BEFORE THE CONNECTICUT

FREEDOM OF INFORMATION COMMISSION

ABLECHILD, Complainant, v. CHIEF MEDICAL EXAMINER, STATE OF CONNECTICUT, OFFICE OF THE CHIEF MEDICAL EXAMINER; AND STATE OF CONNECTICUT, OFFICE OF THE CHIEF MEDICAL EXAMINER, Respondents.	**SUPPLEMENTAL BRIEF OF ABLECHILD** Docket No. FIC 2013-197 Valicia D. Harmon, Hearing Officer

SUPPLEMENTAL BRIEF OF ABLECHILD

Complainant AbleChild, by counsel, respectfully submits this post-hearing brief as a supplement to its previously submitted briefs. This supplemental brief has been filed within the time specified by the Hearing Officer. It confirms, based on controlling precedent, that the Commission has primary jurisdiction, and the legal duty, to determine the legality of the Office of the Chief Medical Examiner's (hereinafter "OCME") reliance on a "Next of Kin Rule"[1] adopted internally and *sua sponte*, without notice and comment rulemaking, in violation of the Open Meetings Act and the Administrative Procedure Act.

[1] As explained herein, the OCME prohibits disclosure of all decedent records in its possession unless the requester is "next of kin, attorneys involved in litigation or attorneys handling the estate of the deceased, as well as physicians involved in the patient's care, insurance claims agents and investigative authorities." *See* Complainant Exh. 2, at Ex. 2. Throughout this brief, AbleChild refers to this OCME rule as the "Next of Kin Rule."

The bases articulated by respondent OCME for non-disclosure of the requested public records are, as explained in detail below, unlawful. Moreover, AbleChild has established a legitimate interest in the requested documents within the meaning of the governing Commission on Medicolegal Investigations' rule, Conn. Agencies Regs. § 19a-401-12. Accordingly, AbleChild respectfully requests that the FOIC forthwith order OCME to grant AbleChild's request for the autopsy, drug history, and toxicology records OCME possesses concerning Adam Lanza, the Newtown, Connecticut shooter. In particular, AbleChild respectfully requests issuance of an FOIC order compelling the OCME to conduct a thorough search of its records germane to this request by a date certain; to give AbleChild a written list identifying all responsive documents it possesses; to turn over to AbleChild all responsive records by a date certain; and to confirm in writing to AbleChild that its production is accurate and complete in every particular.[2] AbleChild hereby incorporates all facts and argument presented to the FOIC in its opening complaint, memoranda in support, supplemental pleadings, and exhibits. *See* Exhibits 1-4.

[2] Immediately before the hearing, OCME for the first time produced a responsive document to AbleChild, a toxicology summary sheet that is incomplete, entered into evidence as Respondents' Exh. 1. That production constitutes a further waiver of its argument against production because it is incongruous with OCME's articulated position that complete non-production is warranted under its Next of Kin Rule. The incomplete production reveals that OCME, even in this instance, has chosen selective non-disclosure of responsive materials. To lay a proper foundation against this tactic, AbleChild respectfully requests that the Commission's order include each element here sought, that (1) OCME conduct a thorough search of its records germane to AbleChild's request by a date certain; (2) OCME give AbleChild a written list identifying all responsive documents it possesses; (3) OCME turn over to AbleChild all responsive records by a date certain; and (4) OCME confirm in writing to AbleChild that its production is accurate and complete in every particular.

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FACTS AND BACKGROUND

The Freedom of Information Commission (herein "FOIC") held a hearing in this matter on August 22, 2013 at 11:00 AM. All counsel stipulated to the facts and exhibits presented by AbleChild at that hearing and reiterated below:

AbleChild is a 501(c)(3) non-profit organization that represents and advocates the interests of its members, who are parents, caregivers, and children. *See* Complainants Exh. 1, at 1. Incorporated in New York in 2003, AbleChild aims to ensure the safety of parents and caregivers when those for whom they give care are diagnosed as mentally ill and are prescribed drug treatments that may induce adverse events that include thoughts of murder, homicide, or suicide. *Id.*; Exh. 4 (Attachments B-G). A public interest group and media organization, AbleChild seeks to determine which recommendations are appropriate to reduce the risk of violence and suicidality in mentally ill children arising from prescription drugs labeled by FDA as ones that increase violence and suicidality. In aid of that mission, AbleChild is collecting data concerning the use of psychiatric drugs in those children and young adults who were involved in school shootings across the United States. *Id.*; Complainant Exh. 2, at 1-2; Exh. 4 (Attachments B-G).

As parents and custodians of children who are treated with psychiatric medications, AbleChild's members have a legitimate interest in determining the extent to which use of such drugs and treatment protocols affect behavior by increasing the incidence of violence and suicidality. By evaluating proof from school shootings and identifying all potential early warning signs, AbleChild can then recommend to its members, the general public, health care professionals, and federal and state legislators measures that might help prevent or reduce the risk of violence by mentally ill youth prescribed these drugs. Adam Lanza's autopsy, drug

history, and toxicology records provide information germane to AbleChild's analysis and reform advocacy.

Violent crime among school-aged children has increased in recent years, and so has the use of prescription drugs in the treatment of mental illness and disorders among those in that population. *See* Complainant Exh. 2, at 2-3. In 2004, the FDA determined that antidepressant drugs increased the risk of suicidal thoughts and violent behavior in children and young adults treated with psychiatric medications. *See* Complainant Exh. 4 (Attachment F). In response, the FDA ordered manufacturers of such medications to include "black box" warnings on labels so physicians and patients would be alerted to the existence of these risks. *Id.* "A 'black box' warning is the most serious warning placed in the labeling of a prescription medication" by the FDA. *Id.* (noting that FDA's labeling revisions "warn of the risk of suicidality and encourage prescribers to balance this risk with clinical need"); *See* Complainant Exh. 4, Attachment G, at 3 (summarizing statements of Dr. Martin Teicher, psychiatrist from Harvard Medical School).

AbleChild can only determine or investigate the relationship of prescription drugs and current psychiatric treatment protocols and violence if records and information germane to that inquiry is available to it. Because FDA has identified an increased risk of suicidality and violence associated with psychiatric drugs prescribed to children and young adults (*see* Complainant Exh. 2, at 2), an investigation into Adam Lanza's autopsy record, drug history, and toxicology reports will enable AbleChild to determine if Lanza, like other school shooters, has a history of prior use of psychiatric drugs and reliance on such protocols. Almost all school shootings in the United States have been committed by individuals who were found to have been treated at some time prior to the commission of the offense with psychiatric drugs.

On March 5, 2013, AbleChild filed a request for records with the Connecticut OCME seeking the autopsy report, drug history records, and toxicology records of decedent Adam Lanza, the shooter responsible for 27 deaths, including his own, at Sandy Elementary School in Newtown, Connecticut. AbleChild's request was supported by the signatures of 263 Newtown residents, each of whom signed a petition for the release of Adam Lanza's records. *See* Complainant Exh. 3 (AbleChild's Petition to Connecticut Lawmakers—For Release of Adam Lanza Toxicology Reports). AbleChild sought to investigate Adam Lanza's drug history, evidence of drug use at the time of his death, and the measures taken by the OCME to investigate same.[3] *See* Complainant Exh. 1. AbleChild thus requested:

> [T]e immediate release of the complete autopsy report, toxicology report, and prescription drug history possessed by the [OCME] for and concerning the decedent Adam Lanza … [including] all public records and files … concerning or relating to drugs in Mr. Lanza's serum and organs and concerning or relating to drugs prescribed to Mr. Lanza. For any tests performed on Mr. Lanza's body for which results have not yet been produced by the testing entity, [AbleChild] respectfully request[s] that those results be supplied to them when they are produced to [the OCME's] office.

See Complainant Exh. 1, at 1.

On March 19, 2013, the OCME responded with a two-paragraph, single-page letter denying AbleChild's request. *See* Complainant Exh. 2, at Ex. 2. The only legal justification for withholding the requested documents that OCME specified in its letter was the vague contention

[3] It is important to note that psychotic episodes, involving thoughts of aggressive behavior and suicide, can occur long after use of psychiatric drugs has ceased. *See Does antipsychotic withdrawal provoke psychosis? Review of the literature on rapid onset psychosis (supersensitivity psychosis) and withdrawal-related relapse*, Joanna Moncrieff, ACTA Psychiatrica Scandinavica (Feb. 9, 2006), *available at* http://psychrights.org/research/digest/nlps/actadrugwith.pdf. Consequently, blood serum evidence of the presence of these agents in the decedent is not the dispositive factor in determining whether a person who actually commits murder and suicide suffered from drug induced thoughts of murder and suicide. Rather, drug history evidence along with autopsy and toxicology data are all helpful in assessing that potential.

that the requested records "are not subject to the statutes and regulations under the jurisdiction of the Freedom of Information Commission…" *Id.* Moreover, the OCME stated that the requested documents were available to a select subset of the public to the exclusion of all others, namely to "next of kin, attorneys involved in litigation or attorneys handling the estate of the deceased, as well as physicians involved in the patient's care, insurance claims agents and investigative authorities" (herein referred to as the "Next of Kin Rule"). *Id.* Because AbleChild was not in the class of requesters preferred by OCME, the OCME refused Able Child's request without passing on the "legitimate interest" articulated by AbleChild in its request. *Id.*

The parties appeared for a hearing in this case on August 22, 2013 at 11:00 AM. By that date, OCME had not submitted any brief or pleading explaining its position, beyond the aforementioned one-page letter dated March 19, 2013. OCME therefore articulated at hearing for the first time its legal position for withholding the requested documents.

At oral argument, counsel for respondent OCME admitted that the "Next of Kin Rule" had not been promulgated following an open public meeting and notice and comment rulemaking, but had instead been created by OCME internally and *sua sponte* and had been applied by OCME to all public record requests germane to decedents, regardless of the requesters' articulation of a legitimate interest. *See* Video Recording of Contested Case Hearing, FIC 2013-197 (Aug. 22, 2013) (beginning at 1:10.30).[4]

Although not contained in the letter from OCME, counsel for respondent explained that OCME had rejected Able Child's request on another basis: OCME's disdain for what it presumed to be AbleChild's intended use of the information (an act of viewpoint discrimination), reciting at oral argument:

[4] *available at*, http://www.ctn.state.ct.us/ctnplayer.asp?odID=9336.

> The complainant is proposing that they can make generalizations—generalize from one single incident. No matter how the outcome of the use of antidepressants, or the causal link between the use of antidepressants, and the kind of violence that took place in Newtown, that's not a legitimate use of information, that information. You can't generalize just from one case. Even if you can conclusively establish that Adam Lanza, … his murderous actions were caused by antidepressants, you can't logically conclude that … [he] committed actions as a result of taking antidepressants. So it's simply not legitimate.
>
> And not only is the use to which they're proposing to put the information not legitimate, it is harmful. Because then you can cause a lot of people to stop taking their medications, stop cooperating with their treating physicians, just because of the heinousness of what Adam Lanza did. As the FDA materials that they've submitted show, a lot of studies of a long period of time and within various demographic groups, to even begin to establish causal links between antidepressants and aggressive action, suicidal behavior, and the informed opinion has not quite reached that point to say definitively that there is a causal link between the use of antidepressants and violent behavior… To say there are correlations doesn't necessarily mean the relationship is causal. And this is an issue that the FDA is still grappling with. And so far all it's been willing to do is ask the drug makers to put warnings on their products and to advise treating physicians to follow their, to monitor their patients closely … at the beginning of the taking of antidepressants. So it's a complex issue, and to pretend that you can just based on this one case make recommendations as to how people should make their treatment choices is a disservice to the public, and illustrates why these types of reports should not be made available because in the wrong hands they can be the source of mischief.

See id. (beginning at 1:04:10). Respondent offered no facts or evidence to support its assertion that AbleChild intended to "make recommendations as to how people should make their treatment choices" based "on this one case" (a misperception). In fact, AbleChild is gathering this kind of information on all school shooting cases in the United States so that AbleChild will be in a position to make informed recommendations to its members, the public, health authorities, and federal and state legislators. *See id.*; *see also* Respondents' Post-Hearing Brief,

at 1-10. Respondent omitted reference to the fact that FDA has required placement of a blackbox warning on these drugs, alerting the public to increased risk of suicidality and aggressive behavior from the drugs. Respondent omitted reference to the fact that an FDA "black box" warning is that federal agency's most serious drug label warning, a requirement imposed only on rare occasion in FDA's entire history. In effect, OCME arbitrarily presumed that AbleChild would put the information requested to a use in support of public policy disfavored by OCME and, based on that arbitrary and prejudicial act of viewpoint discrimination, OCME deemed AbleChild not deserving of the public records it sought.

On September 9, 2013, Respondent submitted a Post-Hearing Brief in which it argues threefold: (1) that Adam Lanza's records are exempt from disclosure under the FOIA; (2) that the FOIC lacks jurisdiction to adjudicate this case; and (3) that AbleChild does not have a legitimate interest in the requested records. We address each of those points below. OCME's jurisdictional and procedural arguments are contrary to the governing law. Respondent relies on inapposite precedent for legal propositions that have been repeatedly rejected by the FOIC and by the courts. AbleChild has established a legitimate interest in Adam Lanza's records. The OCME has failed to rebut that interest or establishing a countervailing compelling interest in non-disclosure. Consequently, production of the requested documents is required under the law.

SUMMARY OF ARGUMENT

AbleChild's complaint is governed by two primary sources of law: Conn. Gen. Stat. § 19a-411(b) and Regs. Conn. State Agencies § 19a-401-12(c)(2).

Connecticut General Statutes Section 19a-411 requires release of OCME records to general public requesters who have a "legitimate interest in the records." *See* Conn. Gen. Stat. § 19a-411(b). In particular, the law provides: "Any person may obtain copies of such records upon such conditions and payment of such fees as may be prescribed by the commission, ***except that no person with a legitimate interest in the records shall be denied access to such records***…" (emphasis added). Whenever the Chief Medical Examiner, as here, chooses not to produce requested documents to a party with a legitimate interest, Section 19a-411(c) makes it incumbent on the CME to seek a protective order from the superior court pursuant to Section 19a-411(c) and establish a compelling public interest to justify that non-disclosure. The CME has no authority to avoid pursuit of the protective order if it chooses to withhold requested documents, but CME has violated that statutory mandate in this very case. *See id*; *Galvin v. Freedom of Information Commission*, 201 Conn. 448, 460 (1986).

The Commission on Medicolegal Investigations duly enacted regulations implementing Section 19a-411(b) and (c). *See* Regs. Conn. State Agencies § 19a-401-12(c). Under Section 19a-401-12(c)(2), members of the general public "may obtain access to [OCME] records if the person has a legitimate interest in the documents and no court has issued an order prohibiting disclosure pursuant to section 19a-411(c) of the Connecticut general statutes." *Id.*

While the Commission on Medicolegal Investigations duly enacted the foregoing regulation, it did not adopt the Next of Kin Rule. Rather, OCME itself adopted the Next of Kin Rule through internal, *sua sponte*, non-public deliberations, having never followed the legally

required course of holding a public meeting to consider the rule and having never adopted the rule pursuant to notice and comment rulemaking. *See* Video Recording of Contested Case Hearing, FIC 2013-197 (Aug. 22, 2013) (beginning at 1:10.30).[5]

Consistent with the statute and the duly enacted regulation of the Commission on Medicolegal Investigations, AbleChild explained to OCME its "legitimate interest" in Adam Lanza's autopsy, drug history, and toxicology records possessed by the OCME. The Supreme Court has repeatedly held protection of citizens from harmful drugs and violent crime to be "legitimate interests." *See Kuhali v. Reno*, 266 F.3d 93, 111 (2001); *Washington v. Harper*, 494 U.S. 210, 211 (1990); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

OCME's primary argument against production made at oral argument and in its brief is that only OCME has jurisdiction to determine the propriety of its withholding of requested public records. That position is not the law. The FOIC has twice rejected the identical argument. *See John Vivo* III, Docket #FIC 2005-380 (Jan. 25 2006); *Paul J. Ganim*, Docket #FIC 2010-328 (April 27, 2011). Indeed, the FOIC has primary jurisdiction to determine whether the OCME's rules and regulations unduly restrict the disclosure of public records. *See* Conn. Gen. Stat. Ann. § 1-205 (West); *Bd. of Educ. for City of New Haven v. Freedom of Info. Comm'n*, 545 A.2d 1064, 1070 (Conn. 1988) (holding that, the FOIC has "full authority to determine...the propriety of disclosure [of public records]"). Were it otherwise, were it the case that an agency could refuse production on the notion that it alone had jurisdiction to determine whether a public records request before it was warranted, the Freedom of Information Act would be a dead letter and the FOIA's statutory mission of affording independent review of agency non-disclosures would be defeated, causing the law to revert to its status before adoption of the FOICA, when

[5] *available at*, http://www.ctn.state.ct.us/ctnplayer.asp?odID=9336.

regulatory agencies could, without having to answer to the independent FOIC authority, simply refuse production of public documents.

Here, the OCME erroneously presumed itself possessed of unbridled discretion to determine in an extra-statutory and extra-regulatory manner which citizens are entitled to access. OCME did so without passing upon actual interests in the information requested. Instead, OCME employed its Next of Kin Rule, a rule adopted internally and *sua sponte*, without resort to a single public meeting or notice and comment rulemaking.

The OCME's Next of Kin Rule is unlawful and void. The OCME never followed the open meeting and notice and comment rulemaking required by the Open Meetings Act and the UAPA. *See* Conn. Gen. Stat. § 1-225; Conn. Gen. Stat. Ann. § 4-168.[6] Under the governing law, a rule not adopted through adherence to the requirements of the Open Meetings Act and the UAPA is void and unenforceable by every agency of this government, including the OCME and the FOIC. *See Salmon Brook Convalescent HomeInc. v. Comm'n on Hospitals & Health Care*, 417 A.2d 358, 368 (Conn. 1979) (holding that agency's "guidelines" were not adopted under the rule-making provisions of the UAPA and were thus "void and of no effect"). Because the OCME's Next of Kin Rule is unlawful and unenforceable, the FOIC is forbidden from upholding

[6] The UAPA states:

> No agency regulation is enforceable against any person or party, nor may it be invoked by the agency for any purpose, until (1) it has been made available for public inspection as provided in this section, and (2) the regulation or a notice of the adoption of the regulation has been published in the Connecticut Law Journal if noticed prior to July 1, 2013, or posted on the eRegulations System pursuant to section 4-172 and section 26 of public act 13-247, if noticed on or after July 1, 2013. This provision is not applicable in favor of any person or party who has actual notice or knowledge thereof. The burden of proving the notice or knowledge is on the agency.

Conn. Gen. Stat. Ann. § 4-167.

OCME reliance upon it in support of its refusal to turn over the requested records. Indeed, if the FOIC were to defer to OCME's decision under the Next of Kin Rule, FOIC would thereby base its own rule of decision on an illegality, something it cannot do without engaging in arbitrary and capricious decision-making, contrary to its own requirements under the UAPA. *See* Conn. Gen. Stat. Ann. § 1-205(d); Conn. Gen. Stat. Ann. § 4-167. In short, OCME's decisional Next of Kin Rule is an unlawful and unenforceable rule, which infects OCME's decision fundamentally, causing that decision to be unlawful and unenforceable, and impugning the legitimacy of all subsequent decisions by every state agency that would choose to rely on OCME's decision in the AbleChild case or on OCME's decisional Next of Kin Rule.

In its oral argument and Post-Hearing brief, OCME offered an additional ground for withholding the requested documents, viewpoint discrimination. Viewpoint discrimination is a constitutionally forbidden ground. At oral argument and in its brief, OCME explained that it would not supply AbleChild the documents requested because OCME presumes AbleChild will use the requested documents to advocate reforms disfavored by OCME. Government is forbidden from denying access to information on the basis that the Government disagrees with the viewpoint that may be expressed in reliance on that information. Viewpoint discrimination violates the Free Speech Clause of the First Amendment of the U.S. Constitution (and Article I, Section 4 of the Connecticut Constitution). *See, e.g., Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 115 (1991). Speaker based and viewpoint based discrimination is unconstitutional absent proof of a compelling state interest and proof that there is no less restrictive alternative to the proscription adopted. *See Boos v. Barry*, 485 U.S 312, 313 (1988). OCME has offered no proof of either requirement.

The OCME's Next of Kin Rule also violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution (and Article First, Sec. 20 of the Connecticut Constitution) because it arbitrarily limits to a narrowly defined subset those requesters who may be given decedent information. It discriminates in this way without a compelling justification for the act of discrimination (indeed, the rule having not been adopted formally through notice and comment rulemaking is backed by no articulated justification at all). *See, e.g., Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) (holding that "[t]he Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives"). The OCME has offered no evidentiary or factual basis to support its rule that severely discriminates among members of the public to arrive at a very narrow category of individuals who, without need for any expression of legitimate interest, are the only ones ever allowed access to OCME records.

OCME's rule also contradicts applicable statutory and regulatory sections that favor disclosure. Because OCME's Next of Kin Rule substantively conflicts with legislative intent and the plain meaning of the enabling statute, Section 19a-411(b), and in particular the Commission on Medicolegal Investigations' duly adopted regulation implementing the statute, Regs. Conn. State Ag. § 19a-401-12(c)(2), OCME's Next of Kin Rule is entitled to no deference. Its Next of Kin Rule is void and unenforceable; even were it lawfully promulgated, it is substantively arbitrary and capricious, without any reasoned basis justifying severe truncation to such a limited universe of public requesters, a substantially less inclusive subset of the public than is specified in the duly adopted Commission on Medicolegal Investigations' rule, Regs. Conn. State Ag. § 19a-401-12(c)(2).

Finally, AbleChild has demonstrated a legitimate interest in the OCME's records concerning Adam Lanza. AbleChild is a non-profit organization with members from the general public, including parents, custodians, and caretakers of children with mental illnesses. Those members have a keen interest in discovering whether Adam Lanza's thoughts of suicide and suicidality were in any way precipitated or encouraged by psychiatric protocols and drug treatments given Lanza before his murderous rampage. AbleChild's interest is further endorsed by signatures from 263 Newtown residents supplied to the OCME. *See* Complainant Exh. 3 (AbleChild's Petition to Connecticut Lawmakers—For Release of Adam Lanza Toxicology Reports). The OCME has not rebutted that interest. It has not presented facts or evidence to dispute AbleChild's complaint. OCME was statutorily obliged to seek a protective order from the superior court dependent on proof of a compelling public interest that would justify limiting disclosure of the requested records. It did not do so. It violated the law. *See* Conn. Gen. Stat. § 19a-411(c).

OCME failed to hold public meetings concerning its Next of Kin Rule, failed to promulgate the Next of Kin Rule pursuant to notice and comment rulemaking, failed to seek protective order in superior court as required by Section 19a-411(c), and violated state and federal law by applying its Next of Kin Rule that arbitrarily limits disclosure to a select class of "preferred" members of the public to the exclusion of all others and by justifying its decision based on prohibited speaker and viewpoint based discrimination. In sum, in this single action OCME has violated three state statutes in addition to the Equal Protection and Free Speech Clauses of the federal and state constitutions. The FOIC thus cannot uphold OCME's action without itself committing those same law violations.

ARGUMENT

I. THE FREEDOM OF INFORMATION COMMISSION HAS JURISDICTION TO HEAR CONTESTED CASES INVOLVING THE OFFICE OF THE CHIEF MEDICAL EXAMINER'S DENIAL OF ACCESS TO RECORDS UNDER CONN. GEN. STAT. §19A-411 AND REGS. CONN. STATE AGENCIES § 19A-401-12

OCME argues that AbleChild's request for Adam Lanza's records is not subject to the statutes and regulations under the jurisdiction of the FOIC. *See* Respondents' Post-Hearing Brief, at 2-4. OCME errs. The FOIC expressly rejected OCME's present argument in prior cases. *See John Vivo III* (Docket #FIC 2005-380); *Paul J. Ganim* (Docket #FIC 2010-328). The *Vivo* and *Ganim* cases involved requests for OCME records. OCME moved to dismiss complaints brought before the FOIC by arguing that the Commission on Medicolegal Investigations has exclusive jurisdiction over records requests. In both cases the FOIC rejected OCME's argument and denied OCME's motion to dismiss. FOIC reasoned that "dismissing the complaint would be contrary to the fundamental principles upon which the FOI Act was created." *Paul J. Ganim and the Bridgeport Probate Court v. Office of the Chief Medical Examiner*, Docket #FIC 2010-328 (2011).

FOIC held that §19a-411 obtains its authority "by virtue of §1-210(a)" of the FOI Act. *James Coll v. Office of the Chief Medical Examiner*, Docket #FIC 2002-053 (2002). Therefore, the FOIC held that §19a-411 of the General Statute falls within the purview §1-210 of the Freedom of Information Act (herein "FOIA") and thus the purview of the FOIC. *See John Vivo III v. Office of the Chief Medical Examiner*, Docket #FIC 2005-380 (2006) (holding that §19a-411 is a state statute that falls within the "except as otherwise provided" exception to §1-210); *Anthony Sinchak v. Office of the Chief Medical Examiner*, Docket #FIC 2005-035 (2006); *Paul J. Ganim and the Bridgeport Probate Court v. Office of the Chief Medical Examiner*, Docket #FIC 2010-328 (2011); *Chad St. Louis v. Office of the Chief Medical Examiner*, Docket #FIC

2009-389 (2010). Indeed, Section 19a-411(b) expressly incorporates the general FOIA in Section 1-210 and in accordance therewith mandates the production of records. *See* Conn. Gen. Stat. § 19a-411(b). The FOIC held the requirements imposed by §19a-411 to be an exception, not an exemption, to §1-210 of the FOIA. *See John Vivo III*, Docket #FIC 2005-380 (2006) (holding that §19a-411 is a state statute that falls within the "except as otherwise provided" exception to §1-210); *Anthony Sinchak* , Docket #FIC 2005-035 (2006); *Paul J. Ganim*, Docket #FIC 2010-328 (2011); *Chad St. Louis*, Docket #FIC 2009-389 (2010); *James Coll*, Docket #FIC 2002-053 (2002). As such, the FOIC has handled contested cases, like the AbleChild case, to determine OCME's compliance with the FOIA when a complaint alleges that the OCME failed to comply with a §19a-411 records request. As in *John Vivo III*, *Paul J. Ganim*, and similar cases, the FOIC has already determined that it has the jurisdiction to hear cases such as the instant one.

FOIC's jurisdiction is unaltered by the Connecticut Supreme Court's decision in *Galvin v. Freedom of Information Commission*, 201 Conn. 448 (1986). In *Galvin*, the Court addressed whether the more general access provision in Section 1-210 would prevail over the limited disclosure provisions in Section 19a-411(b) and implementing regulations. *Id.* at 459-60. The Court held the more specific provisions control or, in other words, the Commission on Medicolegal Investigations' Section 19a-401-12 is an effective restriction on the right of public access. *Id. Galvin* did not hold that the FOIC lacks authority to interpret the law governing OCME disclosure of public records or the general FOIA law as it applies to the OCME. Nor did *Galvin* hold that OCME's Next of Kin Regulation was lawfully promulgated. The *Galvin* decision specifically noted that the regulations governing OCME records disclosure must be interpreted harmoniously with the FOIA law: "§ 19a–411 incorporates only those provisions

of § 1–19 that are not inconsistent with the former statute's restrictions on disclosure. These provisions include, but are not limited to, the exceptions to disclosure set forth in § 1–19(b), insofar as they apply to the types of records covered by § 19a–411." *Id.* at 459-60. Moreover, the Court in *Galvin* had an occasion to consider the FOIC's jurisdiction in context with the mandatory time constraints in Section 10-21i(b), and the Court unequivocally held that the FOIC "had jurisdiction to act in this case." *Id.* at 454.

Here, AbleChild does not argue that the general FOIA law contradicts and supplants the duly adopted Commission on Medicolegal Investigations' regulation, Regs. Conn. State Ag. § 19a-401-12(c)(2), governing OCME record disclosures. Such an argument would be contrary to *Galvin*. Rather, consistent with *Galvin,* AbleChild calls for full enforcement of that duly adopted Commission on Medicolegal Investigations' regulation in lieu of the contradictory and unlawful OCME Next of Kin Rule. AbleChild represents that it has satisfied the "legitimate interest" standard in the duly promulgated Commission on Medicolegal Investigations' regulation, Conn. Agencies Regs. § 19a-401-12(c)(2), and, therefore, is entitled to access to the OCME records.[7]

[7] The *Galvin* decision expressly refrained from reaching the question of which persons have a "legitimate interest," stating:

> The defendants do not claim that they are persons with a 'legitimate interest' within the meaning of either the statute or the regulation. We need not and do not consider, therefore, the validity of administrative distinctions between persons based on the presence or absence of a "legitimate interest" in disclosure.

Galvin, 201 Conn. at 460 n.11.

A. The FOIC Has Jurisdiction to Determine What Constitutes a "Legitimate Interest" Under Conn. Gen. Stat. § 19a-411

The FOIC's enabling Act gives the FOIC jurisdiction to determine when documents are wrongfully withheld by an agency of the Connecticut government. *See* Conn. Gen. Stat. Ann. § 1-205. In determining whether documents are wrongfully withheld, the FOIC must necessarily construe the statutes and regulations germane to document production by the agency appearing before it. *See, e.g., Araxy Najarian v. First Church Village Housing Inc.*, Docket No. FIC 2001-442 (Jan. 23, 2002) (rejecting argument that records at issue were exempt under Sec. § 52-146 G.S. because they did not relate to the clinical evaluation and treatment of an individual); *Cos Cob Volunteer Fire Co. No. 1, Inc. v. Freedom of Info. Comm'n*, 561 A.2d 429, 431 (Conn. 1989) (upholding FOIC's interpretation of term "operational" under Gen. Stat. § 7-314(b) to determine whether an entity was a public agency).

FOIC routinely construes the statutory and regulatory provisions of other agencies that are relied upon by those agencies as justifications for non-disclosure. *See, e.g., American News and Information Services v. Dept. of Public Safety*, Docket No. FIC 2011-002 (interpreting Title 29, which concerns Public Safety and State Police); *The Greenwich Time v. Dept. of Public Health*, Docket No. FIC 2010-026; *Faroulh Dorlette v. Connecticut Dept. of Correction*, Docket No. FIC 2010-284. FOIC has stricken regulatory actions withholding documents when inconsistent with the FOIA and the enabling acts of those agencies *sub judice*. *See, e.g., Nancy Rice v. Kent Haydock, et al.*, Docket No. 2011-176. If FOIC lacked the power to compel production of documents withheld contrary to the statutory and regulatory provisions governing other agencies, it would have no power other than that of recommendation, which is contrary to the plain and intended meaning of the FOIA and the precedent of the FOIC for the past 38 years.

Indeed, stripping it of review power now would render FOIC feckless, returning the law to the state that existed before the FOIA was enacted in 1975.

It is well settled that the FOIC has "full authority to determine ... the propriety of disclosure [of public records]." *Bd. of Educ. for City of New Haven*, 545 A.2d at 1070. The scope of the FOIC's authority extends to all public agencies and all public records, including those of the OCME. *See* Conn. Gen. Stat. Ann. § 1-205(d); Conn. Gen. Stat. Ann. § 1-210(a). That authority exists even if an agency adopts criteria for disclosure concerning its own records. *See* Conn. Gen. Stat. Ann. § 1-205(d); *Wilson v. Freedom of Info. Comm'n*, 435 A.2d 353, 362 (Conn. 1980) (holding that the FOIC is empowered to investigate "all alleged violations" of Connecticut's Freedom of Information Act). The FOIC is only prevented from ordering disclosure if such records are specifically exempted under the FOIA. *See* 1-210(a); *Maher v. Freedom of Info. Comm'n*, 472 A.2d 321, 324-25 (Conn. 1984); *Corey Turner v. Office of Gov't. Accountability, et al.*, Docket No. FIC 2011-406. No such situation exists in this case.[8] Here, in the presence of stipulated facts establishing that AbleChild has a "legitimate interest" in Adam Lanza's records and OCME's argument against disclosure consisting of reliance on its unlawful Next of Kin Rule and on its prohibited speaker based and viewpoint based discrimination, the Commission on Medicolegal Investigations Rule Conn. Agencies Regs. § 19a-401-12 will only be fulfilled by an FOIC order compelling disclosure of the requested records.

[8] The Connecticut Legislature has specifically exempted records when that is intended. *See, e.g.,* Conn. Gen. Stat. Ann. § 10-151c (West) ("Any records maintained or kept on file by the Department of Education or any local or regional board of education that are records of teacher performance and evaluation shall not be deemed to be public records and shall not be subject to the provisions of section 1-210…")*;* Conn. Gen. Stat. Ann. § 51-44a(j) (West) ("Except as provided in subsections (e) and (m) of this section, the investigations, deliberations, files and records of the commission shall be confidential and not open to the public or subject to disclosure…").

Further, the FOIC has specific authority, subject to the UAPA prohibition on arbitrary, capricious, and unlawful action, to determine the meaning of broad terms where the legislature has not provided a definition. *See Ottochian v. Freedom of Info. Comm'n*, 604 A.2d 351, 354 (Conn. 1992) ("When the legislature uses a broad term ... in an administrative context, without attempting to define that term, it evinces a legislative judgment that the agency should define the parameters of that term on a case-by-case basis"); *Wiese v. Freedom of Info. Comm'n*, 82 Conn. App. 604, 608 (2004); *Carpenter v. Freedom of Info. Comm'n*, CV 980577840, 1998 WL 886615 (Conn. Super. Ct. Dec. 8, 1998) *aff'd*, 755 A.2d 364 (2000); *Sinchak v. OCME*, Docket No. FIC 2005-035 (finding that complainant had not met the conditions set forth under §19a-401-12(f), and therefore, the records could not be disclosed).[9] Such authority allows for interpretation of all terms concerning disclosure regardless of whether such terms fall under statutes other than the FOIA. *See Cos Cob Volunteer Fire Co. No. 1, Inc. v. Freedom of Info. Comm'n*, 561 A.2d 429, 431 (Conn. 1989) (upholding FOIC's interpretation of term "operational" under Gen. Stat. § 7-314(b) to determine whether an entity was a public agency).

In *Carpenter*, a primary question to the FOIC was whether school-related records were "records of teacher performance and evaluation." *Carpenter*, 1998 WL 886615 at 1. Such records were exempt from disclosure under Conn. Gen. Stat. Ann. § 10-151c. *Id.* No definition existed for that phrase, yet the teacher argued that the requested records fell under a FOIA

[9] The FOIC consistently makes determinations concerning the nature of public records when parties to a contested case disagree on whether certain records may be disclosed. *See Wilson v. Freedom of Info. Comm'n*, 435 A.2d 353, 362 (Conn. 1980) (finding that Sec. 1-205(d) "anticipates that the commission will play a central role in resolving disputes administratively under the act"). The FOIC's basic function and purpose would be rendered hollow if it could not interpret the statutes of agencies concerning disclosure. *See* Conn. Agencies Regs. § 1-21j-3 ("The commission is generally empowered to exercise specified grants of authority for the administration of statutes that provide access to public records, public meetings, and other sources of public information, as set forth in the Freedom of Information Act").

exemption. *Id.* at 3. FOIC reviewed the records in-camera to determine whether the exemption applied, and it held that the records were not "records of teacher performance and evaluation," thus construing the other agencies' regulatory definition. *Id*. The interpretation of the FOIC was affirmed on appeal. *See Carpenter v. Freedom of Info. Comm'n*, 755 A.2d 364, 366 (Conn. 2000). Similarly, the term "legitimate interest" is not defined by statute or regulation, and the FOIC is obliged in assessing the legality of non-disclosure to determine if OCME acted wrongfully when it defined "legitimate interest" in violation of law and in a severely truncated way, embracing only a small subset of those within the full embrace of the duly promulgated regulation of the Commission on Medicolegal Investigations, Section 19a-401-12(c)(2). *Compare* Conn. Agencies Regs. § 19a-401-12 *with* Next of Kin Rule in OCME letter, Complainant Exh. 2, at Ex. 2.

FOIC is not required to "accept an agency's generalized and unsupported allegations relating to documents claimed to be exempt from disclosure." *Wilson v. Freedom of Info. Comm'n*, 435 A.2d 353, 362 (Conn. 1980). Further, interpretations that run contrary to the FOIA (and to law in general) are rejected. *See Office of Health Care Access v. Freedom of Info. Comm'n*, CV030521573S, 2005 WL 1095361 (Conn. Super. Ct. Apr. 19, 2005) (unpublished) (rejecting the CT Office of Health Care Access' proposed meaning of statute that would frustrate access to records).

B. FOIC Has the Authority to Issue Rulings Concerning the Constitutionality of Agency Decisions to Withhold Records

The FOIC cannot uphold an unlawful agency rule used as a pretext for non-disclosure, and the FOIC may strike such rules in its discretion to uphold and enforce the FOIA:

> In any appeal to the Freedom of Information Commission under subdivision… the commission may confirm the action of the agency or order the agency *to provide relief that the commission, in its discretion,* believes

> appropriate to rectify the denial of any right conferred by the Freedom of Information Act.

See Conn. Gen. Stat. Ann. § 1-206 (West) (emphasis added). As discussed below, the FOIC should reject the OCME's Next of Kin Rule because it is illegal and unenforceable--not adopted pursuant to notice and comment rule-making. Acceptance of such a rule would cause the FOIC to violate its own legal obligations under the OMA, APA, and the FOIA.

First, the FOIC cannot lawfully enforce agency action that fails to comply with the UAPA. *See Salmon Brook*, 417 A.2d at 363-64 (affirming that agency's "guidelines" were not adopted under the rule-making provisions of the UAPA, and were "void and of no effect"). Further, the OCME may only adopt promulgated rules that "carry into effect the will of the legislature as expressed by the statute." *Salmon Brook*, 417 A.2d at 362.

Second, by adopting the OCME's definition, the FOIC would itself violate the Open Meetings Act, the Administrative Procedure Act and the FOIA. Condoning or upholding a violation of the OMA, APA, and FOIA would also violate the hearing officer's oath of office.

The FOIC is, under the law of Connecticut, an agency subject to the Open Meetings Act and the Uniform Administrative Procedure Act.[10] The FOIC is legally obliged to abide by the

[10] *See* Conn. Gen. Stat. Ann. § 1-200(1)(A) (West) (defining "agency" under Freedom of Information Act):

> Any executive, administrative or legislative office of the state or any political subdivision of the state and any state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision of the state, including any committee of, or created by, any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official, and also includes any judicial office, official, or body or committee thereof but only with respect to its or their administrative functions, and for purposes of this subparagraph, "judicial office" includes, but is not limited to, the Division of Public Defender Services.

OMA and UAPA. *See* Conn. Gen. Stat. Ann. § 1-205(d); Conn. Gen. Stat. Ann. § 4-167. When an agency fails to disclose information requested by the public and, thus, becomes subject to the FOIC's jurisdiction, that jurisdiction reaches all grounds asserted for non-disclosure and, when an agency is the party not producing, necessarily involves determinations of legality under the OMA and APA. FOIC cannot itself abide by those Acts unless it upholds them. In the face of a failure of OCME to abide by those Acts, FOIC must declare the law violations and order the disclosures that were unlawfully not made, or the FOIC will be complicit in the law violations under the OMA, UAPA, and the FOIA.

Third, the FOIC may refuse to accept the interpretation of a statute advanced by a party on the basis that such interpretation contravenes principles of statutory construction. *See Thomas Germain v. Town of Manchester*, Docket No. FIC 2009-145, ¶ 31. (Jan. 13, 2010) (rejecting party's suggestion that the term "hand-held scanner" could include a "flatbed scanner"); *State v. Nelson*, 11 A.2d 856, 858 (Conn. 1940) ("Courts may not by construction supply omissions in a statute, or add exceptions merely because it appears to them that good reasons exist for adding them. This is especially so when it appears that the omission was intentional"). Additionally, it is presumed that "the legislature intended to enact one consistent body of law." *Sutton v. Lopes*, 201 Conn. 115 (1986). "If there are two possible interpretations of a statute, this court must adopt the more reasonable construction." *Turner v. Turner*, 219 Conn. 703, 713 (1991). It is

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See also Conn. Gen. Stat. Ann. § 4-166 (West) (defining "agency" under UAPA):

> "Agency" means each state board, commission, department or officer authorized by law to make regulations or to determine contested cases, but does not include either house or any committee of the General Assembly, the courts, the Council on Probate Judicial Conduct, the Governor, Lieutenant Governor or Attorney General, or town or regional boards of education, or automobile dispute settlement panels established pursuant to section 42-181.

therefore a fundamental principle of statutory construction that the FOIC should interpret statutes using common sense and assume that the legislature intended a reasonable and rational result. *See Longley v. State Employees Retirement Commission,* 284 Conn. 149, 172-73 (2007). Inherent in that task is the authority to adjudge for itself whether the OCME is abiding by statutes germane to OCME production of requested documents. In other words, because FOIC has authority to determine the legality of agency non-disclosure of records, it necessarily has the specific authority to determine the legality of OCME's Next of Kin Rule, which is OCME's primary basis for non-disclosure in this case, as well as the specific authority to determine the legality of OCME's speaker and viewpoint based justification for non-disclosure, which is OCME's only other basis for non-disclosure in this case.

C. AbleChild Was Not Required To Seek a Declaratory Ruling Under UAPA Section 4-176

All appeals arising out of the non-disclosure of public records must be heard by the FOIC. *See* Conn. Gen. Stat. Ann. § 1-206(b)(1) ("Any person denied the right to inspect or copy records under section 1-210… may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission"). The OCME is a public agency, and its records are "public records." *See* Conn. Gen. Stat. Ann. § 1-200(1), (5); *see also Sinchak v. OCME*, Docket No. FIC 2005-035. AbleChild was not, therefore, required to pursue a declaratory judgment in lieu of an appeal to the FOIC. *See Hill v. State Employees Ret. Comm'n*, 851 A.2d 320, 325 (Conn. 2004) ("Declaratory rulings are not proper for review of an agency's prior administrative decisions"). Indeed, questions concerning the merits or "correctness" of an agency's decision to act are to be resolved "only by appeal," not through seeking a declaratory judgment. *See Young v. Chase*, 557 A.2d 134, 137-38 (Conn. 1989)

(holding that declaratory action was inappropriate to determine whether the plan and zoning commission's decision to grant a modification for the location and height of a radio transmission tower). Examples of issues appropriate for declaratory judgments are narrow and include "those where an agency lacks jurisdiction due to defective notice, where statutory authority has been exceeded, or where the validity of a statute or ordinance is attacked." *Young v. Chase*, 557 A.2d 134, 137 (Conn. 1989) (internal citations omitted). Those matters are not at issue here.

This case proceeds from the OCME's denial of AbleChild's request for records. AbleChild's standing stems from the denial of the record request, and the issues *sub judice* arise from the OCME's invocation of its Next of Kin Rule against disclosure and its assertion of speaker and viewpoint-based justifications for non-disclosure. AbleChild was not required to pursue a declaratory ruling prior to appealing the OCME's non-disclosure to the FOIC. Exhaustion of remedies to contest the denial of access to public records is satisfied through appeal to the FOIC. *See* Conn. Gen. Stat. Ann. § 1-206(b)(1); *Messenger v. Connecticut Dep't of Motor Vehicles*, 0115796, 1993 WL 498988 (Conn. Super. Ct. Nov. 19, 1993) ("[1-206(b)] specifically sets forth the proper appeal procedure for a person who has been denied access to public records") (unpublished); *Pane v. City of Danbury*, CV97347235S, 2002 WL 31466332 (Conn. Super. Ct. Oct. 18, 2002) (unpublished).

Further, Section 4-176 of the UAPA does not replace the defined appeals process before the FOIC. *See LaCroix v. Bd. of Educ. of City of Bridgeport*, 199 Conn. 70, 78 (1986) ("where a statutory right of appeal from an administrative decision exists, an aggrieved party may not bypass the statutory procedure and instead bring an independent action to test the very issue which the appeal was designed to test") (internal citations omitted); *P.R.I.C.E., Inc. v. Kenney*, CV94 542469, 1995 WL 139510 (Conn. Super. Ct. Mar. 17, 1995) ("one fundamental rule is that

a declaratory judgment cannot be used as a substitute for an appeal"). Indeed, most records requests proceed through agencies other than the FOIC. If requesters were always required to first seek a declaratory judgment before challenging the rules and regulations that apply to those agencies' disclosure policies, then the FOIC would rarely, if ever, have jurisdiction over cases concerning non-disclosure of public records. The FOIC's precedential history reveals otherwise. The FOIC consistently determines the legality or validity of agency policies that limit access to public records without the necessity for commencement of rulemakings at the agency or actions for declaratory judgment. Where, as here, a case develops through a request for records, there is a single, defined appeals process for the denial of access and that process is through an appeal to the FOIC. The statute demands an appeal directly to the FOIC. *See* Conn. Gen. Stat. Ann. § 1-206(b)(1); *Messenger v. Connecticut Dep't of Motor Vehicles*, 0115796, 1993 WL 498988 (Conn. Super. Ct. Nov. 19, 1993). AbleChild has pursued the statutorily prescribed process.

II. ABLECHILD DEMONSTRATED A "LEGITIMATE INTEREST" IN THE RECORDS REQUESTED, AND OCME FAILED TO SEEK A PROTECTIVE ORDER IN SUPERIOR COURT AS REQUIRED BY SECTION 19a-411(c)

A "legitimate interest" is a question of fact to be decided on a case-by-case basis. *See Meriden Record Co. v Browning*, 6 Conn. Cir. Ct. 633, 634-35 (1971) (holding that "legitimate interests" can be of all kinds); Opinion of the Connecticut Attorney General, 1971 WL 21766 (Conn. A.G. 1971). To hold that "legitimate interests" can only relate to certain individuals in contractual privity with the deceased, or those with investigative duties over the deceased, excludes the overwhelming majority of public requesters allowed access in the duly adopted regulation of the Commission on Medicolegal Investigations, Conn. Agencies Regs. § 19a-401-12. *See, e.g., Meriden Record Co. v. Browning*, 6 Conn. Cir. Ct. 633, 637 (1971); *Kuhali v.*

Reno, 266 F.3d 93, 111 (2001); *Washington v. Harper*, 494 U.S. 210, 211 (1990); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

Courts have found a "legitimate interest" present when parties seek to protect society from acts that cause physical or mental harm. For instance, the United States Court of Appeals for the Second Circuit determined that government "has a legitimate interest in protecting society from the commission of aggravated felonies…" *See Kuhali*, 266 F.3d at 111. The Supreme Court of the United States has also held that government has a "legitimate interest" in protecting citizens from mentally ill persons who may be violent, and in protecting the health of its citizens generally. *See, e.g., Harper*, 494 U.S. at 211 (holding that state had a "legitimate interest in combating the danger posed by a violent, mentally ill inmate"); *Eisenstadt*, 405 U.S. at 442 (holding that state had a legitimate interest in "protecting the health of its citizens").

As in those examples, here AbleChild has a legitimate interest in Adam Lanza's records because AbleChild seeks to investigate the potential causal connection between drug and drug treatment protocols for mental illness and violent behavior by the mentally ill, so that means may be identified to reduce the risk of drug induced murder and suicide. AbleChild aims to ensure the safety of its member parents, caregivers, and children when those in their company are diagnosed with mental illness and are prescribed drugs or treatment protocols that involve agents and conditions that the FDA has determined may evoke thoughts of violence and suicide. *See* Complainant Exh. 4. AbleChild has a legitimate interest in accessing Adam Lanza's autopsy, toxicology, and drug history records so that an evaluation may be made to determine the extent to which his case is one associated with treatments that may have contributed to increased thoughts of murder, homicide and suicide. That information and resulting AbleChild recommendations stemming from the information will help parents, caregivers, health

authorities, state and federal governments, and the public nationwide to make better informed decisions concerning how best to care for the mentally ill and protect parents and caregivers.

As explained by Respondent's counsel at hearing and in Respondent's brief, an additional reason given for non-disclosure is OCME's assumption that AbleChild will advance positions based on the information obtained with which OCME objects: classic viewpoint discrimination. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995) ("[v]iewpoint discrimination is . . . an egregious form of content discrimination [forbidden by the First Amendment]"). Nowhere in Connecticut law is there a grant to OCME of power to deny access to requested documents on the basis that requesters with that information may advance views antithetical to those preferred by the OCME. Indeed, that basis for non-disclosure violates the First and Fourteenth Amendments to the U.S. Constitution and the comparable provisions of Connecticut's Constitution. *Id.* ("government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction").

It is a patently illegitimate basis for decision to deny otherwise lawfully required production of requested documents on the basis that one obtaining them may use the documents to advance a view the government believes impolitic. Certainly the FOIC cannot condone or endorse such a position without hopelessly embedding itself in the same unconstitutional act; rather, FOIC should condemn speaker and viewpoint based discrimination in no uncertain terms, ensuring that this and other state agencies will not think it appropriate to deny document requests on the constitutionally repugnant basis that requesters may use information disclosed to advance views disfavored by state agencies.

Respondent argues, for example, that "any general treatment recommendation based on [Lanza's] isolated case would have to rely on incomplete and unscientific data and would be scientifically unsound." *See* Respondents' Post-Hearing Brief, at 9-10. For that reason, OCME would deny AbleChild access to information.

In addition, Respondent entirely misrepresents the purpose and importance of FDA's "black box" warnings on drugs for mental illness. Since the 1930s, the FDA has issued very few "black box" warnings for drug products. A "black box" warning is the most significant labeling measure FDA can take, one just short of removing a drug product from the market due to safety reasons. *See* Complainant Exh. 4 (Attachment F, at 1). When issuing that warning, the FDA determined that antidepressant drugs do, in fact, cause an increase in the risk of aggressive behavior and suicidality. *See* Complainant Exh. 4 (Attachments B-D, F, G). Thus, Respondents have mischaracterized the record by arguing that FDA has "not quite reached the point to say definitively that there is a causal link between the use of antidepressants and violent behavior." To the contrary, FDA has. AbleChild now seeks only to determine the extent of that causal link in certain contexts, particularly school shootings. The OCME also fails to consider the possibility that antidepressants may have simply failed to work for Adam Lanza, who eventually killed himself. That information would concern the drugs' efficacy, another factor AbleChild will consider in its evaluation of the requested information.

Connecticut courts have held that the burden to establish an exemption under the Freedom of Information Act—the burden to withhold documents—is with the government party claiming the exemption. *See City of New Haven*, 205 Conn. at 775-76. Section 19a-411(b) also incorporates the protections of the general Freedom of Information Act, even though Section 19a-411(b) represents an independent disclosure provision. *See* Conn. Gen. Stat. § 19a-411(b)

(requiring that records be made available "in accordance with … section 1-210"). Once a requester demonstrates a *prima facie* "legitimate interest," the burden shifts to the OCME to prove the interest does not exist or is insufficient. *See City of New Haven*, 205 Conn. at 775-76. It may not satisfy that burden based on rank speculation (such as a disagreement with the presumed use to which a requester may put information requested in furtherance of one or more presumed requester views). The courts have explained that:

> [The] burden requires the claimant of the exemption to provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested.

Id. (collecting cases). Here we have nothing in the record beyond OCME's speculation to support its conjecture about AbleChild's intentions.

In its Post-Hearing Brief, counsel argues that "[a] person claiming a legitimate interest in a record under § 19a-411(b) must, thus, demonstrate, at the minimum, a personal interest that is compelling, direct and bona fide." *See* Respondent Brief, at 6. Respondents claim, therefore, that the phrase "legitimate interest" in Section 19a-411(b) really means "compelling interest." *Id.* That is not the law. Respondents' cited cases are inapposite. Respondents cite several cases that touched upon the word "legitimate" when interpreting the confidentiality clause of Section 46b-124, a completely unrelated records provision governing the disclosure of juvenile records in legal cases.[11] For instance, *In re Jessica* stated that the "compelling need" test was an historical element of certain cases before the latest statute became effective. *See In re Jessica*, 25 Conn. L. Rptr. 388, 1999 WL 775753, at *2-3 (Conn. Super. 1999) (stating that "the history of the statute prior to P.A. 95-225" required a showing of compelling need). The court then

[11] Section 46b-124(e) does, however, have a similar clause that provides for the disclosure of juvenile matters involving delinquency proceedings "upon the order of the court to any person who has a legitimate interest in the information and is identified in the order."

explained that the legislature, "reflecting the national trend," had expanded records access to those with a "legitimate interest." *Id.* The case does not in any way establish a higher "compelling need" burden for records disclosure. In fact, in the AbleChild case under Section 19a-411(b), that interpretation would be illogical given that the legislature placed a contrary burden on the OCME itself to justify non-disclosure by proving a "compelling public interest," thus as to OCME, the legislature created a compelling interest burden but as to the public requestor the legislature created a legitimate interest requirement. *See* Conn. Gen. Stat. § 19a-411(c). Had the legislature intended the public requestor to bear a compelling interest, it certainly would have so stated, particularly when the same section imposes that very standard not on the public requestor exclusively but on the government non-discloser. In short, when the legislature means to impose a "compelling" burden, it has clearly shown that it will do so, selectively and advertently so in the context of Section 19a-411(c).

The OCME's citation to decisions interpreting Section 46b-124 must be assessed in context with the historical confidentiality of juvenile records generally. Unlike the OCME's records, which have historically been available to the public, juvenile criminal records have historically not been available. *Compare* Testimony of Mitch Pearlman Connecticut Committee Transcript, GAE 3/6/2002 ("Prior to around 1984 or '85 when the Supreme Court decision held to the contrary, autopsy reports were available to the public"), *and Dep't of Pub. Utilities of City of Norwich v. Freedom of Info. Comm'n*, 739 A.2d 328, 331 (Conn. 1999) (the FOIA statute presumes disclosure), *with In re Jessica*, 1999 WL 775753, at *2 (finding that a "history of the statutes prior to P.A. 95-225 which govern confidentiality of juvenile records" establish "the strong presumption of juvenile confidentiality"). Section 19a-411(b) was drafted to facilitate disclosure of records to the general public, not transfer unbridled discretion to the OCME in

determining whether to release documents. Terms used in the FOI Section 19a-411(b) thus may not be properly interpreted to carry the same meaning as similar terms used in juvenile code Section 46b-24(e).

Finally, even assuming the OCME had relevant authority and evidentiary support, the OCME was statutorily required to pursue its cause in Superior Court in an action for a protective order. *See* Conn. Gen. Stat. § 19a-411(c). Respondents' counsel argued that AbleChild lacked a "legitimate interest" because its intended use of the information was "harmful." According to counsel, "you can cause a lot of people to stop taking their medications, stop cooperating with their treating physicians, just because of the heinousness of what Adam Lanza did." *See* Hearing Recording, *supra* at 3 (beginning at 1:04.27); Respondents' Post-Hearing Brief, at 10 (arguing further that AbleChild's use of information "would be dangerous as it could cause some patients to forego life-saving treatment to their detriment and the detriment of the general public"). That argument misleads because it is based on a false predicate. AbleChild is a member of the public, not a professional or institutional entity, so it cannot translate its recommendations into treatment decisions, it can only recommend changes to existing treatments and treatment protocols for ultimate decision by other authorities who may or may not deem AbleChild's recommendations persuasive.

Nonetheless, arguments related to OCME fear of how information might be translated into public advocacy are ones OCME should have asserted in the first instance before the Superior Court in a motion for protective order. Section 19a-411(c) provides:

> Upon application by the Chief Medical Examiner or state's attorney to the superior court for the judicial district in which the death occurred, or to any judge of the superior court in such judicial district when said court is not then sitting, said court or such judge may limit such disclosure to the extent that **there is a showing by the Chief Medical Examiner or state's attorney of compelling public interest against disclosure of any particular document**

> **or documents.** Public authorities, professional, medical, legal or scientific bodies or universities or similar research bodies may, in the discretion of the commission, have access to all records upon such conditions and payment of such fees as may be prescribed by the commission. Where such information is made available for scientific or research purposes, such conditions shall include a requirement that the identity of the deceased persons shall remain confidential and shall not be published.

Conn. Gen. Stat. Ann. § 19a-411(c) (emphasis added). That section requires the OCME to seek a protective order if it believes that a compelling public interest overcomes the requester's legitimate need.[12]

III. OCME'S NEXT OF KIN RULE IS UNLAWFUL AND UNENFORCEABLE

Despite AbleChild's showing of "legitimate interest," the OCME denied the non-profit group's request for records because the group did not fit within the narrow class of individuals specified in OCME's Next of Kin Rule and because OCME opposes the viewpoint it presumes AbleChild will advocate if given the information requested. *See* Complainant Exh. 3, at Ex. 2 (noting that records are only available to "next of kin, attorneys involved in litigation or attorneys handling the estate of the deceased, as well as physicians involved in the patient's care, insurance claims agents and investigative authorities"). At present, only those persons included in OCME's Next of Kin Rule can receive OCME records, regardless of the nature or type of interest the requester has in OCME's records. The Next of Kin Rule violates state and federal law, and imposes a rule applied to all public requesters in violation of the UAPA. The Next of Kin Rule is unlawful, procedurally and substantively infirm, and entitled to no deference.

[12] That Medicolegal Investigations' rule reads: "[i]f the requester of the records is a member of the general public, he or she may obtain access to such records if the person has a legitimate interest in the documents and no court has issued an order prohibiting disclosure pursuant to section 19a-411(c) of the Connecticut general statutes." *See* Regs. Conn. State Agencies § 19a-401-12(c)(2).

A. OCME's Next of Kin Rule Is Invalid Under the UAPA and Is Therefore Void and Unenforceable

The Connecticut UAPA requires administrative agencies to proceed through required procedures when changing regulations or substantive policies. *See* Conn. Gen. Stat. § 4-168(a). Those procedures ensure due process of law and protect citizens from arbitrary government action. *Pet v. Department of Health Services*, 228 Conn. 651, 683 (1994) ("[b]ecause the UAPA is designed and intended to safeguard minimal due process rights, strict compliance with its mandate is necessary to ensure that significant property rights are not unlawfully destroyed").

The Connecticut UAPA defines a "regulation" as "[e]ach agency statement of general applicability, without regard to its designation, that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of the agency." *See* Conn. Gen. Stat. § 4-166(13). Before enacting a regulation, OCME is obliged to: (1) give thirty days notice to the public; (2) give notice to each joint standing committee of the General Assembly with interest in the subject matter; (3) give notice to interested persons; (4) provide a paper copy or electronic version of the proposed regulation to persons requesting it; (5) prepare a fiscal note that includes an estimate of the cost or revenue impact; (6) afford interested persons a reasonable opportunity to submit data, views, or arguments; (7) grant oral argument; and (8) consider all written and oral submissions concerning the proposal. *See* Conn. Gen. Stat. § 4-168(a). The OCME did none of that. Instead, it created the Next of Kin Rule internally, in an imperial fashion, without notice and comment from any member of the public.

Even informal guidelines violate the UAPA if agencies apply them as substantive rules. *See Hosp. of St. Raphael v. Comm'n on Hospitals & Health Care*, 438 A.2d 103, 107 (Conn. 1980). "Substantive rules" are those that have a "substantial impact on the rights and obligations of parties who may appear before the agency in the future." *Salmon Brook*, 416 A.2d at 362.

Here the OCME's Next of Kin Rule is substantive because OCME applies the Next of Kin Rule to every public request. Regulation 19a-401-12(c)(2) states that "if the requester of the records is a member of the general public, he or she may obtain access to such records if the person has a legitimate interest in the documents…" *Id.* The regulation does *not* say that a requester can only obtain records if he or she falls within a specific group of individuals to be named by the OCME. Because the OCME's Next of Kin Rule determines the rights of those members of the public who request records from the OCME and governs release of all OCME documents, it is a substantive rule subject to the rulemaking requirements of Conn. Gen. Stat. § 4-168(a).

To be sure, the Next of Kin Rule is not an "interpretive" policy that merely defines ambiguous terminology. The Next of Kin Rule restricts access to records in every case and, thus, is, in fact, not an *interpretation* of existing regulatory language at all but a categorical rule governing all requests of decedent records and confining what is released to a select, arbitrary subset of the requesters, recognized by the Commission on Medicolegal Investigation's duly adopted rule, Conn. Agencies Regs. § 19a-401-12.

OCME's Next of Kin Rule is enforced by OCME in place of the statutory and regulatory text to limit to a severely truncated subset those who may receive OCME documents, a subset that incorporates only a small part of the people defined as eligible for access to OCME records in the Commission on Medicolegal Investigations' regulation, Section 19a-401-12(c)(2). According to OCME, if an individual or entity does not fall within its Next of Kin Rule, the records requested will not be supplied (and that applies even if, as here, the entity does fall within the Commission on Medicolegal Investigations' duly adopted regulation).

The FOIC itself has determined that the OCME's "policies" violate the UAPA. In 1986, FOIC determined that similar OCME "policies" had no application in the FOIC proceedings, in

part, because those policies circumvented the UAPA rulemaking process. In *Patrice Courtney and Citizen Publications v. Office of the Chief Medical Examiner*, Docket #FIC 86-128 (1986), the Commission held in a contested case that "permission for disclosure from the decedent's family is not a statutory precondition for such disclosure [of autopsy records], but is merely a practice adopted by the respondent." *Id.* at 3, ¶ 16. As in this case, OCME had attempted to limit disclosure of records because the decedent's family did not consent. The Commission found that the OCME could not circumvent the rulemaking process, and explained that "[i]n the absence of statutory authority, it is concluded that under [§ 1-210] G.S., the respondent [OCME] cannot create a precondition to disclosure of a public record"). *Id.* Thus, the FOIC determined that disclosure of autopsy records, including "related toxicology and other laboratory reports," was required. *Id.*

Because the OCME's Next of Kin Rule violates the UAPA notice and comment rulemaking requirements, the Next of Kin Rule is legally invalid and cannot be relied upon as a basis for decision or condoned in a decision by the FOI Commission. *See Salmon Brook*, 417 A.2d at 363-64 (holding that where an agency's "guidelines" were not adopted under the rule-making provisions of the UAPA, and were "void and of no effect").

B. OCME's Unlawful Next of Kin Rule Can Receive No Deference from the FOIC Because The Rule Is Unreasonable, Arbitrary, Illegal, and an Abuse of Discretion

The Respondents rejected AbleChild's initial request for records solely on the grounds that AbleChild did not fall within the persons listed in the Next of Kin Rule. *See* Complainant Exh. 1. At hearing, Respondents' counsel again reiterated that OCME believed its Next of Kin Rule controlled, and that the OCME was entitled to deference for its Next of Kin Rule. That argument misstates and conflicts with the governing law. The FOIC cannot defer to an illegal

rule. Moreover, the FOIC has no obligation to defer to the OCME's interpretation of Section 19a-411(b) because the FOIC itself is charged with interpreting that statutory section *de novo*. *See supra* at 5. Notwithstanding, OCME's definition of "legitimate interest" is also not a "permissible construction" of the statutory and regulatory text. *See Hargrove v. Commissioner of Social Services*, No. CV020516243, 2003 WL 21716063, at * 7 (Conn. Super. Ct. 2003) (unpublished) (citing *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)). The FOIC has consistently refused to insert new definitions into a statutory term absent a lawful foundation. *See, e.g., Stephanie Reitz v. Dept. of Public Safety*, Docket No. FIC 2010-091 (Jan. 13, 2011) (rejecting respondent's argument that "mug shot" should also be considered part of a "record of arrest" when the plain language of the statute did not include it). It should similarly refuse that invitation here.

Where an agency interprets statutory sections that stray beyond its jurisdiction, neither the courts nor the FOIC defer to the interpretation, which in the end is "a question of law for the courts where the administrative decision is not entitled to special deference, particularly where … the statute has not previously been subjected to judicial scrutiny or time-tested agency interpretations." *City of New Haven*, 205 Conn. at 773-74; *see also State Bd. of Labor Relations v. Freedom of Information Com'n*, 244 Conn. 487, 494-95 (1998). As in *New Haven*, here government counsel admitted at oral argument that OCME's interpretation of statutory law has not been "subjected to judicial scrutiny" and, so, it is entitled to no FOIC deference. *New Haven*, 205 Conn. at 774; *see also* Hearing Recording, *supra*, at 1:13.42.[13]

[13] The Hearing Officer asked counsel: "Has any other entity ever challenged this further definition that the OCME has on its website, of who has a legitimate interest?" Counsel answered: "Not that I am aware of." *See* Hearing Recording, *supra*, (beginning at 1:13.42).

In this case, OCME's Next of Kin Rule is a truncation of the term "legitimate interest" in Section 19a-411(b), which section "involves a number of interrelated statutory provisions," not all of which are charged to the OCME for enforcement. *See State Bd. of Labor Relations*, 205 Conn. at 494-95. For instance, Section 19a-411(b) requires that the Chief Medical Examiner provide documents "in accordance with this section, *section 1-210* and the regulations of the commission." *See* Conn. Gen. State § 19a-411(b) (emphasis added). Interpretation of the phrase "legitimate interest" therefore requires an analysis of the interplay between the Connecticut FOIA (Section 1-210), a statutory section beyond the OCME's jurisdiction, and Section 19a-411(b), so that a cohesive body of law can be applied to requests for public records. Applying *State Bd. of Labor Relations* here would require a *de novo* review based on principles of "statutory construction that apply in all cases turning upon the interpretation of statutes." *Id.* at 495. However, even if OCME is generally entitled to deference in its statutory interpretations, OCME's definition of "legitimate interest" still fails because it is unreasonable, arbitrary, illegal, and an abuse of discretion. *See Griffin Hosp. v. Commission on Hospitals and Health Care*, 200 Conn. 489, 496-97 (1986) ("Judicial review of the conclusions of law reached administratively is limited," and the court ultimately decides whether the agency "acted unreasonably, arbitrarily, illegally, or in abuse of its discretion").

1. OCME's Next of Kin Rule Violates the Equal Protection Clause of the Fourteenth Amendment and the Free Speech Clause of the First Amendment

OCME's decision to withhold documents based on AbleChild's failure to fit within its severely limited listing in the Next of Kin Rule and based on AbleChild's presumed viewpoint violates the Equal Protection and Free Speech Clauses of the United States Constitution (and the

Connecticut Constitution). OCME has not met its high burden to prove a compelling state interest and narrow tailoring such that there are no less restrictive alternatives to achieve that interest.

The Fourteenth Amendment to the United States Constitution provides in relevant part, "No State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." *See Batte-Holmgren v. Comm'r of Pub. Health*, 281 Conn. 277, 280 (2007) (noting similarities in Connecticut and Federal constitutions). "The Equal Protection Clause has traditionally been applied to governmental classifications that treat certain groups of citizens differently than others." *Fortress Bible Church v. Feiner*, 694 F.3d 208, 221 (2d Cir. 2012). "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (internal citations omitted). Accordingly, the Supreme Court has recognized successful equal protection claims "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *See id.* (collecting cases).

When state discrimination results in the diminution or infringement of a fundamental right, the state must meet its burden to demonstrate "that any abridgment of the right has been narrowly tailored to effectuate a compelling state interest." *See Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 144, 158 (2008) ("If … state action invidiously discriminates against a suspect class or affects a fundamental right, the action passes constitutional muster ... only if it survives strict scrutiny").

Here, OCME's Next of Kin Rule and condemnation of AbleChild's presumed intended advocacy violates AbleChild's First Amendment right to access the requested records. The United States Supreme Court recognizes a constitutional right to gather information under the First Amendment. *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("without some protection for seeking out the news, freedom of the press could be eviscerated"); *Roth v. United States*, 354 U.S. 476, 484 (1957) (explaining that the First Amendment "was fashioned to [ensure] unfettered exchange of ideas for the brining about of political and social changes desired by the people"); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (holding that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system"). Thus, to the extent the OCME infringes citizens' First Amendment rights, strict scrutiny applies to the OCME's discriminatory policy and renders it unconstitutional.

Notwithstanding, OCME's Next of Kin Rule does not survive even lower scrutiny under the rational basis test because the OCME failed to provide any reasoned justification for its Next of Kin Rule. Respondent's counsel was unable to explain how or why the OCME developed its Next of Kin Rule. OCME counsel entered no evidence in the record to support the OCME's decision to restrict access to certain individuals, other than to simply restate the rule itself. Moreover, although the OCME rejected AbleChild's request for records on the basis of its Next of Kin Rule, Respondent offers no support for the Next of Kin Rule in its Post-Hearing Brief.

Under its policy the OCME performs no case-by-case analysis, choosing instead to reject records requests categorically based on its Next of Kin Rule without even considering each requesters' specific "legitimate interest" showing. That decision to limit production of

documents to a small subset of individuals over all others who may nevertheless have stronger interests in the decedent's records violates the Equal Protection Clause because no legitimate or rational basis can justify why weaker interests held by certain individuals who are nevertheless within a category under the Next of Kin Rule should prevail over stronger interests held by other individuals who are not within a category under the Next of Kin Rule.

OCME's Next of Kin Rule and its subjective prejudice against AbleChild's presumed intended advocacy in reliance on records requested also violates the First and Fourteenth Amendments because it imposes a speaker-based and viewpoint-based restriction on the use of information. Permitting the government to choose who receives information based on whether the government favors the views of the requester is classic viewpoint discrimination forbidden by the First Amendment. Here OCME has restricted AbleChild's ability to obtain information and, in turn, *disseminate* information based on its assumptions about the type of advocacy AbleChild has planned. At the very core of the First Amendment is the principal that government cannot regulate speech based on government displeasure with the views the speaker may express. *See R. A. V. v. St. Paul*, 505 U.S. 377, 382 (1991) ("the First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed"). The Supreme Court has held that content-based regulation of speech is presumptively unconstitutional under the First Amendment. *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 115 (1991); *Consolidated Edison Co. of N. Y. v. Public Servo Comm'n of N. Y.*, 447 U. S. 530, 536 (1980); *Boos*, 485 U.S. at 313; *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 95 (1972). A content-based government speech restriction is subjected to strict scrutiny. To overcome the strong presumption against the constitutionality of government action that gives rise to strict scrutiny, the government must prove that the

regulation it has adopted is narrowly drawn and necessary to achieve a compelling government interest. *Boos*, 485 U.S. at 313. No such proof has been offered by the OCME or exists on this record.

Here, the OCME has not shown a compelling government interest in refusing production of Adam Lanza's records to AbleChild, nor has OCME narrowly tailored its restriction to serve a compelling interest by establishing the absence of less restrictive alternatives to outright bans on release of the requested information (such as appropriately selective redaction). The OCME maintains only that the recommendations that will arise from AbleChild if it is given the requested information will be "harmful" to mentally ill patients. *See* Respondents' Post-Hearing Brief, at 10. While on its face that viewpoint discrimination is unconstitutional, OCME's position conflicts with that of a federal agency, the FDA. FDA has recommended that treating physicians weigh risks of increased aggressiveness and suicidality arising from psychiatric medications before prescribing. *See* Complainant Exh. 4 (Attachment F). Respondents also speculate as to the precise nature of AbleChild's recommendations when not even AbleChild knows presently precisely what it will recommend because it has yet received and evaluated the requested records. Because Respondents have offered nothing other than rank speculation to rebut AbleChild's showing of a legitimate interest, the government has not met its burden of overcoming the strong constitutional presumption against speaker-based and viewpoint-based discrimination.[14]

[14] Moreover, as discussed in more detail below, if the OCME feared that release of Adam Lanza's records would lead to public harm, the OCME was then statutorily obliged to seek a protective order under Section 19a-411(c). Moreover, as prior AbleChild submissions to the FOIC in this proceeding establish, OCME's fear is belied by its selective release of autopsy records sought here to certain broadcast and print journalists. *See* Exh. 2 at Ex. 2.

2. OCME's Exercise of Unbridled Discretion Is Unlawful, Unreasonable and an Abuse of Agency Discretion

The OCME departed from the plain and ordinary meaning of "legitimate interest" and, instead, applied a constricted definition that recognizes "legitimate" interests only for certain members of the public.[15] By creating its Next of Kin Rule in an imperial manner without the required public meeting and notice and comment rulemaking, OCME has assumed unbridled discretion to limit records access under Section 19a-411 of the general statutes upon its momentary whim or caprice. Today it has arbitrarily limited records to those who fall within the narrow category of persons in its Next of Kin Rule, tomorrow, again without public meeting and notice and comment rulemaking, it may decide unilaterally to restrict access even further. Unless its unlawfully promulgated Next of Kin Rule is held illegal, there will be nothing to prevent OCME from internally, *sua sponte,* without a public meeting and without notice and comment rulemaking, from promulgating an even more restrictive rule in future.

That assumption of unilateral rule promulgation authority by OCME exceeds statutory and regulatory limits, is illegal and void, and cannot be upheld or condoned.

The OCME was statutorily obliged under Section 19a-411 (and regulatory section 19a-401-12(c)(2)) to produce records to those members of the public possessed of a "legitimate interest" in the records sought. Because OCME's Next of Kin Rule conflicts with and does not fully and faithfully implement the Commission on Medicolegal Investigations duly promulgated regulation in paragraphs 19a-401-12(c)(1) and (2), OCME's Next of Kin Rule is unreasonable and an abuse of agency discretion.

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[15] The OCME limits the universe of "legitimate interest" to one or more of the following: "next of kin, attorneys involved in litigation or attorneys handling the estate of the deceased, physicians involved in the patient's care, insurance claims agents, and investigating authorities." *See* Complainant Exh. 2, at Ex. 3.

3. OCME's Next of Kin Rule Is Inconsistent With Legislative Intent

Legislative intent is the primary endpoint in statutory interpretation. The Court in *State Bd. of Labor Relations* explained:

> The process of statutory interpretation involves a reasoned search for the intention of the legislature. In seeking to discern that intent, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.... Furthermore, we presume that laws are enacted in view of existing relevant statutes ... and that statutes are to be interpreted with regard to other relevant statutes because the legislature is presumed to have created a consistent body of law. No part of a legislative enactment is to be treated as insignificant or unnecessary, and there is a presumption of purpose behind every sentence, clause or phrase.... Statutes are to be construed "in a manner that will not thwart [their] intended purpose or lead to absurd results. The law favors a rational statutory construction and we presume that the legislature intended a sensible result.

State Bd. of Labor Relations v. Freedom of Info. Comm'n, 244 Conn. 487, 495 (1998).

Connecticut regulation § 19a-401-12(c)(2) provides access to any "member of the general public" with a "legitimate interest in the documents." *Id.* Section 19a-411(b) specifically states that "no person with a legitimate interest in the records shall be denied access to such records." *See* Conn. Gen. Stat. § 19a-411(b). Here the OCME has *severely* limited who among the general public may receive access to its records, doing so by categorically excluding the entire public except those with familial or occupational positions favored by the OCME. OCME has not explained why, invariably, all of those in the few specified Next of Kin Rule categories have in every case a "legitimate interest" and why, invariably, all of those not in the few specified Next of Kin Rule categories never have in any case a "legitimate interest." OCME has not explained why an inflexible rule is appropriate for applying the Commission on Medicolegal

Investigations' regulation that, by its very terms, requires a case by case approach. Instead, the OCME Next of Kin Rule is inconsistent with law because "withholding information under FOIA cannot be predicated on the identity of the requester." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2004); *Bd. of Trustees of Woodstock Acad. v. Freedom of Info. Comm'n*, 436 A.2d 266, 270 (Conn. 1980) (holding that Connecticut courts look to the federal Freedom of Information Act for guidance because "the purpose of the federal act and of [the state] act are virtually identical").

Here OCME's Next of Kin Rule is at odds with the general body of disclosure law because OCME looks at the identity of the requester alone, rather than the nature of the requester's articulated interest in the information. For example, the OCME would release records, under its Next of Kin Rule, "to all parties in civil litigative proceedings."[16] Therefore, attorneys in litigation with even the most remote interest in an OCME autopsy record have a right to access, while nonprofits like AbleChild, with a compelling interest in investigating potential causes of violence and suicide, are categorically excluded. The OCME Next of Kin Rule expressly states that, for individuals not included in OCME's "next of kin" list, "[r]ecords are not otherwise open to the general public." That statement is in direct conflict with the statutory text of Section 19a-411(b), which expressly says "no person with a legitimate interest in records shall be denied." Conn. Gen. Stat. § 19a-411(b).

To the extent OCME argues that only those individuals in its list can be presumed to have a "legitimate" interest, its argument is contrary to legislative intent. Section 19a-411 was designed to work in conjunction with the general Connecticut FOIA law. *Ottochian*, 604 A.2d at 354 ("[I] t is well established that the general rule under the Freedom of Information Act is

[16] *See* OCME Website, Frequently Asked Questions, *available at* http://www.ct.gov/ocme/cwp/view.asp?a=2166&Q=295104&ocmeNav=|.

disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the FOIA legislation"). That law promotes disclosure and government transparency by, for example, placing the burden on the state to justify why documents should be exempted from disclosure on a case by case basis. *See City of New Haven*, 205 Conn. at 775-76.

When drafting Section 19a-411, the legislature explained that OCME records should be generally available to the "general public." On March 6, 2002, Mitch Pearlman, Executive Director and General Counsel of the Connecticut Freedom of Information Commission, testified before the Administration and Elections Committee and explained that revisions to Section 19a-411 were designed to facilitate disclosure of records, in part, to allay citizen concerns over "instances where the work … on the autopsies brought into questions competence and also malfeasance in office." *See* Connecticut Committee Transcript, GAE 3/6/2002. He explained that Connecticut had a history of disclosing such records. *Id.* ("Prior to around 1984 or '85 when the Supreme Court decision held to the contrary, autopsy reports were available to the public"). Consequently, he explained that revisions to Section 19a-411 would ensure that those records remained public: "as a general principle the Commission feels that because the state has such a great interest in those situations in which there are possibilities of homicide, suicide, health or environmental concerns, this information should be made public." *See* Connecticut Committee Transcript, GAE 3/6/2002 (explaining that "there are already exemptions in the law under the law enforcement exemptions for withholding information that would harm prosecutions").

Attempting to rebut claims that its Next of Kin Rule conflicts with legislative intent, the Respondent argues that "[e]xamples of … direct bona fide personal interests are found in Regs.

Conn. State Ag. § 19a-401-12(c)(4),(e), and (f)." In other words, Respondent claims that Sections (c)(4), (e), and (f) define the universe of "legitimate interests" that are or ever could be found by OCME. Respondent misapprehends the law. Section 19a-401-12(c)(4) is an entirely independent regulatory provision that grants access to OCME records where the "requester of the records is a pro se litigant seeking access to medical records…" *Id.* That independent subpart has no relevance to this case, where the AbleChild proceeded under paragraph (c)(2). Regardless, the text of paragraph (c)(4) actually supports AbleChild's position because it again reinforces that "legitimate interest" is a test independent of the requester's positional status. The regulatory text in paragraph (c)(4) states: "he or she may obtain access to such records if the records are legitimately sought…" *Id.* That would require a separate analysis of "legitimacy" linked to the *reason* for requesting records in litigation, not linked to the status of a requester as a pro se litigant.

Section 19a-401-12(e) has no application here. Paragraph (e) simply states that "[r]equests by attorneys, insurance claims agents or other interested parties, other than the next of kin or persons acting on behalf of the next of kin, should state reasons for which records are required." *Id.* That procedural notice section does not present a defined listing of persons by occupation or position who are to be deemed exclusively possessed of "legitimate interests." Respondents argue that paragraph (e) contains a list of persons with "direct bona fide personal interests." *See* Respondents' Post-Hearing Brief, at 7. However, paragraph (e) expressly lists "other interested parties" as eligible, thus again defeating Respondents' truncated misreading. Even assuming that paragraph (e) had anything to say about "legitimate interests" (it does not), that list would include AbleChild as an "interested party."

Finally, Section 19a-401-12(f) governs disclosure of records in criminal cases. That paragraph is irrelevant in this case. It provides an independent basis for disclosure in criminal cases, and does not interpret or involve the "legitimate interest" analysis here in issue. AbleChild notes, however, that just like paragraph (c)(2), paragraph (f) also requires the OCME to seek a protective order under Section 19a-411(c) if it wishes to withhold information. Therefore, if anything, the mandatory disclosure section in paragraph (f) suggests that the general public's access in paragraph (c)(2) is broad.

In evaluating statutory language, the courts "begin with a searching examination of the language of the statute, because that is the most important factor to be considered." *See Mandell v. Gavin*, 262 Conn. 659, 667 (2003). Here, the statutory and regulatory language both state that *any* individual with a legitimate interest may obtain OCME records, including autopsy reports. Because the OCME's Next of Kin Rule expressly contradicts that language (and the regulation of the Commission on Medicolegal Investigations on point, Section 19a-401-12(c)(2)) by severely limiting the universe of persons capable of receiving OCME files, the OCME Next of Kin Rule is inconsistent with the plain and intended meaning of the statutes and duly promulgated regulation on point and must therefore be held invalid.

4. OCME's Next of Kin Rule Arbitrarily and Capriciously Limits Disclosure to a Subset of Those with Legitimate Interests

Connecticut courts will overturn or invalidate administrative decisions that are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise

of discretion. *See* Conn. Gen. Stat. § 4-183(j). Even assuming, *arguendo*, that the OCME's Next of Kin Rule was constitutional and lawfully enacted, it would still fail because it is an arbitrary and capricious measure.

The OCME Next of Kin Rule is the definition of "arbitrary" because the OCME promulgated it without any reasoned explanation or supporting facts. *See Hoosier Environmental Council, Inc. v. U.S. Army Corps of Engineers,* 105 F. Supp. 2d 953 (S.D. Ind. 2000) (the term "arbitrary and capricious" is a technical legal phrase meaning an administrative action not supported by evidence or lacking a rational basis); *Nor-Am Agric. Prods., Inc. v. Hardin,* 435 F.2d 1133, 1145 (7th Cir. 1970) (holding that an administrative action not supported by evidence or lacking a rational basis is deemed arbitrary and capricious).

OCME counsel argued that "the legislature uses terms all the time that it doesn't define, and in those cases, where a term is not defined … we follow the common usage."[17] He also argued that the word "legitimate" simply means "real." *Id.* (stating that the word "real" was the "most appropriate" meaning in this case). Respondent has not plausibly explained, however, why AbleChild lacks a legitimate interest of its own, particularly when AbleChild's interest seems fits well within Respondent's own definition of "legitimate."

Because the OCME never complied with the UAPA procedural requirements, or offered evidence before the FOIC to support its Next of Kin Rule, the FOIC has no basis to conclude that the OCME's restrictive Next of Kin Rule is at all reasonable. That rule is, in fact, unreasonable, arbitrary, and capricious because it was not lawfully promulgated and "legitimizes" certain interests in records, yet excludes (or renders "illegitimate") other pressing and more compelling interests, all without any factual or evidentiary basis in support. In other words, the OCME has

[17] *See* Hearing Recording, *supra* at 3 (beginning at 1:02.05).

offered no evidentiary support to conclude that AbleChild's interest in Adam Lanza's records is somehow illegitimate when compared to, for example, an estranged family member,[18] treating physician, an insurance claims adjuster, or a civil attorney who may have minimal need for documents in litigation.

CONCLUSION

For the foregoing reasons, and the reasons set forth in AbleChild's complaint, AbleChild respectfully requests that the FOIC overturn OCME's decision to deny access to OCME drug history, toxicology, and autopsy records concerning Adam Lanza and compel the OCME (1) to conduct a thorough search of its records germane to AbleChild's request by a date certain; (2) to give AbleChild a written list identifying all responsive documents it possesses; (3) to turn over to AbleChild all responsive records by a date certain; and (4) to confirm in writing to AbleChild that its production is accurate and complete in every particular.

DATED this 12th day of September, 2013.

Respectfully submitted,

[18] AbleChild seeks Adam Lanza's records to investigate potential causes of violent criminal behavior associated with certain drugs. As with any investigation of the kind, the ultimate outcome may not lead to substantial findings. It might also, however, help federal and state authorities determine whether additional restrictions on the use of drugs are warranted, thus potentially avoiding future tragedy. The OCME finds that interest illegitimate. Yet, under the "next of kin" policy, its office would apparently provide the same records to an estranged father who had not seen his child in 30 years and only wants records out of personal curiosity. Fortunately, neither the OCME nor FOIC must assess the relative weights of those "legitimate interests" to determine whether records are accessible. As long as an interest is "legitimate," the records are *required* to be produced under Section 19a-411(b). *See* Conn. Gen. Stat. § 19a-411(b).

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2013, a copy of the foregoing, **SUPPLEMENTAL BRIEF OF ABLECHILD**, was electronically delivered and mailed to the following:

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