worth Bingham Prize and the Heywood Broun Award. He was also named a "Master Reporter" by the New England Society of Newspaper Editors. Outside the paper, Kauffman teaches college courses in investigative reporting and computer-assisted reporting.

## Collen M. Murphy

Colleen Murphy is the Executive Director and General Counsel of the Connecticut Freedom of Information Commission (FOIC). She previously served as the FOIC's Managing Director and prior to that, as a member of its legal staff.

In addition to her role at the FOIC, Colleen currently serves as a Director for two non-profit organizations, the National Freedom of Information Coalition and the Connecticut Foundation for Open Government, both dedicated to promoting and advancing the values of open and accountable government, one on the national front and the other on the local level. She is a frequent speaker on government transparency, privacy and related issues, both in the United States and abroad; and for several years, she co-taught courses on Privacy and the First Amendment at the University of Connecticut and on Comparative Freedom of Information Law at the University of Connecticut School of Law. She is a long-time member of the Administrative Law and the Media and the Law Sections of the CBA.

Colleen is a graduate of Providence College and the Boston College Law School. She lives in Avon, CT with her husband, three grown children and two mature dogs.

## Mark Sommaruga

Mark J. Sommaruga has spent 28 years proudly representing the interests of public agencies, schools (whether traditional/public, magnet, charter or private), and employers in Connecticut. Among other things, Mark has extensive experience in counseling and representing public and private sector clients in labor, employment, education, and municipal law issues, including Freedom of Information Act ("FOIA") matters. Mark is the author of [\*Understanding Connecticut's Freedom of Information Act \(Fifth Edition, 2018\)\*](#); his book is published by Pullman & Comley and jointly distributed with the Connecticut Association of Boards of

Education (“CABE”) and provides guidance to public agencies and their members (not to mention members of the public) seeking to navigate the maze of edicts and exceptions associated with the FOIA. Mark prides himself on being a self-described FOIA nerd. While Mark has ample experience litigating cases before courts at all levels, and administrative agencies of all kind, including several cases of first impression, Mark takes the most satisfaction in advising clients with practical solutions to address their day to day needs.

Mark is a member of the Labor, Employment Law and Employee Benefits Department and the School Law Section. Mark routinely counsels and represents his clients on labor, employment, education law, and any legal issue that effects their day to day operations, especially FOIA issues. He routinely advises clients on a wide range of employment law matters, including hiring, discipline/termination, compensation, leave, accommodations, discrimination, sexual harassment, and personnel policies and procedures. He also routinely counsels school clients on a wide variety of education law issues, including student discipline, special education, discrimination, abuse/neglect, residency/school accommodations, and policy review, along with counseling clients in disputes with vendors and contractors (including construction matters) and with and between municipal and state agencies. Mark represents his clients in the state and federal courts on both the trial and appellate court levels, as well as before various state and federal agencies such as the State of Connecticut and U.S. Departments of Education, the Connecticut Department of Labor (including the State Board of Mediation and Arbitration and the State Board of Labor Relations), the Connecticut Commission on Human Rights and Opportunities, and the Connecticut Freedom of Information Commission, along with the American Arbitration Association. He is routinely involved in representing clients in all stages of collective bargaining.

## Denis O’Malley

Denis J. O’Malley is an associate attorney at Robinson Cole in the Insurance + Reinsurance Group. He represents commercial insurers in a broad range of coverage matters and disputes.

Prior to entering law school, Denis spent several years as a journalist, primarily covering police, emergency services, and courts for daily newspapers in Scranton, PA; Bridgeport, CT; and Danbury, CT. While in law school, Denis served as the Managing Editor of the *Connecticut Law Review*. Additionally, he was a member of the Connecticut Moot Court Board, and a teaching assistant for courses on Contracts and Moot Court. He received the 2017 Connecticut Judges’ Association Memorial award, the Best Oralist award in the 2015 William H. Hastie Moot Court Competition, the 2015 William F. Starr First Year Award for Outstanding Scholarship, and CALI Excellence awards in five of his courses.



*Police Reform and Freedom of Information:  
How Connecticut's Police Reform Bill Expands Access to Police Records,  
and What the Public Stands to Learn*

*By the  
Connecticut Bar Association  
Media And The Law Section*

**December 10, 2020**

# *So Who Are We? Your Panel*

## ***Presenters:***

- **Colleen M. Murphy**, Executive Director & General Counsel,  
Connecticut Freedom of Information Commission
- **Mark J. Sommaruga**, Member, Pullman & Comley LLC
- **Matthew Kauffman**, Investigative Reporter and Data Journalist

## ***Moderator:***

- **Denis J. O'Malley**, Associate, Robinson & Cole LLP;  
Executive Committee Member, CBA Media & the Law Section

# *So What Is The FOIA?*

- Connecticut's Freedom of Information Act ("**FOIA**") was enacted in 1975.
- Connecticut's Freedom of Information Commission ("**FOIC**") is primarily responsible for enforcement of our FOIA.
- The FOIA essentially has two requirements: 1) meetings of public agencies must be held in open, and 2) records of public agencies are subject to disclosure and inspection by the public at large.
- The FOIA also sets forth numerous exceptions to its open meetings and records requirements.

# What Is A Public Agency?

- A “public agency” is not only the named agency itself, but also includes any committee (or “subcommittee”) of or **created by** the agency. *Connecticut General Statutes §1-200(1)*.
- Just to be clear: a municipality, its police department and the State Police are subject to the FOIA. (Hope you are not shocked).

# *What Is A Public Record?*

- A public record includes “**any** recorded data or information relating to the conduct of the public’s business prepared, owned, used, received or retained by a public agency, ... , whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.”  
*Connecticut General Statutes §1-200(5).*

# “Personnel Files” FOIA Exemption

- Need not disclose “personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy.” *Connecticut General Statutes §1-210(b)(2)*.
- This exception precludes disclosure of such files **only** when the information sought “does not pertain to legitimate matters of public concern **and** is highly offensive to a reasonable person.” *Perkins v. FOIC*, 228 Conn. 158 (1993). **This is a very tough burden.**

# *Evaluations and Records of Employee Misconduct*

- Records of alleged misconduct by an employee (and any resulting records of discipline) are usually subject to disclosure, as “the public has a right to know not only who their public employees are, but also when their public employees are and are not performing their duties.”  
*Perkins v. FOIC, supra.*
- Most employee evaluations are public records.

- Police department internal investigation reports had generally been viewed to be public records subject to disclosure. *Kaloidis v. Chief, Police Department, City of Waterbury*, #FIC 2013-047 (December 18, 2013).
- Indeed, “because of the public interest in the fairness of police investigations, there is a general presumption in favor of disclosure, even for investigative reports that exonerate police officers from the charges that have been brought against them.” *Department of Public Safety v. FOIC*, 242 Conn. 79, 88 (1997).



# Examples of IAs: DISCLOSE!!

- In *Department of Public Safety, Division of State Police v. FOIC*, 242 Conn. 79 (1997), the Supreme Court found that a Department of Public Safety’s internal affairs (“IA”) investigation report regarding a citizen’s complaint of police assault and use of excessive force by a police officer was not exempt from disclosure under the FOIA even though the officer was exonerated from the charges.
- The Department’s response to such a complaint was a matter of legitimate public concern, and information contained in the report was limited to matters of professional conduct.

# *On The Other Hand (In the Same Case!)*

- Conversely, the same Court found that an IA investigation report regarding a citizen's complaint that a state trooper was involved in an inappropriate relationship with the complainant's wife was exempt from disclosure under the FOIA on grounds that this disclosure would constitute an invasion of the trooper's personal privacy.
- Keys: 1) this latter complaint did not focus on conduct of the trooper's official business, and 2) the report described details of the trooper's personal and marital relationships.
- Court found that this report contained information that was highly offensive to a reasonable person *and* that the public had no legitimate interest in its disclosure.

- Disciplinary records are public records!
- Most IA investigation report and records must be disclosed.
- What about a collective bargaining agreement (“CBA”) that provides for “removal” of discipline after a certain period of time? **In FOIA world: too bad, it is still a public record!** Even if removed from the personnel file, clearly is a public record/“similar file” subject to disclosure.
- **Cannot** destroy records of discipline. *Lieberman v. SBLR*, 216 Conn. 253 (1990). Any CBA or grievance settlement provision providing for destruction of discipline records is **ILLEGAL!!!** Must be retained consistent with records retention schedules.

# *Right to Object to Disclosure?*

- **Common myth:** employee or union has automatic right to object to disclosure of any personnel records. **NO!** A public agency must first reasonably believe that the disclosure of such records would legally constitute an invasion of privacy before giving employee or union right to object to disclosure.
- Since the FOIC has the power to issue fines, an agency should not give employees the blanket right to object to the disclosure of all records. Thus, most disciplinary records should be disclosed.
- Public Act 18-93 amends the FOIA so as to require a public agency disclosing such records (after disclosure) to then make a “reasonable attempt” to notify the employee and union representative, if any, of a request for (and release of) records.

# *But What About the State Police?*

- The rules had been (and should be) the same, but .....
- The State Employee Relations Act (“SERA”), which governs collective bargaining for state employees, contains the following provision:

Where there is a conflict between any agreement or arbitration award approved in accordance with the provisions of [SERA] on matters appropriate to collective bargaining, ..., and any general statute or special act, or regulations adopted by any state agency, the terms of such agreement or arbitration award shall prevail;

Conn. Gen. Stat. §5-278(e). This is the so-called supersedence clause and essentially allows the State and its unions to contract away the law.

As a result...

- **On July 1, 2018**, the Connecticut State Police Union (“CSPU”) entered into a CBA containing these new provisions:
  - IA investigations with a disposition of “exonerated unfounded or Not Sustained” will be excluded from the employee's personnel file ....
  - An employee’s personnel file *and* internal affairs investigations with only a disposition of “Exonerated, Unfounded or Not Sustained” shall **not** be subject to the FOIA.

- The new language was apparently adopted in response to concerns regarding an increase in false anonymous complaints filed against State Troopers.
- Consistent with SERA, the Connecticut General Assembly did approve this new CBA. (Thus, “we” vote for this.)
- However, the provisions appear to be overbroad in terms of walling off IA records (AND personnel files).
- Prior CBA already gave state troopers a greater right to object to disclosure for FOIA requests than under CGS §1-214.

- Governor Ned Lamont called a Special Session of the General Assembly to “enact legislation to promote greater transparency and accountability for law enforcement”, and further proclaimed
  - “[A] Minneapolis police officer’s killing of George Floyd has revealed once again the injustice and cruelty that Black people and other people of color suffer at the hands of law enforcement, and has thereby awoken the public’s demand for reforms to our law enforcement agencies and progress toward a just and equitable society. ...
  - [T]he General Assembly passed, and in more recent instances I have signed, legislation promoting police accountability and transparency as well as broader reforms to our criminal justice system ... but much more work remains to be done.”



# “An Act Concerning Police Accountability” (signed 7/31/20)

- Section 8 creates an exception to SERA’s supersedence clause:
  - For any agreement ... approved before, on or after the effective date of this section [7/31/20]... where any provision in such agreement ... **pertaining to the disclosure of disciplinary matters or alleged misconduct** would prevent the disclosure of documents required to be disclosed under the provisions of the Freedom of Information Act ... **the provisions of the Freedom of Information Act shall prevail.**
- Similarly, Section 9 provides:
  - **No** collective bargaining agreement ... entered into before, on or after the effective date of this section, by the state and any collective bargaining unit of the Division of State Police within the Department of Emergency Services and Public Protection may **prohibit the disclosure of any disciplinary action based on a violation of the code of ethics contained in the personnel file of a sworn member of said division.**

# The Aftermath

- Sections 8 and 9 of the Act require disclosure of personnel and disciplinary records under the FOIA regardless of previously negotiated CBAs.
- The CPSU contends that these provisions violate the Contracts Clause of the U.S. Constitution to the extent that they nullify its members' rights under the 2018–22 CBA.
- The CPSU files suit in U.S. District Court. CPSU v. Rovella, No. 3:20-CV-01147 (CSH).
- While the case is still pending, Judge Haight denied CPSU's motion for preliminary injunction seeking to enjoin these new provisions. CPSU v. Rovella, 2020 WL 6042071 (D. Conn. Oct. 13, 2020)

# *Injunction?* **DENIED**

- “Even if a state law substantially impairs a contract, it will not be deemed unconstitutional so long as it is justified by a significant and legitimate public purpose.” The Act was found to serve a legitimate public purpose.
- The Court pointed to the stated need for “greater transparency and accountability for law enforcement” in response to George Floyd incident “which led to mass and sustained protests across the country and awoke the public's demand for reforms to our law enforcement agencies and progress toward a just and equitable society.”
- By subjecting police disciplinary records to FOIA, the Act ensures greater police accountability and benefit the public, “who can now access these important records and see for themselves how state government is operating in this area.”
- The Act's disclosure provisions also aligns with FOIA's “strong legislative policy in favor of the open conduct of government and free public access to government records.”

# *Injunction?* **DENIED**

- To avoid an impairment of contract claim, a state law with a legitimate public purpose must also be reasonable and necessary.
- The Court noted that making disciplinary records subject to FOIA neither negates State Troopers' personal privacy rights, nor implies that all such records will be disclosed. Rather, the usual FOIA standards and balancing that generally governs personnel records under CGS §1-210(b)(2) will apply.
- Also, the CSPU fails to suggest an alternative course that Connecticut could have pursued to advance its objectives regarding promoting transparency in the operation of law enforcement.
- Moreover, "because State Troopers' disciplinary records were subject to FOIA prior to 2018, a state law subjecting these records to disclosure is hardly unreasonable—particularly in light of the public's recent demands for increased law enforcement transparency and accountability."

- Other employees have had their personnel records subject to disclosure even with respect to unsubstantiated allegations.
- The public's right to know about the investigatory process.
- CBAs protect police officers against **use** of unsubstantiated charges via “just cause” provisions.
- Municipalities have had to comply with the FOIA with respect to discipline/IA records for **their** police officers.
- Additional issue: “promptness” of FOIA responses. Prior problems.

- Brady v. Maryland, 373 U.S. 83 (1963): U.S. Supreme Court held that suppression by prosecution of evidence favorable to an accused violates due process where evidence is material as to guilt or punishment, irrespective of good faith or bad faith of prosecution.
- Giglio v United States, 405 U.S. 150 (1972): Extended Brady rule to include any information that could be used to impeach the credibility of a prosecution witness. “When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule.”
- See also Connecticut General Statutes §54-86c
- Consider a) issues with credibility of arresting or investigating officer when prosecuting a defendant, and b) need to disclose to defendant.

# *Criminal Law, Police Misconduct and the Public*

- There may be an obligation for prosecutors to turn over to criminal defendants records of police misconduct.
- Indeed, just in case a prosecutor does not comply with the obligation to disclose such information, criminal defense attorneys will make FOIA requests of personnel files and records of misconduct of arresting and investigating officers.
- Court proceedings take place in public.
- Why should we not get these records too?
- Consider CGS §§1-210(b)(3) and 1-215 and criminal records.
- Importance of knowing if police officers have had specific issues with respect to bias or discrimination. Should the public know? Which leads to ...

# Concern about Discrimination and Bias

- “If the police department treats a segment of the population of any race, religion, gender, national origin, or sexual preference, etc., with contempt, so that the particular minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired.
- Members of the minority will be less likely to report crimes, to offer testimony as witnesses, and to rely on the police for their protection.
- When the police make arrests in that community, its members are likely to assume that the arrests are the product of bias, rather than well-founded, protective law enforcement. And the department’s ability to recruit and train personnel from the community will be damaged.”

Pappas v. Giuliani, 290 F.3d 143, 146–47 (2<sup>nd</sup> Cir. 2002).





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