9-1-1 RECORDINGS — TO RELEASE OR WITHHOLD:
Journalistic, Legal, Public Safety, and Family Perspectives

November 14, 2014

Arnold "Skip" Isaacs, Rapporteur
Glenn Corbett and Charles Jennings, Organizers

JOHN JAY COLLEGE OF CRIMINAL JUSTICE

The Academy for Critical Incident Analysis at John Jay College

RACERS
The Christian Regenhard Center for Emergency Response Studies

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About the College

Since its founding in 1964, John Jay College of Criminal Justice has been a leader in the field of public safety, with a diverse variety of academic programs and research capabilities devoted to the study of emergency and law enforcement organizations such as the fire service, police departments, emergency management offices, and security concerns unequaled by any other academic institution in the United States.

One of the unique aspects of John Jay is its student body. Our students represent a diverse mix reflecting New York, but also the nation and world. Our in-service students include many mid-career emergency responders from virtually every local, state, and federal law enforcement, security, and emergency response organization. As such, we have a unique and long-standing commitment to educating current and future leaders in the emergency response field. John Jay lost 67 of its alumni, faculty, and students on 9/11.

Academy for Critical Incident Analysis at John Jay College

The Academy for Critical Incident Analysis, at John Jay College of Criminal Justice, has been established with the support of the Dart Foundation, to promote and disseminate scholarly research relating to the emergence, management and consequences of critical incidents. ACIA sponsors scholarship and research, hosts conferences and symposiums, and maintains research archives of incident records. ACIA also supports the development and dissemination of course curricula and supporting media for the teaching of critical incident analysis, and supports related instruction at the graduate and undergraduate level at John Jay College.

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Christian Regenhard Center for Emergency Response Studies

The Christian Regenhard Center for Emergency Response Studies (RaCERS) is a unique applied research center focused on development of evidence-based research and organizational learning. Its emphasis is on studying large-scale events from a perspective of first-responder coordination and its relationship to first responder safety, reduced loss through protection of life, property, and critical systems. The Center has a national advisory board of first responder thought leaders representing law enforcement, emergency medical services, fire, emergency management, and homeland security.

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FOREWORD

For as long as I have worked in this area, it has always been especially painful to meet and speak with parents who have lost children in tragic circumstances. I'm a parent, and that fact is always on my mind when I hear stories of other parents whose world has been turned upside down so suddenly.

What I had never seen, though, until [this event] -- something that really still stuns me every time I think about it -- are parents living with unbearable loss who – even years after the fact -– have chosen truth as a continuing tribute to their child. We live in a culture with no shortage of empty, thoughtless talk about how people need to move on or – in one of our most misguided concepts of all – "come to closure," advice often offered by people who did not feel the hurt, and see the grief of others as an interruption, a distraction getting in the way of their peace of mind.

That's why hearing the stories told by Sally Regenhard, Dave Kane, and Al and Maureen Santora, on the panel Chuck Strozier handled so well, made such a powerful impression. Because, whether or not society is anxious to hear from them, and with all the thoughtless talk we hear that "enough is enough," they have decided that "enough" can really only come when every bit of available truth about those events has been revealed, and when those truths have yielded every possible lesson that might protect others in the future.

We are all the recipients of the gift they are giving, their choice of truth. I obviously wouldn't presume to know how they each really feel inside, but I have had enough personal experiences to know that there are few things harder to do, gestures harder to extend to others, than turning toward painful truths. All of us can think of times when we have looked for any escape we could find from truth. (maybe I should just speak for myself!) But it struck me that their faith in truth and their willingness to face it is not unlike the firefighter or other professional who goes back toward the fire.

Sometime on the day of the conference, I couldn't help but imagine a time in the future, a time when someone else's child, struggling to find their way through a smoke-filled hallway, will come upon an accessible stairwell, a working elevator, and be guided to safety by a firefighter or EMS professional who is both fully equipped and speaking into a fully functioning radio.

If I'm around when that happens, I have no doubt who I will be thinking about and how much we will owe them for the truth they insisted on pursuing.

— Steve Gorelick, New York, NY

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INTRODUCTION

In the aftermath of the September 11 attacks on the World Trade Center, along with the shock of the human loss and physical devastation, troubling stories began to emerge about serious failures in New York City's emergency response. The failures were principally in the emergency communications system. Different responding agencies were unable to communicate with each other or exchange critical information. Firefighters and other emergency responders inside the towers never heard evacuation orders. Operators receiving 9-1-1 calls did not know what was happening at the site and often gave exactly the wrong advice to terrified callers trapped in their offices.[1] As more details became known, it also became inescapably clear that the communication breakdowns had cost lives, possibly in large numbers. Beyond possible doubt, if the communication system had worked effectively, many of the responders and civilians who perished that day would have had a chance to survive.

Seeking to document the events of that day, early in 2002 *New York Times* reporter Jim Dwyer filed a Freedom of Information request to the New York Fire Department. Dwyer asked for three sets of records: (1) tapes of all calls made on September 11 to the department's 9-1-1 emergency operators; (2) tapes and transcripts of "dispatch calls" between fire department dispatchers and other department employees, and (3) transcripts of oral history interviews the department conducted with approximately 500 firefighters in the days after the attack. When the Fire Department turned down his request, Dwyer sued. He was subsequently joined in the suit by surviving family members of eight September 11 victims. In March 2005, three years after Dwyer's original FOI request, the New York Court of Appeals gave the *Times* and the family members most, though not all, of the access they had sought. Under the court ruling, the NYFD had to turn over the dispatch calls and interview transcripts, except for material in the dispatch calls that expressed department employees' "opinions and recommendations" and even more limited deletions of passages in the interviews that were "likely to cause serious pain or embarrassment to an interviewee." On the 9-1-1 calls, upholding earlier rulings in the New York Supreme Court and Appellate Division, the Appeals Court judges ordered the city to release the tapes but with the restriction that only one side of the conversations would be audible: the recorded words of the operators could be heard, but those of callers (except the few whose families joined the lawsuit) could not.[2]

The case settled the immediate dispute, but the issues involved are not unique to New York City or the events of September 11. They pose important and difficult questions that still confront New York and the country at large: the extent of privacy rights; the principle of open government and public access to official information; the accountability of public agencies and officials; the need to expose mistakes in order to correct them, and underlying all of those, the issue of trust in government as a vital foundation of democratic practice and a democratic society. To consider different perspectives on those issues, the Christian Regenhard Center for Emergency Response Studies (RaCERS) and the

1 For a clear and thorough summary of the various communication breakdowns that day, see Fu, Laura, "The Government Response to 9/11: Communications Technology and the Media," *Library & Archival Security*, 24:2 (2011), 103-118

2 The full text of the majority decision and dissent are in Appendix 3 below.

Academy for Critical Incident Analysis (ACIA), both affiliated with the John Jay College of Criminal Justice, convened a day-long conference held at John Jay on November 14, 2014. Additional supporters of the conference, titled "9-1-1 Recordings -- To Release or Withhold?", included John Jay's Center on Terrorism and its Center for Media, Crime and Justice, as well as the Dart Center for Journalism and Trauma, affiliated with the Columbia School of Journalism, and the City University of New York Graduate School of Journalism.[3]

> ***"Absolutely no consistency anywhere in this country as to how information is released after a major disaster or some kind of major event."***
>
> ***-Glenn Corbett***

At the conference, speakers were organized into four panels presenting four different angles of vision on the subject: those of victims' families, legal practitioners, emergency responders, and media representatives. Though the events of September 11, the legal battle over the NYFD's 9-1-1 tapes and the shortcomings in the city's response that day were most prominent in the discussions, the focus of the conference was broader, since privacy, right-to-know and other issues have arisen and continue to arise in other disasters and other jurisdictions. Thus, as well as September 11 family members and responders, the panels also included speakers who have been involved with emergency response and public-disclosure issues elsewhere in the country or who had close connections to two other high-casualty, high-impact events since September 11: the 2003 Station Nightclub fire in West Warwick, Rhode Island, and the 2012 Sandy Hook school shooting in Newtown, Connecticut.

Opening the conference, Glenn Corbett, ACIA's director, commented that there is "absolutely no consistency anywhere in this country as to how information is released after a major disaster or some kind of major event. In some cases," he went on, "that information is made available almost immediately; In some cases it takes years and years and some kind of court action to make it available." In that context, he framed the John Jay discussions as an attempt to develop ideas to improve the management of "information that folks need to get." In particular, Corbett singled out the need to inform emergency response practitioners and researchers "who would like to understand what happened with the ultimate goal of improving responses in the future" -- a need that just as clearly exists for policymakers and government executives as well.

That theme -- that disclosure is essential to avoid repeating past mistakes -- ran through all four panel sessions. Presentations and discussions of the four sessions are summarized in the following chapters.

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3 The conference agenda and profiles of the speakers are in Appendix 1. Appendix 2 contains excerpts of 9-1-1 calls from the World Trade Center introduced into evidence in the trial of Zacarius Massaoui. Appendix 3 contains portions of the decision in *New York Times Company et al v. City of New York Fire Department.*

PANEL 1: FAMILY MEMBERS

Before opening the first panel, Charles Jennings, director of the Regenhard Center, asked the gathering to observe "a brief moment of reflection and silence" to remember the lost and support the families -- and also, he added, "to hopefully support the public officials and attorneys and all those involved in making difficult decisions around release of this information, that we may do it in the public interest and that we may advance our practice on account of it."

In the discussion that followed, what emerged was a story of turning unbearable grief into a search for truth and activism for useful change.

Al and Maureen Santora's 23-year-old son Christopher, a probationary firefighter, was lost on September 11 -- one of the youngest of the 343 firefighters who died. "He went to work on the evening of the 10th and he never came home. And I never could say goodbye and I was never able to say I love you one last time," Maureen Santora remembered. "When he left for work, I said have a good tour, son, and I'll see you tomorrow and those were my last words to my son." After such a loss, she went on, "you can shrivel up and move into corner and never move again. Or you can decide you're going to work hard to heal. You can become an activist, you can try to get as much information as you possibly can about why this happened, and those are the decisions that Al and I made."

With the Santoras on the John Jay panel were Sally Regenhard, whose son Christian also died in the September 11 attack, and Dave Kane, the father of 18-year-old Nicholas O'Neill, the youngest of the 100 people killed in February, 2003, in the disastrous Station Nightclub fire in West Warwick, Rhode Island. All four panelists spoke strongly in favor of disclosing the September 11 9-1-1 tapes, in particular, and releasing comparable information from other disasters. They took that position "not because we want to horrify people," as Regenhard put it, but because disclosure is needed to unveil poor emergency planning, mistaken decisions and faulty rescue systems, and "if we don't know what happened, we will be unable to change it for the future." As several speakers also pointed out, more information casts light on what went right, as well as what went wrong, and that can also contribute to a more effective response in future emergencies.

The panelists agreed that 9-1-1 recordings and other documentation of a tragic event can be painful for those who have lost a loved one. But they firmly rejected the suggestion that that justifies the authorities in suppressing such records.

"Maybe some people are thinking," Sally Regenhard commented, "why would families of the victims want to get those tapes and transmissions? The reason is we all believed that if we are ignorant of the sins of past and the failures of past, we're doomed to repeat them. As long as the system could keep everything suppressed and we never learned anything from it, never learned how could this have happened in City of New York, how could this have happened in the tallest and largest buildings in the world? That is what propelled our movement.... We wanted the full truth. We wanted the full story. We wanted to know what really happened, where the failures took place and why they took place."

Regenhard was among the group of family members who joined the Freedom of Information lawsuit for release of the 9-1-1 tapes -- a suit strongly supported by the Santoras. The final decision

in that case was only "a partial victory," Regenhard said, since callers' voices can still not be heard on the tapes. But even hearing just the 9-1-1 operators' voices was enough to make the point the families wanted to make. Even as edited, the tapes unmistakably reveal "the chaos, the confusion, the frustration, the lack of coordination, the lack of planning that the highest levels of people in the city failed to provide for their uniformed services. That was clear as a bell," Regenhard said, "so in that way it was a victory."

Maureen Santora, also driven in her grief "to know how our son was one of 343 firefighters who

died," similarly needed to confront the failures that played a part in his death. With her husband Al, a 40-year veteran and former Deputy Chief of the NYFD, she was one of a small group of family members whom the department allowed to hear a selection of taped department radio transmissions. What they heard, she recalled at John Jay, was 'squelch, squelch, squelch' thousands of times and every once in a while you would hear a word... you could not hear more than 20 words on this tape in the course of an hour and a half." She needed no technical authority to tell her what those noises meant: "The radios did not work. I knew that immediately."

Echoing Regenhard, Maureen Santora explained that family members came together to seek greater disclosure "because we were interested in finding out what happened. How in the City of New York [Fire Department], with the kind of technology that we had, could you have this kind of abysmal situation where you heard a chief up on 78th floor [of the World Trade Center] say, 'bring the hose up, Scotty, I think we can get this fire under containment.' He had no idea that the building had been hit, he had no idea that there was absolutely no way that he was ever going to get down...."

Those discoveries were certainly not without pain. On a different occasion, listening to some of the disputed tapes in the group's lawyer's office during the FOI suit, Maureen Santora wept. "I cried and I cried and I cried because on those tapes there was information that was clearly not only wrong but it indicated that dispatchers had no idea that the buildings had been hit.... They had no idea that people's lives were in danger immediately, not in an hour, not in two hours. There was no way that any fire department personnel would get up to any of those people. But they kept speaking on tapes, 'don't worry, somebody's coming up for you, be calm,' and we knew that was an absolute lie."

Al Santora added: "We at home that morning and everyone else watching on TV had a better view of what was happening in those buildings than the fire department did." Poor communication

was a highly fatal factor on September 11, Santora believes from his own many years of experience. "No firefighters should have died," he said flatly. "The numbers are screaming out at you, 343...." In particular, "no firefighter should have died in the North Tower. Remember, the South Tower came down first. The police knew and got everybody out. The Firefighters did not get the word. A hundred and nineteen fire department personnel died in the North Tower. That should have never occurred. We could not control the situation of the fire, we could not control what happened, but we certainly could have controlled the communications." One key failure was that the fire department could not communicate with the police, so that when a police helicopter radioed that the towers was leaning, fire officials did not hear the warning and could not alert the firefighters inside. "We got that information many years later," Santora recalled -- a stark example of the cost of that particular failing in the communication system.

As to the dispatchers who erroneously told people in the towers to stay where they were, Santora reminded his listeners, "You have to remember the dispatchers were in a windowless building in Brooklyn" -- all of them, the result of a centralization plan implemented some years earlier. "Where are they today? They're in a windowless building in Brooklyn. Has the situation improved? Try to find that out."

The Station Nightclub fire in Rhode Island, said to be the fourth worst nightclub fire in American history, was of course very different from the September 11 attacks -- a disastrous accident, not a terrorist crime. But much like September 11, it left deeply troubling questions about possible official negligence and whether Dave Kane's son Nicky's and the other 99 deaths could and should have been avoided. The fire actually had "many parallels," Kane told the panel. "not just with the 9/11 case but with the whole deal that goes on with our elected and appointed and appointed safety officials and muckamucks who Do. Not. Do. Their. Job."

In mentioning possible negligence, Kane, a long-time radio host for various Rhode Island stations and a comedian, was referring particularly (though not exclusively) to the West Warwick fire marshal and chief fire inspector, a man named Denis Larocque. In his inspections, Kane recalled, Larocque inexplicably did not even notice the flammable soundproofing -- even though it covered a door that he decreed opened in the wrong direction. He also raised occupancy limits several times before the fire, ending up with a limit seemingly higher than should have been approved under fire regulations.[4]

In the aftermath of the fire, a state grand jury handed down involuntary manslaughter indictments against the two brothers who owned the club, Jeffrey and Michael Derderian, and the Great White tour manager, Daniel Biechele. But no charges were ever brought against Larocque, despite vigorous efforts by Kane and others to hold him to account for his actions. "I tried to get this fire marshal on the stand, I tried to get somebody to go after this," Kane recalled. "I dealt with the FBI, I dealt with the U.S. attorney's office, I did battle with the attorney general of the state." But he found himself blocked at every turn.

> ***"Their excuse was they didn't want to put us through that, for us to live it again. Like I ever stopped living it," he said scornfully. "Like there was a moment in my life when I've ever stopped thinking about it.... They want to protect us? Excuse me, protect me from somebody who wants to protect me!"***
>
> ***-Dave Kane***

Many of the families waited for the full story of the fire to come out at the trial. But in the end

4 A detailed account of questionable fire code enforcement at the club is in John Barylick, *Killer Show: The Station Nightclub Fire, America's Deadliest Rock Concert*, University Press of New England: Lebanon, NH (2012). Barylick was one of the lawyers who represented fire victims' families. Also see Michael Rezendes' 10th anniversary retrospective, "Questions still linger over fire inspector's role," *Boston Globe*, Feb. 17, 2013.

the story was not told because there was no trial. Instead the three defendants accepted plea bargains. Two of them, Biechele and Michael Derderian, were given four-year sentences (plus additional time suspended); Jeffrey Derderian got no prison time. Biechele actually spent just under two years in prison. Michael Derderian served approximately two years and nine months before being granted early release. Denis Larocque continued to serve as fire marshal until he retired in 2006.

Kane's conclusion from the fire aftermath and the state attorney general's conduct of the criminal investigation is blunt: when officials are responsible for dangerous mistakes, they try to protect themselves by trying to keep their actions secret, and it is up to citizens to prevent that from happening.

"It's all about covering your ass," he said. And when officials claim they are withholding information only to shield bereaved families from further pain, in Kane's view, they add insult to injury -- as when he and other family members were not permitted to speak to the authorities considering Michael Derderian's early release. "Their excuse was they didn't want to put us through that, for us to live it again. Like I ever stopped living it," he said scornfully. "Like there was a moment in my life when I've ever stopped thinking about it.... They want to protect us? Excuse me, protect me from somebody who wants to protect me!"

While supporting maximum disclosure, the panelists recognized that not everyone mourning a lost family member would want to listen to a 9-1-1 call or other transmission. But they agreed -- and they believe even those who don't want to listen themselves would agree as well -- that anyone wishing to hear a loved one's last conversation or radio call should have the right to do so.

"We have family members that we know, Al and I, who have never wanted to get any information," Maureen Santora told the group. "They have never gone to the museum, never gone to the memorial, they've never gone to any meetings.... They are living their lives the way they are comfortable living. I have no complaint about that." But at the same time, she said, to her knowledge, all those families agree that anyone who does want to listen should have access. Those she has listened to might not have made the same request, but at the same time, with no exceptions she can recall, they agreed "that we who were fighting for this had the right to these tapes. I don't know of one family member who objected to that access."

Sally Regenhard, acknowledging that of course there are people on both sides of the issue, remembered a phone call she received while driving on Riverside Drive one night after a meeting. "I was right by Grant's tomb, and she called," Regenhard related. "I pulled over, and she said to me, 'Why are you trying get these tapes? My husband died and I don't want to hear them. I believe that my husband fell asleep that day, and that's what I want to believe.' And you know what? I didn't answer but what I thought in my mind was, madam, if we continue to suppress these tapes, in the future, we are going to have a lot more people falling asleep in cases like this."

PANEL 2: FIRST RESPONDERS

It is not only the general public or public officials or emergency managers who can benefit from reexamining a disaster response to find out what went right and what went wrong. Emergency responders themselves will also find useful information in 9-1-1 tapes and other records, Donell Harvin observed in opening the second panel of John Jay's conference.

Professor Harvin, who teaches in John Jay College's Department of Security, Fire, and Emergency Management, drew on his own memories as a New York City paramedic who responded not only to the September 2001 attack, but also to the first World Trade Center bombing in 1993. Emergency personnel at the scene of a large-scale disaster often have little or no understanding of what has happened, he explained; they may be on the ground, but that doesn't mean they grasp anything of the situation beyond their immediate tasks. For example, on the morning of September 11, when he was heading toward the towers on foot from the Canal Street subway station, Harvin was focused entirely on finding an Emergency Medical Service unit and being told what to do. "Let me just get to the EMS lieutenant or captain and get my instructions. I can't look at the madness that's going around."

Even when he saw the second plane smash into the tower, he did not stop to think about why it might have happened. "It's what we call tunnel vision," and is typical for first responders in major catastrophes: "We're rushing into these scenes and not understanding. We're not getting situational awareness, and we're at the situation! We're on the ground, and we have no concept of what's going on."

In their daily routine, he pointed out, first responders rely on their dispatchers to give them some idea of the situation before their units arrive at the scene of an incident, but in large-scale events, dispatchers are relying on the first arriving units to give them updates. Those units, however, may not fully understand what has occurred or the situation that is unfolding in front of them.

That restricted vision, Professor Harvin said, is what makes it all the more important for first responders to achieve a wider view after an event is over. Releasing tapes and other documentation will help them "self-evaluate and look at their response retrospectively," so that together with academic researchers, citizens and families affected by the event, and other analysts, they can reach the best possible understanding of how the emergency response system functioned and any weak points that should be addressed before the next event.

Revisiting problems in communications systems is especially important, because those systems are at the core of emergency response. "Every after action report, every commission report that you've ever seen for a high impact incident, always mentions one thing, and what's that? Communications," he pointed out. In a multi-agency training exercise he had observed only weeks before the John Jay meeting, communications was at the top of every agency's list of concerns. "It was the first thing across the board, down the ladder. Every agency said, communications. Thirteen years later [after September 11] and we still can't get our communications right? We know it's a problem, we can't get it right?"

Seen in that light, he declared, when government officials and institutions try to suppress infor-

mation for their own self-protection, they put the community's protectors at risk. "Not releasing information is a hazard for first responders," he concluded, adding to those advocating and implementing broader disclosure: "you will be helping them. You will not be harming them."

Although the reasons for transparency seem compelling, access to records such as 9-1-1 tapes is actually becoming more difficult, not easier, said panelist Glenn Corbett, also a member of the John Jay faculty and director of the Academy for Critical Incident Analysis. In the 20-plus years that he has been compiling information for analysis in Fire Engineering Magazine, where he is technical editor, "it's become increasingly difficult to get access," Corbett said, largely because city legal departments have become more reluctant to release official records. For example, he recalled, officials in New York City and Rhode Island raised significant obstructions during post-disaster building and fire safety investigations by the federal National Institute of Standards and Technology (NIST).

This has been so despite the obvious importance of learning from the past: "how we can do things perhaps a little bit differently in the future," as Corbett put it, "based on things that didn't go well and what did go well, what really worked.... We're not going to move the ball if all these cities become clams, just hold that information for fear of liability or for political purposes."

The September 11 material that was eventually released as a result of the Freedom of Information lawsuit was a clear example, Corbett said. Listening to the tapes, even without the callers' side of the conversations, and putting that data together with what was eventually learned from some survivors who did manage to get out of the towers before they fell, prompted a realization that fire departments and other emergency responders to a large event need a better to plan to gather information -- and communicate it -- from the site: "You've got to deploy a group of intelligence-gathering senior people. Their sole job is to go out during major disaster, and they're not running the scene, not telling people what to do, all they do is gather information."

On September 11, a small number of people (18, according to the NIST study[5]) did succeed in escaping from World Trade Center offices above the impact site in the south tower. But there was no system to find out how they had gotten down so others could be told. "If we had simply posted people at the base of those three stairwells in the twin towers, we would have found out a lot of information," Corbett said. "Eventually Stanley Praimnath and Brian Clark [two of those who managed to escape from the upper stories] would have come by. and someone would have said hey, where are you coming from? And they would have said... well, we started here, went over to this stairwell, what have you, and worked our way down."

After the 9-1-1 tapes were released -- nearly four years after the attack -- Corbett and the *Times's* Jim Dwyer tried to reconstruct a timeline for callers who could be identified from the operators' comments as having called from those upper floors. Even without hearing the callers' side of the conversations, Corbett and Dwyer were able to figure out that if there had been a mechanism to collect that information and get it back to the dispatchers, there was enough time for word to be relayed to callers that there was a possible escape route before the building collapsed.

"Can you imagine today, if we had simply had that information, if we knew there was path to get out? If we changed model from what it's been for a hundred years in high rise fires, telling people 'stay where you are, we'll eventually get to you,' to instead tell them 'hey, look, you gotta go to this stairwell, it's going to be tough, there's some difficulties, but you'll be able to make it down.' Jim Dwyer and I figured out there was probably enough time at least to get some of those people out of there."

That calculation, which could only be made because the tapes were available, is not easy for a fire department or a city to recognize, Corbett acknowledged. "It is an incredibly difficult situation

5 *About the NIST World Trade Center Investigation*, "Summary of Findings," http://www.nist.gov/el/disasterstudies/wtc/wtc_about.cfm

politically to deal with, that there were savable people for a variety of reasons that day.... But that's the reason why we study this stuff. We don't want to repeat it over and over again."

From the other two panelists, the audience heard perspectives from responders in other communities -- including Arlington County, Virginia, where the Pentagon, the other target of the September 11 attacks, is located. In contrast to the faulty system that prevented fire and police responders from communicating with each other in New York, responders to the Pentagon attack had excellent communications even though they represented multiple jurisdictions across two states and the District of Columbia.

Steve Souder was at the nerve center that day, as administrator of the Arlington County 9-1-1 Emergency Communications Center. (Since 2005 he has been 9-1-1 director in neighboring Fairfax County.) The attack on the Pentagon, he recalled at the John Jay discussion, "was obviously an event way larger than any one jurisdiction could handle, namely Arlington County. So very very quickly, Fairfax County; the City of Alexandria; National Airport; the District of Columbia; Prince Georges County, Maryland, Montgomery County, Maryland, were all on the scene within 20 minutes, and the interoperable radio system which had been in place before that became invaluable."

But, Souder quickly added, that system was there only because of an earlier failure. It was born less than two thousand yards from the Pentagon and 19 years before the September 11 attack, when Air Florida Flight 90 took off from National Airport and crashed into the 14th Street Bridge over the Potomac River. The response became "a disaster within a disaster," as Souder called it, "because these same entities responded, and they couldn't talk to anybody." Out of that failure the concept of an interoperable radio system was born and developed over the following years until on that morning of September 11, 2001, it had its greatest test -- and passed with flying colors, Souder remembered, allowing a "far more integrated response and on-scene activities than would have occurred or did occur 19 years before."

A very similar story occurred in Indianapolis, where Frank Straub was public safety director from 2010 to 2012. There too a plane crash some years before 2001 revealed serious problems in emergency communications -- and led to needed reforms. In the incident, an Air Force fighter jet trying to make an emergency landing missed the runway and crashed into a hotel, killing ten people. The response turned into "pure bedlam," Straub recounted. "Everybody came to help and nobody could talk to each other." The result was the creation of a separate metropolitan communications agency that brought different departments' communications under one roof. "It broke down a lot of barriers between disciplines and traditions and agencies," Straub said. Eventually the multi-jurisdiction agency was disbanded, but the well-established interoperable radio system continues to function.

Interoperability is also a recognized necessity in Spokane, Washington, where Straub -- who was the New York Police Department's deputy commissioner for training at the time of the September 11, attacks -- is now chief of police. The region's ten fire districts (Spokane's and nine more outside the city limits) and several police departments are often involved in joint responses to events such as wildfires in the surrounding mountains, and thus interagency radio communication is critical.

In his remarks to the panel, Straub mentioned another feature of Spokane's communication: "a great thing I hadn't seen before in my tenure was a real concern around call takers and dispatchers. Ours work out of a separate communication center, but any time we have significant incident, a fire with injuries or deaths or a police action shooting, we immediately bring those call takers and dispatchers into the critical incident debriefing.... They're the people that are charged, particularly the dispatchers, with keeping things from going to total and complete chaos, they're in many ways guiding the response of EMS personnel, firefighters, police officers." But their experience of an incident is a truncated one: "the only thing they have is what they can hear, they can't see it, and frequently they don't really know the outcome." To counter possible feelings of incompleteness and isolation from other emergency personnel, Spokane's policy is that "in every single incident we bring them in and they are part of the initial debriefing. and then They also have opportunity to meet with department psychologists at the same rate that our police officers and firefighters do, to ensure their mental health.... Including them in that process. so they're not just sitting there as isolated individuals, I think has been incredibly helpful."

"any time we have significant incident, a fire with injuries or deaths or a police action shooting, we immediately bring those call takers and dispatchers into the critical incident debriefing.... They're the people that are charged, particularly the dispatchers, with keeping things from going to total and complete chaos"

-Frank Straub

The issue of releasing 9-1-1 tapes and other recordings rarely leads in his department to the kind of controversy that occurred in New York City, Straub noted, because Washington's Freedom of Information law is stronger -- probably, in fact, "the broadest public records request law in the country. It is virtually impossible for us to hold anything back," he went on. "As a matter of fact it frequently gets released pre-trial even. I have some issues with that because I think sometimes it can probably skew juries and various other things, but it's very very difficult if not impossible in the state of Washington to keep things back."

For Steve Souder in Virginia, the disclosure issue is very much part of his job as director of public safety communications. "It happens every day in my jurisdiction. Every request that is received gets reviewed by what I call my archivist, the person who is in charge and is the custodian of the tapes. When there are sensitive issues involved, they allow me the opportunity to put my ear to it. I have a law that I must adhere to but I also have a moral obligation to the person that might be on that tape. I try to balance those two requirements so that I will not release a tape that if it's going play on the evening news is going bring even more anguish to someone that may have made that call. Sometimes it's very difficult, sometimes it's very cut and dried, an easy decision. But I do believe there is a moral obligation that has to be looked at in conjunction with the legal obligation." Under Virginia law, he noted, the department can edit tapes before release, deleting a name or an address or even an expression of emotion that a caller might consider private.

On an unexpected but happier note, Souder added that the requests his department receives most often are not from tragic events. The tapes most frequently requested, he said, are recordings of calls where a 9-1-1 operator gave advice over the telephone to help in the birth of child. "Over the phone you can hear the first cry of that child, so invariably the parents want as a memento for their newborn the tape of their being born."

PANEL 3: MEDIA

"Is there such a thing as having too much information? And if there is, where do we draw the line?"

That was the first question moderator Stephen Handelman asked his fellow journalists on the media panel. It came after an introductory comment in which he suggested that underlying the specific question of the September 11 9-1-1 tapes is an issue "close to the heart of who we are as a country, which is the right to know. How much do we have a right to know about things that affect us? Where does the line get drawn between privacy rights and the public's right to know?"

Predictably, although they acknowledged problems of journalistic excess in covering major headline disaster stories, the panelists strongly tilted in favor of disclosure. Even if news organizations ultimately decide to withhold some information, for reasons of compassion or taste or simply to avoid unnecessary excess, the consensus on the panel was is that the material should be accessible so they, and not a government agency or some other authority, can make the decision on what to release and what to keep private.

"My initial inclination is that there's never too much information on the receiving end," said Dave Cullen, who spent years researching the Columbine High School shooting for his book *Columbine*.[6] "Whether it's journalists, researchers, academicians... they need as much data as possible. But in terms of presenting to the public, pushing it out, that's a completely different question."

Handelman, director of John Jay's Center on Media, Crime and Justice, made a similar point. A key element in deciding whether to publish a piece of information or not is whether there is something to be learned from it, he said, "but who makes that decision? Who knows what you can learn from something?... We have no idea what right questions are to ask until we see the information in front of us."

It may be inevitable that major events will be 'overcovered' and people affected by them will come to feel "bombarded," as Cullen put it. But shutting off information risks losing stories that are necessary and important. The rationale for the Freedom of Information request on the September 11 records was an apt case in point, declared Tom Robbins, a long-time New York reporter and, at the time of the John Jay conference, Investigative Reporter in Residence at the CUNY Graduate School of Journalism.

In suing for release of the 9-1-1 calls, Jim Dwyer and the *Times* "were trying to do exactly the right thing, the business of journalism," Robbins told the group. "They were looking to use the tapes to try to identify where people were and the time they called and what was happening. and they believed that if they could identify where they were and what they were saying, that would help point toward the reforms that the city had to address in the wake of what happened. Why was it... that the 1968 building code for New York, which would have commanded them to have six fire exit stairs in the World

6 Dave Cullen, *Columbine,* Twelve: New York, 2009

Trade Center, was whittled down to half that number? Why did that happen and how did it happen? That was their goal, not to be able to put it out over and over again for the sensational value. The idea was to be able to use it, to be able to do the investigative reporting that you needed, to find out was there public culpability for this, did our own building codes contribute to this?"

In a similar vein, two panel members mentioned *Daily News* columnist Juan Gonzalez's reporting soon after the attack on the presence of lingering dangerous toxins in the air over Ground Zero. Even after his stories began appearing, Handelman recalled, the Environmental Protection Agency "refused to admit it, refused give him more information. It took 10 years before we finally found out that what he was writing was totally correct and people had gotten sick as result of being exposed to the various toxins and chemicals that were left at site. That's the kind of work that's the responsibility of journalists to do."

Gonzalez's work came up again later in the discussion, in a somewhat sobering exchange between Tom Robbins and Elizabeth Cronin, who was in the audience. Asking the panel, in effect, when is enough coverage enough? Cronin told the group:

"I worked in lower Manhattan when 9/11 happened, I have a brother-in-law who was a fireman. I almost didn't want to come to work any more. I couldn't stand the constant reminders. A lot of us wanted to get back to work. It wasn't bad enough that we smelled the smells and everything else; it was like the media kept it alive in some ways unnecessarily, looking for stories, sensationalist stories that didn't advance the issue or the conversation at all, just made those of us who were still having to come to the city every day not want to do it any more.... How do you as journalists decide when to back off, when to respect people's right not to know any more. to be informed when you have something to say but not to just keep saying it over and over and over."

No one disputed that the coverage was excessive and repetitive, but recalling Gonzalez's air pollution stories, Tom Robbins reminded Cronin, "folks like you who were going to work that day would have wanted to know that." Others who should have been told, he added, were the cleanup crews, mostly immigrants, "who scrubbed windows and tried to clean offices" but who were not informed of the risk and given no protective equipment. "That was kind of stuff you wanted to be hammering away at, and you want as many reporters as possible."

Cronin, in her turn, did not dissent from that argument, but her reply posed a question not easily answered: "The problem is," she told the panel, "with those issues that we do need to know, we are so tired of it, of the relentless sameness, that when something new happens we can't pay attention."

During the discussion an interesting contrast appeared between responses to September 11 and those to a different catastrophe eleven years, the fatal shooting of 20 first-grade children and 6 adults at Sandy Hook Elementary School in Newtown, Connecticut. As with the September 11 attack, news organizations requested tapes of 9-1-1 calls from the shooting scene. Though

"In Sandy Hook, I will tell you that we struggled when those tapes were released.... In the end, as a news organization, we decided not to air any of the audio. We listened to them and the decision was made that this doesn't teach us anything other than that the first responders did an incredibly professional job in an incredible crisis situation.... We didn't think that airing these tapes would highlight any failures of the dispatch system or any failures by first responders. So we decided to use some of the transcripts, that we chose very carefully, and we left it at that."

-Jim Hoffer

family members and others mobilized against the release, the tapes were eventually released a year after the shooting (the legal process is discussed in more detail in the discussion on Panel 4). But journalists who were virtually unanimous in believing that the September 11 tapes should be made publicly available were far less inclined to distribute the Sandy Hook tapes.

One outlet that decided not to broadcast them was WABC-TV in New York, as the station's Jim Hoffer, one of the panelists at the John Jay meeting, recalled in answering Handelman's opening question whether there is ever too much information.

"There was a time when I would say no, there is not such a thing as too much information," Hoffer told the meeting, "and then there was Sandy Hook. When the recordings were released from September 11, there was really not a whole lot of debate in newsroom as to whether we were going to air them. We listened to them and there was almost total agreement that they should be, because they

can teach us something about some of the mistakes that were made.... They did that, they did underscore some of that, and led hopefully to some improvements. In that case, more is better. In Sandy Hook, I will tell you that we struggled when those tapes were released.... In the end, as a news organization, we decided not to air any of the audio. We listened to them and the decision was made that this doesn't teach us anything other than that the first responders did an incredibly professional job in an incredible crisis situation.... We didn't think that airing these tapes would highlight any failures of the dispatch system or any failures by first responders. So we decided to use some of the transcripts, that we chose very carefully, and we left it at that."

The fact remains, though, that that was the station's decision, not the Connecticut authorities'. And it is also a fact that the decision does not mean now what it would have meant in an earlier era before the Internet and social media provided an alternate channel for distributing information. Whatever one station may have decided on Sandy Hook or any other story, news organizations no longer control the gates to public knowledge.

"Once they're out they're out. That's the world we live in," Tom Robbins pointed out. "Even though your station didn't air them, they immediately went up on the Internet, they became available to everybody." Moreover, that change can put pressure for decisions that may not have much to do with professional standards. "I can hear an editor now," Robbins went on, "saying I don't want to get scooped.... we are looking to get as many clicks or as many viewers as we can, so the pressure to air them just becomes extraordinary. That's one of the things we are up against."

Perhaps in part for that very reason -- that the flow of news is much harder to control than it

once was -- public agencies are more cautious and some information is harder to get than it used to be. Even after the court case on the September 11 tapes, Jim Hoffer told the panel, getting 9-1-1 recordings remains “extremely difficult,” even -- or especially -- when they reveal glaring weaknesses in the emergency reporting system. His Freedom of Information requests are typically ignored, he said, and ultimately, “despite the fact that these recordings can often underscore or highlight flaws in the system, and perhaps show us how to improve the dispatching system, it is very very difficult to get those recordings in New York City.”

PANEL 4: FREEDOM OF INFORMATION AND THE LAW

When the right to know and the right to privacy conflict, there is no ideal solution.

That was the inescapable message of the day's last panel. Speakers included retired New York State judge George Bundy Smith, Sr., who joined the majority in the Court of Appeals ruling on the September 11 9-1-1 tapes case, and attorneys Norman Siegel, who represented the families in that suit, and Daniel J. Klau, a specialist in First Amendment law practicing in Hartford, Connecticut, who served as legal adviser to the governor's advisory commission on the Sandy Hook school shooting.

The presumption of Freedom of Information laws, Klau told the panel, is that "the government's records are the people's records. Any person for any reason can go in and ask to see a government document, a public record, and then the burden is on the government to point to some exemption that would justify withholding disclosure."

When exemption is claimed in a specific case on the grounds that releasing the information would result in an unwarranted breach of privacy, the debate then turns on "the public's interest in disclosure versus a victim or a family member of the victim having to suffer the trauma of having information that is very personal, emotional, being released," Klau continued, and balancing those needs is the core of any FOI decision. He summarized his own conclusion this way: "It is impossible, in my opinion, absolutely impossible, to design a legal rule or statute or regulation that defines perfectly when information is sufficiently private that it should outweigh the public's interest, or vice-versa. You cannot have a perfect rule. It's beyond our capacity as humans. So what do you do if you know that it's impossible to design a perfect rule? You have to err one way or the other."

Drawing an analogy with rulings on free-speech cases, Klau noted that the Supreme Court "has said repeatedly, we're going to err on the side of more speech. When we design our rules addressing defamation, for example, we're going to set them up so we err on the side of more speech." They did so, Klau pointed out, even though "there is going to be a cost at times. Someone is going to be defamed and the defamer is going to get off the hook because we are erring on the side of more speech." The same is true, he went on, "in this privacy versus public disclosure context. We have to decide which way we are going to err. Personally, I think that history teaches us you need to err on side of more disclosure, even though that at times will exact a very real tangible cost on individuals, because privacy is invaded. I'm not saying everything should be open to the world 100 percent. I am saying that I think designing the system to err in favor of more disclosure rather than less is way to go."

Responding to Klau's comments, Judge Smith did not dissent from the theoretical principle that the legal system should err "on the side of freedom." But he appeared ready to give weight to privacy concerns as well, even if that leads to a somewhat contradictory formulation: "On other hand, I think that there is something that's private" (for example, a rape victim who does not want that fact made public) "... While you try to err on side of divulging these things, I think you have to also err on side of privacy."

Later in the discussion, specifically referring to his decision against releasing the callers' words on the September 11 9-1-1 tapes, Judge Smith made the point again: "I think there are times when privacy trumps disclosure, and that was one of the times." He saw no contradiction in the government's use of several highly emotional tapes that were played -- with the callers' voices -- as part of victim impact testimony in the trial of 9/11 conspirator Zacarias Moussaoui. "That was a good reason,"[7] he agreed, but he reaffirmed his view that as a general rule, the callers' anguish should remain private. "That personal message, I'm going to die, I love you, this is the last thing I can say to you -- if a person wants that kept private, I think that's private."

7 The tapes were played during the sentencing phase of the trial, where prosecutors sought a death sentence for Moussaoui. Excerpts from the recordings, as reported in the Los Angeles Times, are in Appendix 2 below.

Norman Siegel, declaring himself a strong admirer of Judge Smith's overall record on the bench, paid a heartfelt tribute to the judge in the course of the panel discussion. But as he had in the courtroom, he questioned the majority's reasoning on the particular case at issue. The only families whose wishes were known, he pointed out, were the eight families who had joined the effort to release the tapes. "There was no evidence in the record that the other families did not want the information to be released. The majority said we know that there's eight families, but we don't know that the other families want it to be released or not to be released. In the absence of any evidence on the question, the City of New York took the position that the other families did not want it, and the majority went along with that." The three dissenting judges, Siegel added, suggested a middle ground between public disclosure and private pain: "They took the position that the public interest was more important than the privacy interest," so the material should be known. But they called for it to be released only in written transcripts, rather than on the recordings themselves, as a way to make the experience "less hurtful and painful" for listeners.

In addition to withholding the callers' words on the 9-1-1 tapes, the court also put some restrictions on the dispatch calls and oral history transcripts, though most of that material was released. "We got a lot of what we wanted," Siegel summed up, "but we didn't get everything," so the historical record is still incomplete, and the knowledge and will to correct faults in the emergency response system are not as strong as they should be.

Freedom of information laws are not as strong as they should be either, Siegel commented later in the discussion. "When you read the New York Freedom of Information law, it's a beautiful document because it really sets forth the principles and values of an open democracy, that we the people have the right to have this information. It makes government employees what they really are, employees for us, by us, and for us." In practice, however, that ideal remains distant, and those who try to actually use the law find it "very very difficult."

For example, Siegel said, in his experience the New York Police Department typically doesn't even respond to FOI requests. "They just ignore the law. Isn't that ironic, that people who are employed to uphold the law ignore the law in this area? The fire department doesn't have a wonderful record either. You can send stuff to them, and even though they are supposed to respond in five days under the law, it never happens. It's frustrating.... So what the law was supposed to be is not really where it is at this point."

The legal battle over 9-1-1 recordings from the Sandy Hook shooting did not last as long as the September 11 lawsuit, but was as emotionally intense, or perhaps even more so. Families' concerns were initially aroused when the Associated Press filed a routine request for the tapes shortly after the shooting, Daniel Klau recalled, and were subsequently inflamed by a rumor that Michael Moore, the liberal film-maker, was seeking release of crime scene photographs of the murdered first-graders, presumably to be shown in a film. Even though that report was verifiably false, it helped fuel a stam-

pede in the Connecticut legislature to write new restrictions into that state's Freedom of Information law. Meanwhile the Danbury state's attorney went to court to oppose the AP's FOI request, contending among other things that the tapes should be confidential because they related to child abuse and because they were equivalent to signed witness statements in a criminal investigation.[8] The state Freedom of Information Commission rejected those arguments, and so did Judge Eliot D. Prescott of the New Britain Superior Court, who described the state's attorney's arguments as close to "frivolous." On November 26, 2013, two and a half weeks before the first anniversary of the shooting, Judge Prescott ordered the tapes released.

The results of the decision were surprising, Klau told the John Jay audience. During the months of litigation, the argument against making the tapes public was largely based on the expectation that they would be unacceptably shocking, that listeners "would hear real-time, live, emotional reports by somebody as he or she was about to be shot and perhaps killed by Adam Lanza. It turns out," Klau continued, "that none of the calls had anything like that. What they revealed was the heroism of a custodian who helped guide police and first responders and told them where Adam appeared to be and where in the building he was, and the heroism of teachers regarding their students." The media response was mixed. "I know many struggled," Klau recalled, "should we publish them, should we not publish them, should we put them on our websites? Redact them? There was a range of decisions. Some put them up entirely, others put up redacted parts. But the world did not come to an end."

The Sandy Hook 9/11 tapes controversy and other freedom-of-information issues he has been involved in taught Klau two lessons, he said. One is that outside special cases involving national security, "the last person that I want making decisions about what should be public or not public is the government." Alternative gatekeepers such as the news media or the courts are not perfect either, "but as a general principle, I think having the government decide what the public should know or shouldn't know is a bad idea."

His second lesson is that "it is almost impossible to make good public policy in immediate wake of a tragedy like Sandy Hook or a tragedy like 9/11. There needs to be some distance and I wish that our elected representatives would get this message and not have the knee-jerk reaction.... From the human perspective, what I saw happen in Connecticut makes absolute sense. You can understand why people were trying to protect the families from further trauma. But you don't want to make public policy in that environment. What you do need is the information to come out, so that when the emotions calm down, when there is a little bit more perspective, you have the information, you have clear thinking, and then you can make decisions."

"You can understand why people were trying to protect the families from further trauma. But you don't want to make public policy in that environment. What you do need is the information to come out, so that when the emotions calm down, when there is a little bit more perspective, you have the information, you have clear thinking, and then you can make decisions."

-Daniel Klau

8 Harry Bruinius, "Sandy Hook 911 calls being released, ending legal battle to shield families," Christian Science Monitor, Dec. 3, 2013. Online at: http://www.csmonitor.com/USA/Justice/2013/1203/Sandy-Hook-911-calls-being-released-ending-legal-battle-to-shield-families-video

CLOSING COMMENTS

Following the final panel, Steven M. Gorelick of Hunter College offered some final reflections. Among them was his observation that the day's discussions clarified that "the supposed tension between trauma and truth" does not mean there are any obvious either-or decisions about disclosing or withholding information.

"This was an excellent day to dismantle that idea that there is some clear choice that has to be made between revealing truth or traumatizing people," Gorelick said, when in fact the issue is invariably complicated and ambiguous. "The idea that governments often impose, that because we want to protect families, you have to choose between trauma and truth -- that's not the dichotomy. It's a much more complex thing, where equities can be balanced." Nearly all the day's speakers took the side of more truth and more information, he reminded his listeners, "but from the first panel to the last, no one was unaware that those have to be balanced with very real concerns about things that are released that might be traumatic for individuals."

Gorelick cited a different September 11 disclosure to show why complete, uncensored information is valuable and necessary for anyone trying to understand an event. That was the release -- after a 10-year bureaucratic struggle led by John J. Farmer, Jr., dean of the Rutgers University School of Law and former senior counsel for the 9/11 Commission -- of the full audio record of air traffic control communications that morning on the four aircraft seized by the attackers.[9]

The tapes cover a period of just under three hours, beginning at 8:09 a.m. with a routine transmission from American Airlines Flight 11 after takeoff from Boston, and ending just after 11 a.m. after all four hijacked planes had crashed. On the tapes, Gorelick said, "all sorts of quintessentially human mistakes are revealed. They could not be more useful to people trying to understand how decision-making takes place and how people work. They couldn't be more useful.... It's an example of what you learn when there's *nothing* taken out." The tapes pinpoint "the exact moments when misperceptions and mistakes are passed along," when one small word is introduced that turns accurate information into a mistake. Thus they teach "incredible things" about human response and decision-making in a crisis, insights that would not be nearly as clear from anything less than a complete record.

If the air traffic control tapes taught important lessons, the decade-long resistance to releasing them (and similar obstruction in other freedom-of-information cases) teaches a different one: that institutions are powerfully motivated not to reveal their mistakes. That, Gorelick said, indicates a need to develop a new concept of error. "We really have to rethink how we view the notion of error. We need a fundamental change in our willingness to see error as an opportunity to learn." It is not only bureaucracies that need to form a different attitude toward mistakes, he added: "It's not only that public officials are self-protective. It is often the public that is extraordinarily impatient with public officials, and sometimes it's very hard for public officials to resist this kind of pressure."

9 The tapes, along with a complete transcription, can be heard at http://www.rutgerslawreview.com/2011/full-audio-transcript/

In a final observation, Gorelick noted that while there is still tension between disclosure and privacy rights, that debate now takes place in a changed world where "for good or bad, an enormous amount of what we used to see as the private realm is simply gone. It's just gone." The discussion about the September 11 9-1-1 tapes and the broader underlying questions cannot avoid the fact that "technology and this new world have rendered a lot of notions of what is private really antiquated. I may miss them and you may miss them... but it's gone, those days are gone. So some things, no matter what we want to do, are always going to become public."

CONCLUSION: A QUESTION OF TRUST

After listening to the family members who spoke on the opening panel, Charles Strozier, the moderator, commented bluntly that events following both September 11 and the Rhode Island night-club fire involved similar stories "of deceit, lies, ass-covering, abuse of power and coverup. Those are unifying themes."

Other comments in that and the rest of the day's sessions struck a similar note. On that first panel, Sally Regenhard characterized the authorities' post-September 11 reaction as "a concerted effort to suppress so many aspects of what happened that day. There was certainly a concerted effort," she went on, "ranging from the federal government to the State of New York and the City of New York and the Port Authority, to really not disclose true horror of what happened, not disclose the lack of emergency preparation, the lack of emergency planning, the lack of a unified command structure between the Police Department and the Fire Department, and certainly to suppress the horror that people experienced in those buildings, the confusion, the lack of direction and in some cases false directions that people were given." The use of patriotism as a buffer against any criticism, Regenhard declared, "allowed the people who were really responsible for many of the failures of 9/11 at the World Trade Center to avoid criticism... those were the people who worked hardest to suppress the truth about what really happened."

Opening the following panel, Donell Harvin was sharply critical of official reports following major incidents. "After action reports after large-scale events are generally scams. They're shams. They're commissioned by the same agency that doesn't want people to look externally at what they're doing." And when faults in the system or in carrying out an emergency response are kept from public view, needed changes are hard to make. "A lot of first responders and agencies know what has to be done," Professor Harvin said, "but they can't get elected officials to do it."

In the same vein, attorney Norman Siegel told the final panel that a key reason Freedom of Information laws don't work as they are supposed to is that officials don't want them to work. "The reality in my experience," Siegel said, "is that most people, especially government people, especially the elected officials, they don't want anyone knowing what they actually are doing, because they do know that if we know everything they're doing, they're not going to come out looking so good."

Those and many similar comments pointed to an underlying issue in the privacy-vs-disclosure debate: an absence of trust in political leaders and in institutions of power. As Stephen Handelman noted, Americans "are a lot more cynical people today than we were," less willing to trust government but also less willing to trust the news media -- a climate of distrust that will continue to affect how information is made available and how the public will interpret what it learns.

The different crises discussed at the John Jay meeting provided an instructive look at the role of trust in shaping public discussion. In two of them, the September 11 attack and the Station Nightclub fire, release of information strengthened perceptions of official negligence. In the former, disclosure of the 9-1-1 tapes and other records revealed communication failures that may have cost many lives; in the latter, information that came out after the fire about lax fire safety enforcement suggested that the disaster could and should have been prevented entirely. In the Sandy Hook school shooting, by contrast, nothing that became known about the event indicated any failures or any way that public safety agencies could have prevented the tragedy. (The shooting did give rise to sharp debate about gun laws, but that was clearly not the responsibility of local authorities.)

Both September 11 and the Rhode Island tragedy left a sense that those who were supposed to protect society had betrayed the public's trust. Sandy Hook did not. That difference changed the balance between privacy and right-to-know considerations, as shown in WABC-TV's and many other news organizations' decision not to air those 9-1-1 tapes after they were released.

Trust is a key area not just in freedom-of-information issues but far more broadly in critical incident analysis. In all the case studies carried out by ACIA and its predecessors -- on the Virginia Tech shooting, the aftermath of Hurricane Katrina, and other critical incidents -- trust emerged as a crucial component both in managing the event and in recovering from it. Trust (or its absence) between government and the governed makes a profound difference in the ability of authorities to manage a crisis. It also profoundly affects how a community emerges from a traumatic event, and whether it can do so without fracturing social bonds or weakening important values.

The study of critical incidents teaches something else about trust, as well. In its examination of releasing 9-1-1 tapes, as in all the other incidents ACIA has considered, the lesson is clear that after a crisis begins, it is too late to ask for the public's confidence. If a government wants people to trust it in an emergency, it needs to have shown them before that it deserves to be trusted.

APPENDIX 1

AGENDA AND SPEAKER BIOS

Time	Event	Comment
0900	Registration	
0930	Opening Remarks	Glenn Corbett Charles Jennings
0945	Survivor/Family Panel	Charles Strozier, Moderator Dave Kane Sally Regenhard Alexander Santora Maureen Santora
1050	Academic/Emergency Responder	Donell Harvin, Moderator Steve Souder Glenn Corbett Frank Straub
1200	Lunch – Speaker Summary of Morning Discussion	
1245	Media Panel	Steve Handelman, Moderator Dave Cullen Jim Hoffer Tom Robbins
0150	Legal Panel	Charles Jennings, Moderator Daniel Klau George Bundy Smith Norman Siegel
0245	Summary/Group Discussion	Led by Steve Gorelick, All panelists
0315	Closing Remarks	
0400	ADJOURN	

Glenn Corbett is an Associate Professor of Fire Science at John Jay College of Criminal Justice. He is a technical editor of Fire Engineering magazine and is a former assistant chief of the Waldwick, New Jersey Fire Department. He testified before the 9/11 Commission and recently served on the Federal Advisory Committee of the National Construction Safety Team that investigated the World Trade Cen-

ter disaster. In addition, he is the technical advisor to the Skyscraper Safety Campaign. Corbett has served as the President of the New Jersey Society of Fire Service Instructors. He has spent a large part of his career in code enforcement. He was a fire protection consultant for the City of Austin, Texas Fire Department and was the Administrator of Engineering Services for the San Antonio, Texas Fire Department. Corbett currently sits on the New Jersey State Fire Code Council. Corbett is a co-author of Brannigan's Building Construction for the Fire Service, 5th Edition. In addition, he is the editor of Fire Engineering's Handbook for Firefighter I and II. He is a licensed Professional Engineer in the State of Texas.

Dave Cullen is the author of the *New York Times* bestseller *Columbine,* a haunting portrait of two killers and their victims. He is currently writing a book about two closeted gay army couples he has been following for 14 years. Cullen has written for *New York Times, BuzzFeed, NewRepublic.com, Guardian, Times of London, Newsweek, Washington Post, Slate, Salon,* and *Daily Beast. Columbine* won the Edgar Award, Barnes & Noble's Discover Award, the Goodreads Choice Award. It spent thirteen weeks on the bestseller list, and made two dozen Best of 2009 lists, including the *New York Times,* and was declared Top Education Book of 2009 by American School Board Journal. Dave has been a frequent television analyst, on Nightline, Today, Katie, NBC Nightly News, PBS Newshour, CBS This Morning, Anderson Cooper 360, The Rachel Maddow Show, Hannity, Morning Edition, and Talk of the Nation. Dave created a free Columbine Teacher's Guide.

Steven M. Gorelick, PhD, is Distinguished Lecturer in the Department of Film And Media Studies at Hunter College, CUNY. He received an M.A. degree in Mass Communication at Columbia University and a PhD In sociology (criminology; media studies) at the Graduate Center of the City University of New York. He studies the representation of crime and violence in media and culture, with special emphasis on the impact of catastrophic violence on society. He serves on the Advisory Council of the Dart Center on Journalism and Trauma at Columbia University. In 2005, he was named a delegate to the Madrid International Summit on Terrorism and Democracy and in 2007 was awarded a Fulbright German Studies Seminar grant. As a board member of John Jay College of Criminal Justice's Academy for Critical Incident Analysis (ACIA), he was invited to Norway in 2012 to observe the trial of mass-murderer Anders Bering Breivik and examine the impact and traumatic aftermath of the 2011 Utøya tragedy. He currently serves on the editorial board of the journal Violence and Gender.

Stephen Handelman is Director of the Center on Media, Crime and Justice (CMCJ) at John Jay College, and Executive Editor of The Crime Report, www.thecrimereport.org, the nation's most comprehensive daily news and resource service on criminal justice. He also serves as host of "Criminal Justice Matters," a monthly TV show at CUNY-TV; and as consulting managing editor of *Americas Quarterly*, a journal on hemisphere affairs published by the Americas Society. An award-winning veteran journalist, columnist and foreign correspondent with over 30 years' experience in reporting and editing (most recently *Time* magazine), he has been a consultant to U.S. law enforcement agencies and the United Nations, and has lectured and taught at universities around the United States. His books include *Comrade Criminal: Russia's New Mafia, Biohazard* (with Ken Alibek); and *How They Got Away With It: White Collar Criminals and the Financial Meltdown* (with David Brotherton and Susan Will). He earned his Masters in Public Administration from the John F. Kennedy School of Government at Harvard University.

Donell Harvin is an assistant professor in the Department of Security, Fire, and Emergency Management at John Jay College of Criminal Justice. He is actively revitalizing the College's offerings in

emergency medical services and emergency management areas, serving as Coordinator of the Fire and Emergency Services undergraduate programs. A doctoral candidate at SUNY Downstate Medical Center in Public Health, he was formerly Deputy Director for the NYC Medical Examiner's Special Operations Division, an interdisciplinary team tasked with responding to incidents involving numerous fatalities and/or in complex fatality management scenarios in the tri-state region. He functioned as the agency lead on disaster and Emergency Management-related planning and response. He has a broad EMS and hazardous materials (HazMat) response background, having served as an NYC paramedic for over 16 years, as well as on several HazMat response teams for several NYC agencies. He is a voting member of the NYC Regional EMS Council (REMSCO), and has written and taught extensively on EMS, emergency management and suicide terrorism. Professor Harvin teaches EMS, Police and Fire/Rescue personnel as a trainer and has served as a researcher for the Center on Terrorism Studies at John Jay. He is a member of the Christian Regenhard Center for Emergency Response Studies' Executive Committee of the Board.

Jim Hoffer joined WABC's Investigative Team in June 1998. Hoffer's undercover investigations have led to stricter requirements at New York state gun shows, Congressional hearings into the English language testing of foreign airline pilots, and tougher security measures to protect military vessels. He has won 5 Emmys and was most recently honored with a National Edward R. Murrow Award for a series of investigative reports on Con Ed, entitled "Profit Over Safety". In 2002, Hoffer was the recipient of Columbia University's esteemed DuPont award for exposing lax security at the nation's naval bases.

Charles Jennings is a public safety academic, researcher, and consultant. Jennings is Director of the Christian Regenhard Center for Emergency Response Studies (RaCERS) at John Jay College of Criminal Justice, where he is also Associate Professor in the Department of Security, Fire, and Emergency Management. Jennings has taught at the College since 1997, serving from 2002-2008 as Deputy Commissioner of Public Safety for the City of White Plains, N.Y. He publishes on emergency communications, policy and community risk, and co-edited *Managing Fire and Emergency Services*, published by the International City/County Management Association. Jennings has been involved in investigation of major fires for the United States Fire Administration, including several significant high-rise incidents. He is an alternate to the National Fire Protection Association's High Rise Building Safety Advisory Committee. He was recognized in 2012 as a Fellow of the Institution of Fire Engineers.

Dave Kane is a radio host, comedian, performance artist and author. As a talk show host, Mr. Kane was known for his passionate, sometimes confrontational style of talk radio, urging people to stand up for what they believe in and to take action in the face of injustice. He has often quoted the Irish philosopher, Edmund Burke's, "All that is necessary for evil to exist is for good people to do nothing." In 2003, Dave's 18-year-old son, Nicholas O'Neill, was the youngest victim of the Station Nightclub fire. This was the fourth largest nightclub fire in the country's history. In an attempt to assure justice for the victims and families of this horrible and avoidable tragedy, Mr. Kane publicly confronted the U.S. Attorney, the F.B.I. and the RI Attorney General, even going as far as declaring himself a candidate for that office.

Daniel J. Klau is an attorney in the Hartford, Connecticut, office of McElroy, Deutsch, Mulvaney & Carpenter. His practice focuses on appellate and First Amendment (particularly media law) litigation. Dan is also an adjunct professor at the University of Connecticut School of Law, where he teaches privacy law. He is frequently quoted on First Amendment and privacy issues, is the author of numerous articles and columns on appellate practice and First Amendment issues, and is a frequent lecturer on

these topics. Dan is the immediate past president of Connecticut Foundation for Open Government and has received numerous awards for his work on behalf of government access and transparency, including the Society of Professional Journalist's 2009 Helen M. Loy Freedom of Information Award, the Connecticut Council on Freedom of Information's 2007 Stephen Collins Award and the Connecticut Bar Association's 2007 "Pro Bono" Award.

Sally Regenhard lost her only son, USMC Sgt. & New York City FF Christian Regenhard, age 28, on 9/11. He was one of 17 Probationary Firefighters lost at the World Trade Center and is one of the 1,115 victims who remain missing at the WTC site to this day. . Ms. Regenhard is the Founder & Chairperson of The Skyscraper Safety Campaign, an award-winning 9/11 organization which advocates for firefighter, building & public safety. She is the assistant chair of 9/11 Parents & Families of Firefighters and WTC Victims, and has led successful campaigns for building and fire code reform, and advocates for enhanced emergency radio communication for FF's and other first responders. Her groups have testified to City, State & Federal Agencies on the failures associated with 9/11. In February, 2005, the Skyscraper Safety Campaign successfully sued the City of New York for release of the 9/11 tapes and transmissions. Group members remain committed to ending the exemptions and immunities of the Port Authority in the WTC reconstruction and continue to work for the removal of unidentified human remains from the basement of the 9/11 Museum to a respectful, above-ground tomb on the WTC Plaza.

Tom Robbins has worked as a reporter and columnist on politics and urban issues for the *Village Voice,* the *Daily News,* and the *New York Observer.* His freelance stories have appeared in the *New York Times Magazine* and other publications. He is currently Investigative Journalist in Residence at the CUNY Graduate School of Journalism.

Alexander W. Santora, a retired Deputy Chief of the New York Fire Department with more than 40 years of service, lost his only son Christopher (age 23) on September 11, 2001. Chief Santora received both his B.S. in fire science) and M.S. in public administration from John Jay College of Criminal Justice. In addition, he has 30 post graduate credits in education. He was the chief in charge of Safety for the FDNY for 12 years. He was also an adjunct professor in NYU for High Rise Safety for 22 years. Since 2005, he has been a docent at the Tribute Center and a member and board member of the advisory committee for the Sept. 11 Education Trust. Since 2002, he has been a volunteer at the National Fallen Firefighter Foundation. He is an advocate for justice regarding numerous issues concerning September 11, 2001 including FDNY radio failures, human remains at Fresh Kills, issues regarding the memorial and museum, and safety of new construction in NYC. He is a member of several 9/11 groups.

Maureen Santora, a retired staff developer and educator with 27 years of service at the New York City Department of Education, lost her only son Christopher (age 23) on September 11, 2001. Christopher was one of the youngest firefighters to die that day. Ms. Santora holds a B.A (Pace University-Psychology/Education), an M.S. (Hunter College - Special Education), an M.A.S (Bank Street College - School Administration) and 30 post graduate credits in education. She was awarded Teacher of the Year in District 30, Queens, in 1990 and 2000. She has been a docent at the Tribute Center since 2005 and is a member and board member of the advisory committee for the September 11 Education Trust, working on the national curriculum of September 11, 2001. She is the author of three children's books on September 11: *The Day the Towers Fell, My Son Christopher,* and *We Remember.* She has been a volunteer at the National Fallen Firefighter Foundation since 2002. She is an advocate for justice regarding numerous issues regarding September 11, 2001 including FDNY radio failures, human

remains at Fresh Kills, issues regarding the Memorial and Museum, and safety of new construction in NYC. She is a member of several 9/11 groups.

Norman Siegel is a civil rights and civil liberties lawyer. He is a graduate of Brooklyn College (1965) and New York University's School of law (1968). In 1968 he accepted a position with the American Civil Liberties Union's Southern Justice and Voting Law Project. It was this immersion in civil rights and civil liberties that helped forge his abiding commitment to insure the rights guaranteed in the United States Constitution extend to all Americans, regardless of race, age, ethnicity, sexual orientation, or gender. In 1985 the New York Civil Liberties Union named Siegel as Executive Director. For the next 15 years he was on the front line in some of New York City's most critical civil rights and civil liberties struggles. In private practice since 2002, he has also advocated for and represented: families who lost loved ones on September 11, 2001, in their successful quest to obtain the public record of materials including 9-1-1 emergency tapes and transcripts, arguing the case in the New York Court of Appeals in February, 2005; the Skyscraper Safety Campaign and Firefighters Families, advocates for enhanced safety programs and tested, reliable, state-of-the-art communications equipment for firefighters; Republican National Convention arrestees held for more than 24 hours; the World Trade Center Families for Proper Burial; the bicycle riders of Critical Mass, and Occupy Wall Street participants. In 2012, Siegel, along with his wife Saralee Evans and Herbert Teitelbaum, formed a new law firm, Siegel Teitelbaum & Evans, LLP, which handles a wide variety of legal issues, including civil rights and civil liberties issues.

Hon. George Bundy Smith, Senior served as a Judge in the New York State Court System for 31 years, the last 14 as a Judge on the New York State Court of Appeals, New York State's highest court. After completing his term on the Court of Appeals, Judge Smith retired as a Judge. His entire life has been committed to the pursuit of justice, seeking to assure fairness, inclusiveness, and equal opportunity. Throughout his distinguished career, Judge Smith has received numerous awards and honors, including life-time achievement awards from the Judicial Friends, an organization of predominantly African American Judges in New York State; the Nigerian Lawyers Association; the Fund for Modern Courts; the Golda Meir Award from the Jewish Lawyers Association; and honorary doctor of laws degrees from Albany Law School, Brooklyn Law School, and Fordham Law School. Since 2006, Judge Smith has been a partner in the national and international law firm of Chadbourne & Parke, LLP where he specializes in arbitration, mediation, commercial disputes, estates, property, appeals, and trials. He is also a member of JAMS, the largest private alternative dispute resolution provider in the world.

Steve Souder is a nationally recognized leader and authority on 9-1-1 and public safety communications and a frequent presenter, author and consultant on these subjects. He has served in four public safety communications centers in the National Capitol Region, three as director. Since November 2005, he has been Director of the Fairfax County (VA) Department of Public Safety Communications. Before that, he was director of the Montgomery County (MD) 9-1-1 Emergency Communications Center and prior to that served as director of the Arlington County (VA) 9-1-1 Public Safety Communications Center. Steve began his public safety career as a firefighter in the District of Columbia Fire Department and early in his career was drawn to the communications aspect of public safety. He has been personally involved in the public safety communications aspect of many high-profile and historic incidents including; the inauguration and funeral of President John F. Kennedy, the civil disturbances following the assassination of Dr. Martin Luther King, Jr., the attempted assassination of President Ronald Reagan in March 1981, the crash of Air Florida Flight 90 into the Potomac River on January 13, 1982 and (crash of a Metro subway train beneath the National Mall 30 minutes later), the attack on the Pen-

tagon on September 11, 2001, the Amtrak train derailment in Montgomery County (MD) in July 2002, the Washington area sniper incident in 2003 and the largest, longest and most widespread emergency telephone system outage in the Nation -- the severe derecho storm on June 29 and 30, 2012. Steve is active in numerous national associations, and a champion for recognition and career development of 9-1-1 public safety communications personnel and the deployment of all aspects of voice, data and incident management interoperability, and is widely known for his work in public safety communications center design, staffing, training, operations and management.

Frank Straub, Ph.D., is the Chief of the Spokane Police Department. Spokane is the second largest city in Washington and serves a community of 210,000 residents. During his tenure, the SPD has dramatically reduced serious crime, expanded community policing initiatives, and is implementing a department-wide body worn camera program.
Chief Straub served as the Public Safety Director in Indianapolis; the Public Safety Commissioner in White Plains; the Deputy Commissioner of Training for the New York City Police Department; and as a federal agent during his 30 year career. Chief Straub was present at the World Trade Center on 9/11 and actively participated in rescue and recovery efforts. In the aftermath of 9/11, he led the development and implementation of counterterrorism training for the NYPD. Chief Straub holds a B.A. in Psychology from St. John's University, an M.A. in Forensic Psychology from John Jay College of Criminal Justice, and a Ph.D. from the City University of New York. He served as an adjunct faculty member at John Jay College of Criminal Justice and is a Christian Regenhard Center board member.

Charles B. Strozier has a Harvard B.A., an M.A. and a Ph.D. from the University of Chicago, and has training as a research candidate at the Chicago Institute for Psychoanalysis and clinical psychoanalytic training at TRISP in New York City. He is a Professor of History and the founding Director of the Center on Terrorism, John Jay College, City University of New York, and a practicing psychoanalyst in New York City. Strozier's most recent book, published by Columbia University Press in August, 2011, is *Until The Fires Stopped Burning: 9/11 and New York City in the Words and Experiences of Survivors and Witnesses.* In 2011 he published, as lead author and editor, along with Terman, Jones, and Boyd, *The Fundamentalist Mindset: Psychological Perspectives on Religion, Violence, and History* (Oxford, 2010). His earlier books include a prize-winning psychological study of Abraham Lincoln (*Lincoln's Quest for Union: A Psychological Portrait,* Basic Books, 1982, revised edition in paper from Paul Dry Books, 2001, and *Heinz Kohut: The Making of a Psychoanalyst* (Farrar, Straus & Giroux, 2001), which won the Gradiva Award from the National Association for the Advancement of Psychoanalysis, the Goethe Prize from the Canadian Psychoanalytic Association, and was nominated for a Pulitzer Prize. He is also the author of *Apocalypse: On the Psychology of Fundamentalism in America* (Beacon Press, 1994, new edition 2002) and has edited, with Michael Flynn, *Trauma and Self* (1996), *Genocide, War, and Human Survival* (1996), and *The Year 2000* (1997). Strozier was the founding editor (until 1986) of *The Psychohistory Review* and has published scores of articles and book chapters on aspects of history and psychoanalysis.

APPENDIX 2

Excerpts from 9-1-1 calls introduced as victim impact testimony

in the trial of Zacarias Moussaoui, as reported by the *Los Angeles Times*

... Other voices were heard Monday too, the voices -- and the final screams -- of the dead.

For the first time, the government played 911 audiotapes of two people trapped inside the World Trade Center, each screaming into the phone as they tried desperately to summon emergency crews to burning offices high above Lower Manhattan.

"I'm going to die, aren't I?" cried Melissa Doi, 32, lying across the floor, trying to find fresh air in a south tower engulfed in smoke and fire.

Sixteen stories above her, on the 99th floor, Kevin Cosgrove cried, "I'm not ready to die!"

Emergency dispatchers tried to reassure them. "We're getting there. We're getting there," they said.

Both callers died in the flames.

... The testimony and recordings were part of the prosecution's case as it seeks the death penalty for Zacarias Moussaoui, an admitted terrorist. Jurors last week concluded that Moussaoui had caused at least one death on Sept. 11 because of his failure to alert the FBI to the terrorist plot, making him eligible for execution.

... The first tape to be played was the cry of Doi, an employee of IQ Financial at the World Trade Center. Recently the government released recordings of the dispatchers' voices on the tapes. This time the victims were heard.

"I'm on the 83rd floor," she screamed. "Are you going to be able to get somebody up here. We're on the floor and we can't breathe and it's very, very, very hot."

"Please," she said, over and over. Five co-workers huddled around her. "Everybody's having trouble breathing. Some people are worse."

A dispatcher asked how much smoke there was. "Of course there's smoke," she snapped. "I can't breathe. There is fire because it's hot.... Help help help!"

The firefighters have been notified, the dispatcher said. But Doi was not hopeful.

"I'm going to die, aren't I?" she screamed into the phone. "I'm going to die. I'm going to die. I don't want to die.... It's so hot. I'm burning up.... Oh my God!"

On Floor 99, Cosgrove could not get out either. Forty-six years old, he worked as a claims vice president for the Aon Corp. Three times he called 911. On the last call he could barely be heard because there was so much yelling behind him.

"We're getting there. We're getting," the dispatcher told him.

Cosgrove could be heard breathing. Hard. Panting into the phone. "I need oxygen," he screamed. "I'm not ready to die." Then abruptly came shouts about broken windows, one long wrenching scream, what

appeared to be many voices, and then silence.

-- Excerpted from Richard A. Serrano,
"Moussaoui Jury Hears the Panic From 9/11,"l
Los Angeles Times, April 11, 2006

APPENDIX 3

New York State Court of Appeals and Supreme Court Decisions in the Matter of The New York Times Company et al., Appellants-Respondents, and Catherine T. Regenhard et al., Intervenors-Appellants, v City of New York Fire Department, Respondent-Appellant.

(1) Court of Appeals

Argued February 9, 2005; decided March 24, 2005

Majority decision

Matter of New York Times Co. v City of N.Y. Fire Dept., 3 AD3d 340, modified.

{**4 NY3d at 482} OPINION OF THE COURT

R.S. Smith, J.

The issue here is whether the New York City Fire Department is required by the Freedom of Information Law (FOIL) to disclose tapes and transcripts of certain conversations that occurred on and shortly after September 11, 2001. Supreme Court and the Appellate [*2]Division held that FOIL requires disclosure of some, but not all, of the materials in dispute. We affirm most of the rulings below, but we modify the Appellate Division's order in two respects.

Facts and Procedural History

Some four months after the September 11 attacks on the World Trade Center, Jim Dwyer, a New York Times reporter, requested "various records" from the Fire Department. In the two requests that are still disputed, he asked for:

"All transcripts of interviews conducted by the department with members of the FDNY concerning the events of Sept. 11, 2001. (These might be called 'oral histories.') . . .
"Any and all tapes and transcripts of any and all radio communications involving any FDNY personnel on Sept. 11, starting from 8:46 AM."

The Fire Department denied the first of the above requests, and also denied the second in large part. As a result, three categories of tapes and transcripts are now at issue. They contain: (1) calls made on September 11 to the Department's 911 emergency service; (2) calls made on the same day on the Fire Department's internal communications system, involving Department dispatchers and other employees, which are referred to as "dispatch calls"; and (3) "oral histories," consisting of interviews with firefighters in the days following September 11.

The New York Times and Dwyer brought this CPLR article 78 proceeding to compel disclosure. Later, family members of eight men who died at the World Trade Center were permitted to intervene in support of the Times's and Dwyer's position. No family member of anyone else killed in the September 11 attacks has appeared on either side.

Supreme Court ordered disclosure of tapes and transcripts containing: (1) the 911 calls, to the extent that the words recorded are those of public employees and of the eight men whose survivors {**4 NY3d at 483}sought disclosure, but redacted to delete the words of other people who called 911; (2)

the dispatch calls, redacted to delete the opinions and recommendations of Fire Department employees; and (3) the oral histories, redacted to delete opinions and recommendations and the "personal expressions of feelings" of the interviewees. The Appellate Division affirmed these rulings, except that it ordered the "personal expressions of feelings" in the oral histories disclosed. We granted both sides' motions for leave to appeal.

In this Court, the Times, Dwyer and the intervenors seek disclosure of all materials in all three categories. The Fire Department asks us to affirm the Appellate Division's [*3]order with two exceptions: It asks us to "reinstate" Supreme Court's ruling by authorizing the redaction from the oral histories of "passages recounting moments of high emotion and revealing personal details," and it asks that disclosure be denied as to six records said by the United States Department of Justice to be possible exhibits in the impending federal criminal trial of Zacarias Moussaoui, who is alleged to have had a role in the September 11 attacks.

We now affirm the Appellate Division's order with two modifications: (1) we direct that the entire oral histories be disclosed, except for specifically-identified portions that can be shown likely to cause serious pain or embarrassment to an interviewee; and (2) we direct that the Department of Justice be given a chance to demonstrate that disclosure of the six potential exhibits would interfere with the Moussaoui case, or would deprive either the United States Government or Moussaoui of a fair trial.

Discussion

FOIL requires state and municipal agencies to "make available for public inspection and copying all records," subject to 10 exceptions (Public Officers Law § 87 [2]). Here, the Fire Department relies on three of those exceptions—the "privacy," "law enforcement" and "intra-agency" exceptions. To the extent they are relevant here, these exceptions permit agencies to

"deny access to records or portions thereof that: . . .
"(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision {**4 NY3d at 484}two of section eighty-nine of this article; . . .
"(e) are compiled for law enforcement purposes and which, if disclosed, would:
"i. interfere with law enforcement investigations or judicial proceedings; [or]
"ii. deprive a person of a right to a fair trial or impartial adjudication; . . .
"(g) are inter-agency or intra-agency materials which are not:
"i. statistical or factual tabulations or data; [or]
[*4]
"ii. instructions to staff that affect the public." (*Id.*)

The Fire Department contends that the privacy exception applies to the portions of the 911 calls that are in dispute; that the intra-agency exception applies to the disputed portions of the dispatch calls; and that both these exceptions apply to portions of the oral histories. The Department also contends that the law enforcement exception applies to the six potential exhibits at the Moussaoui trial, but it does not identify those six exhibits or say which categories they belong to. Thus, we first consider the application of the privacy and intra-agency exceptions to each category of materials, and then discuss the law enforcement exception.

A. The 911 Calls

The Fire Department does not now oppose disclosure of the words spoken in the 911 calls by 911 operators, or by the eight men whose families are seeking disclosure. Thus, the only issue before us is whether the disclosure of words spoken by other callers would constitute an "unwarranted invasion of

personal privacy." Supreme Court and the Appellate Division both held that it would, and, in view of the extraordinary facts in this case, we agree.

We first reject the argument, advanced by the parties seeking disclosure here, that no privacy interest exists in the feelings and experiences of people no longer living. The privacy exception, it is argued, does not protect the dead, and their survivors cannot claim "privacy" for experiences and feelings that are not their own. We think this argument contradicts the common understanding of the word "privacy."

Almost everyone, surely, wants to keep from public view some aspects not only of his or her own life, but of the lives of loved ones {**4 NY3d at 485}who have died. It is normal to be appalled if intimate moments in the life of one's deceased child, wife, husband or other close relative become publicly known, and an object of idle curiosity or a source of titillation. The desire to preserve the dignity of human existence even when life has passed is the sort of interest to which legal protection is given under the name of privacy. We thus hold that surviving relatives have an interest protected by FOIL in keeping private the affairs of the dead (*cf. National Archives and Records Admin. v Favish*, 541 US 157 [2004]).

The recognition that surviving relatives have a legally protected privacy interest, however, is only the beginning of the inquiry. We must decide whether disclosure of the tapes and transcripts of the 911 calls would injure that interest, or the comparable interest of people who called 911 and survived, and whether the injury to privacy would be "unwarranted" within the meaning of FOIL's privacy exception. Public Officers Law § 87 (2) (b), which creates the [*5]privacy exception, refers to section 89 (2), which contains a partial definition of "unwarranted invasion of personal privacy," but section 89 (2) (b) is of little help here; it says only that "[a]n unwarranted invasion of personal privacy includes, but shall not be limited to" six specific kinds of disclosure. None of the six is relevant to this case, and so we must decide whether any invasion of privacy here is "unwarranted" by balancing the privacy interests at stake against the public interest in disclosure of the information.

The privacy interests in this case are compelling. The 911 calls at issue undoubtedly contain, in many cases, the words of people confronted, without warning, with the prospect of imminent death. Those words are likely to include expressions of the terror and agony the callers felt and of their deepest feelings about what their lives and their families meant to them. The grieving family of such a caller—or the caller, if he or she survived—might reasonably be deeply offended at the idea that these words could be heard on television or read in the New York Times.

We do not imply that there is a privacy interest of comparable strength in all tapes and transcripts of calls made to 911. Two factors make the September 11 911 calls different. First, while some other 911 callers may be in as desperate straits as those who called on September 11, many are not. Secondly, the September 11 callers were part of an event that has received and {**4 NY3d at 486}will continue to receive enormous—perhaps literally unequalled—public attention. Many millions of people have reacted, and will react, to the callers' fate with horrified fascination. Thus it is highly likely in this case—more than in almost any other imaginable—that, if the tapes and transcripts are made public, they will be replayed and republished endlessly, and that in some cases they will be exploited by media seeking to deliver sensational fare to their audience. This is the sort of invasion that the privacy exception exists to prevent.

We acknowledge that not everyone will have the same reaction to disclosure of the 911 tapes. The intervenors in this case, whose husbands and sons died at the World Trade Center, favor disclosure.

They may feel, as other survivors may also, that to make their loved ones' last words public is a fitting way to allow the world to share the callers' sufferings, to admire their courage, and to be justly enraged by the crime that killed them. This normal human emotion is no less entitled to respect than a desire for privacy. Recognizing this, the Fire Department does not challenge the lower courts' rulings that the words of the eight relatives of the intervenors be disclosed, and has assured us that it will honor similar requests made in the future by the families of other September 11 callers. That commitment must be kept. Surviving callers who want disclosure are also entitled to it (Public Officers Law § 89 [2] [c] [ii]). But the privacy interests of those family members and surviving callers who do not want disclosure nevertheless remain powerful. [*6]

On the other hand, there is a legitimate public interest in the disclosure of these 911 calls. In general, it is desirable that the public know as much as possible about the terrible events of September 11. And more specifically, as the Times and Dwyer point out, the public has a legitimate interest in knowing how well or poorly the 911 system performed on that day. The National Commission on Terrorist Attacks Upon the United States, which had access to the tapes and transcripts at issue here, identified significant flaws in the system's performance (9/11 Commission Report, at 286-287, 295, 304, 318, available on the Internet at <http://www.9-11commission.gov>, cached at <http://www.courts.state.ny.us/reporter/webdocs/fullreport.pdf>), and more public scrutiny might make these problems better understood. But the parties seeking disclosure here do not request only particular calls that may be relevant to this subject; they seek complete disclosure of all the 911 calls.

We are not persuaded that such disclosure is required by the public interest. Those requesting it have not shown that the information{**4 NY3d at 487} that will be disclosed under our ruling—including the words of the 911 operators, and of callers whose survivors seek, or who themselves seek, disclosure—will be insufficient to meet the public's need to be informed. We conclude that the public interest in the words of the 911 callers is outweighed by the interest in privacy of those family members and callers who prefer that those words remain private.

B. The Dispatch Calls

The dispatch calls are communications within the Fire Department; the only participants in the calls were Department dispatchers and other Department employees. The tapes and transcripts of these calls are therefore "intra-agency materials," and are protected from disclosure by Public Officers Law § 87 (2) (g) unless they fit within one of two exclusions from the intra-agency exception: the exclusions for "statistical or factual tabulations or data" (§ 87 [2] [g] [i]) and for "instructions to staff that affect the public" (§ 87 [2] [g] [ii]). We interpreted the first of these exclusions in *Matter of Gould v New York City Police Dept.* (89 NY2d 267, 277 [1996]), where we said that "[f]actual data . . . simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making" (citations omitted). Here, Supreme Court and the Appellate Division ordered that the dispatch calls be disclosed to the extent they consist of factual statements or instructions affecting the public, but that they be redacted to eliminate nonfactual material—i.e., opinions and recommendations. This is, in our view, a straightforward and correct application of the statute as we interpreted it in *Gould*.

The parties seeking disclosure argue otherwise, relying on cases in which we have characterized the intra-agency exception as being applicable to " 'deliberative material,' i.e., communications exchanged for discussion purposes not constituting final policy decisions" (*Matter of Russo v Nassau County Community Coll.*, 81 NY2d 690, 699 [1993], citing *Matter of Xerox Corp. v Town of Webster*, 65 NY2d 131 [1985]). In *Russo* and *Xerox*, however, we were concerned with materials that were arguably not

"intra-agency" at all—in *Russo*, films shown by a public college to its students, and in *Xerox*, a report prepared for a public agency by an outside consultant. In deciding that the films were not intra-agency materials, and that the report was, we relied on the facts that the films were not used by the college as part of an internal decision-making process, while the report {**4 NY3d at 488}was used for just that purpose. Neither case implies that materials that fit squarely within the plain meaning of "intra-agency"—in this case, tapes and transcripts of internal conversations about the agency's work—are not within the scope of the intra-agency exception to FOIL.

The parties seeking disclosure also rely on our reference in *Gould* to "the consultative or deliberative process of government decision making" (81 NY2d at 277). But we used those words in *Gould* simply to define the scope of the "factual data" exclusion from the intra-agency exception; we spoke of "objective information, in contrast to" exchanges that were part of "the consultative or deliberative process." (*Id.*) *Gould* does not hold, as the parties seeking disclosure seem to suggest, that the intra-agency exception shields from disclosure only formal, lengthy or profound policy discussions.

The point of the intra-agency exception is to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure (*see Xerox*, 65 NY2d at 132, citing *Matter of Sea Crest Constr. Corp. v Stubing*, 82 AD2d 546, 549 [2d Dept 1981]). This purpose applies not only to comments made in official policy meetings and well-considered memorandums, but also to suggestions and criticisms offered with little chance for reflection in moments of crisis. A Fire Department dispatcher who believes that a rescue operation is being badly handled should feel free to say so without the concern that a tape of his or her remarks will be made public.

C. The Oral Histories

The record here leads us to conclude, subject to the qualification discussed below, that the oral histories are not protected from disclosure by either the privacy or the intra-agency exception. We infer from the record that the oral histories were exactly what their name implies—spoken words recorded for the benefit of posterity—and that the Department intended, and the people interviewed for these histories understood or reasonably should have understood, that the words spoken were destined for public disclosure. If this inference is correct, the privacy exception obviously has no application here. Nor does the intra-agency exception apply where, though agency employees are speaking to each other, the agency and the employees understand and intend that a tape of the conversation will be made public. The point of the intra-agency exception, as we explained {**4 NY3d at 489}above, is to permit the internal exchange of candid advice and [*7]opinions between agency employees. The exception is not applicable to words that are intended to be passed on verbatim to the world at large.

The record evidence about the purpose and origin of the oral histories comes largely from an affidavit submitted by a representative of the Fire Department. The affidavit adopts the title "oral histories," previously used in Dwyer's request, to identify these materials, and says that after September 11 the Fire Department decided "to promptly record the recollections of Fire Department personnel who were present at the World Trade Center site on that day." These recollections, the affidavit says, were collected for two purposes: "to be an invaluable historical record, in addition to assisting in any investigations or assessments of the incident."

The Fire Department's affidavit also says that all interviewees "were assured that the interviews would be held in complete confidence." This statement, if true, would be highly relevant to this case—but it was later acknowledged to be in error. The parties stipulated that the Fire Department "has withdrawn its claim that each of these interviews ('oral histories') with Fire Dept. personnel was recorded with a

promise of confidentiality to the interviewee, since it has come to the [Department's] attention that only some interviews included such a promise." After the stipulation, the Fire Department made no attempt to substantiate even the claim that "some" interviewees were promised confidentiality. The Department does not now rely on the existence of any such promise.

While the record is less clear than it might be, it establishes that the interviews were intended as an "historical record"—which implies that the interviews would be disclosed to the public. If that is the case, they should not be protected from disclosure merely because they also were, as the Fire Department says, intended to be used in "investigations or assessments." The record does not show that any interviewee was given a promise of confidentiality or led to believe that his or her words would be kept secret. Thus, the best inference is that the Department intended, and the interviewees knew or should have known, that the words spoken in the interviews would become a public record. If this is not true the burden was on the Department—which is in possession of the relevant facts—to prove otherwise (*see Matter of Newsday, Inc. v Empire State Dev. Corp.*, 98 NY2d 359, 362 [2002]; *Matter of Mantica v New York {**4 NY3d at 490}State Dept. of Health*, 94 NY2d 58, 61 [1999]). The Department has not met that burden.

This logic leads to the conclusion that all of the oral histories are discloseable under FOIL. We add one qualification, however, because we are given pause by the Fire Department's insistence that "the oral histories contain numerous statements which are exceedingly personal in nature, describing the interviewees' intimate emotions such as fears, concern for themselves and loved ones, and horror at what they saw and heard." If indeed some [*8]firefighters made such statements in what they were led to believe was a private setting, it may be unfair to invade their privacy based solely on the inadequacy of the evidence the Department has submitted. We therefore direct that the Department be given an opportunity, on remand, to call to Supreme Court's attention specific portions of the oral histories which, in the Fire Department's view, would cause serious pain or embarrassment to interviewees if they were disclosed. Supreme Court should then consider, following an in camera inspection if necessary, whether those portions of the oral histories are subject to the privacy exception, taking into account any further evidence that may be submitted on the question of whether the interviewees thought the interviews were private.

D. The Law Enforcement Exception

As to the six unidentified tapes and/or transcripts which the United States Department of Justice has said it intends to use in evidence at the trial of Zacarias Moussaoui, the issue is whether they were "compiled for law enforcement purposes" and whether their disclosure would either "interfere with law enforcement investigations or judicial proceedings" or would "deprive a person of a right to a fair trial or impartial adjudication." We agree with the courts below that, on this record, there is no showing that disclosure would interfere with the Moussaoui trial or cause any unfairness.

The materials in issue are already in the Justice Department's possession, and have been made available to Moussaoui; thus their public disclosure would not give the equivalent of discovery to either side in the criminal case. Theoretically, their disclosure before Moussaoui's jury is selected might create some prejudice among potential jurors. But the items cannot, by their nature, contain anything specifically relating to Moussaoui; they relate to the September 11 events generally. Potential jurors are already exposed to an enormous mass of publicly available information{**4 NY3d at 491} about the events of September 11—most of which obviously will not be offered in evidence at the Moussaoui trial. In this context, it is hard to see how the public disclosure of six items that the jury will see at trial anyway could have any significant effect on the federal court's ability to impanel an impartial jury.

In short, the record would justify affirming the Appellate Division's ruling that the law enforcement exception does not apply to the records in issue. Once again, however, we qualify our conclusion, because we are mindful of the enormous importance to the public interest of an orderly and fair trial for Moussaoui. The federal court has shown some concern about pretrial publicity; it has entered an order, binding on the parties to the Moussaoui case—though not, of course, on the Fire Department or the Times—prohibiting disclosure of "discovery materials" produced by the prosecutors to Moussaoui and his counsel. It may be that there is some good reason, not apparent from the record before us, why the disclosure of the six potential [*9]exhibits at issue here would create problems in the criminal case, and it can do no harm for the Department of Justice to have an opportunity to point out such a good reason to Supreme Court. If such a submission is made, Supreme Court should decide, in light of the additional information submitted and following an in camera inspection if necessary, whether the potential exhibits are subject to the law enforcement exception to FOIL.

Conclusion

Accordingly, the order of the Appellate Division should be modified to the extent described in this opinion, and, as modified, affirmed, without costs.

Dissenting Opinion

Rosenblatt, J. (dissenting in part). I disagree with the majority only with respect to the 911 calls. The Freedom of Information Law (FOIL) requires more disclosure. The public is well aware of the function of the 911 system and the sort of information it is designed to relay. Ordinarily, there is no reasonable expectation of privacy in a call to 911, and the full contents are generally subject to disclosure under FOIL.[FN1]

Here, because of the unique nature of the attack, the Court has {**4 NY3d at 492}ordered disclosure of words spoken by the operators, while deleting the words of the callers. There is, of course, a need to balance the competing public and private interests. On the side of full disclosure lies the public's interest in a complete and coherent account of what happened on September 11, 2001. FOIL's goal of making information public is inhibited when only half the conversation is divulged. The value of a response is compromised when the words that prompt the response are deleted. In some instances, the thrust of an incomplete communication can be inferred or constructed; in others it will be incoherent or even misleading.

The public interest supports disclosure broader than the Court has allowed. September 11th is a date burned in the minds of Americans, an event in which our security was profoundly violated. Precisely because of the importance of the September 11th attacks, Americans deserve to have as full an account of that event as can be responsibly furnished. Indisputably, the 911 tapes would shed light on the effectiveness of the City's disaster response. In turn, the City (and other municipalities) may adopt response plans that take into account the lessons of September 11th. This will surely save lives in the event of future disasters or emergencies. Indeed, the public report of the National Commission on Terrorist Attacks Upon the United States found various inadequacies in the City's 911 system and clearly found value in reviewing the 911 tapes (*see* 9/11 Commission Report, at 286-296, available on the Internet at <http://www.9-11commission.gov>, cached at <http://www.courts.state.ny.us/reporter/webdocs/fullreport.pdf>).

Balanced against disclosure is FOIL's narrow exception for an "unwarranted invasion of personal pri-

vacy" (Public Officers Law § 87 [2] [b]; § 89 [2] [b]). I agree with the Court that those who suffered the loss of loved ones could be traumatized by the disclosure of tapes that identify victims and contain dramatic, highly personal utterances different from ordinary 911 calls. Not every call, however, falls into that category. But for their connection with September 11th, many of the calls in question are {**4 NY3d at 493}ordinary 911 calls: people reporting factual information and seeking help.[FN2] Notably, the City has not provided any affidavits from survivors or victims' family members suggesting that disclosure of 911 tapes, or any other material sought, would violate their privacy. The record contains only the opposite: affidavits from nine intervenors, family members who want full disclosure. Nevertheless, I do not [*10]challenge the majority's assumption that full disclosure would cause considerable anguish to many victims' families.

Even so, the goals of privacy and openness can both be met by additional, limited disclosure. I would expand the majority's ruling and release a written transcript of the callers' side of the 911 conversations.[FN3] The City could redact everything that would identify nonofficial callers in calls that have some unusually personal component, such as an expression of dying wishes to be relayed to family members, as opposed to the ordinary reporting of crime scene facts. With such calls, the City should, however, be allowed to withhold any utterance that would by name or other means identify the caller. The public interest would be served by meaningful disclosure, while the grieving families and friends of the callers would be spared the agony of having their personal lives and emotions thrust into the public realm.

My final thought relates to the performance of the firefighters, police officers and others who spearheaded the rescue efforts. It may well be that the 911 transcripts reveal imperfections or mistakes amid the chaos. This, however, is no reason to withhold the transcripts. On the contrary, they will give the public the clearest picture of how the first responders reacted, and that picture should be as comprehensive as possible. The revelation of any deficiencies on the part of the departments or their personnel is essential to improving and enhancing lifesaving procedures. Of course, no one can rightly expect perfection and exquisite orderliness in the face of an attack as horrific as this one. Exposing mistakes may prove discomforting, but this will {**4 NY3d at 494}pale in the face of the unforgettable heroics that we will always associate with September 11th. For every person critical of an error or omission, ten thousand voices will rise up in praise of the firefighters, police officers and others who risked life and limb in the line of duty.

Judges G.B. Smith, Graffeo and Read concur with Judge R.S. Smith; Judge Rosenblatt dissents in part in a separate opinion in which Chief Judge Kaye and Judge Ciparick concur.

Order modified, without costs, by remitting to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

[*11]

FOOTNOTES

Footnote 1: Other courts considering the availability of 911 calls under FOIL have uniformly required their disclosure, and the majority appears to be in agreement in the ordinary case (*see* majority op at 484). In *State ex rel. Cincinnati Enquirer v Hamilton County* (75 Ohio St 3d 374, 377-378, 662 NE2d 334, 337 [1996]), the Ohio Supreme Court held that there was no expectation of privacy in a 911 call and, accordingly, ordered the release of 911 tapes under that state's version of FOIL. It further held that the tapes became public records at the moment they were made and that their content was irrelevant (*see* 75 Ohio St 3d at 378, 662 NE2d at 337). In accord are *Meredith Corp. v City of Flint* (256 Mich App 703, 708-709, 671 NW2d 101, 104-105 [2003]), *Asbury Park Press v Lakewood Twp. Police Dept.* (354 NJ Super 146, 161, 804 A2d 1178, 1187 [Ocean County 2002]) and *Brazas v Ramsey* (291 Ill App 3d 104, 106-107, 682 NE2d 476, 477-478 [2d Dist 1997], *appeal denied* 174 Ill 2d 555, 686 NE2d 1158 [1997]).

Footnote 2: The 9/11 Commission, for instance, cites the testimony of a person who called 911 from the 31st floor of the South Tower and complained that he had been put on hold multiple times before deciding on his own to flee the building (*see* 9/11 Commission Report*, supra*, at 295).

Footnote 3: *See generally New York Times Co. v National Aeronautics & Space Admin.*, 920 F2d 1002 (DC Cir 1990) (where the majority remanded for a balancing test to determine whether a complete transcript or tapes must be disclosed under the federal Freedom of Information Act [5 USC § 552]).

(2) Supreme Court of the State of New York, County of New York

February 4, 2003. *120120

Norman Siegel, New York City, and McLaughlin Stern, LLP, New York City, for Catherine T. Regenhard and others, proposed petitioners-intervenors.

David E. McCraw, New York City for petitioners.

Michael A. Cardozo, Corporation Counsel, New York City (Naomi Sheiner and Marilyn Richter of counsel), for respondent.

OPINION

RICHARD F. BRAUN, J.

The horrors of September 11, 2001 shall remain with those who experienced the events of that infamous day, and the traumatic scars will only slowly heal up in part. The significant effects of September 11 will continue to emanate profoundly for a long, long time.

This is a combined article 78 proceeding and declaratory judgment action brought by notice of petition and verified petition in which petitioners seek a judgment pursuant to the Freedom of Information Law (Public Officers Law article 6) declaring certain records subject to disclosure thereunder, allowing petitioners to inspect and obtain copies of the records, and awarding to petitioners litigation costs, including attorney's fees. Petitioners are The New York Times Company, which is the publisher of The New York Times, and Jim Dwyer (Dwyer), one of its reporters. Respondent is the agency of the City of New York responsible for fire safety and certain emergency services. On September 11, 2001, respondent sent thousands of its firefighters to the World Trade Center after the buildings were attacked by terrorists, and, of the approximately 2700 innocent people who died there that day, 343 were firefighters.

As petitioners assert, they are seeking "release of certain materials of enormous historical importance. . . ." Petitioner Dwyer, as a reporter for The New York Times, sent to respondent by e-mail a letter requesting various records under the Freedom of Information Law (FOIL), including: *121121

1. All transcripts of interviews conducted by the department with members of the FDNY concerning the events of Sept. 11, 2001. (These might be called "oral histories.")

. . . .

3. Any and all tapes and transcripts of any and all radio communications involving any FDNY personnel on Sept. 11, starting from 8:46 AM.

. . . .

In the months following the World Trade Center tragedy, respondent conducted interviews of its personnel in order to record promptly their recollections of their experiences on September 11. According to respondent, approximately 511 oral histories have been recorded that respondent intended to be "an invaluable historical record", and which would assist in investigations or assessments of the event. These interviews of a wide range of respondent's employees, including officers, chiefs, high level administrative personnel, firefighters, emergency medical technicians, and paramedics were audiotaped and subsequently transcribed. These were the "oral histories".

The "tapes and transcripts of any and all radio communications involving any FDNY personnel" consist of emergency 911 telephone calls received by respondent (fire-related 911 calls are forwarded to respondent by the police department communications technicians who receive them) on September 11, its dispatch communications recorded on that day, calls from telephone operators notifying respondent's units of the World Trade Center attacks, calls dispatching respondent's apparatus and personnel to the scene, and reports back from units traveling to and at the World Trade Center. Respondent gives examples of (1) the content of a number of 911 emergency telephone calls from people in the World Trade Center on September 11 after the airplane attacks occurred, including from some callers on upper floors of the buildings, and (2) the gist of several of the interviews conducted after the September 11 event.

Respondent granted petitioners' request in part and denied the request in part. The disclosure of the oral histories was denied based on their being exempt from disclosure (1) pursuant to Public Officers Law §87(2)(e)(i), due to the ongoing criminal prosecution of Zacarias Moussaoui, the alleged so-called 20th hijacker, (2) pursuant to Public Officers Law § 87(2)(g), as nondiscoverable intra-agency materials, and (3) pursuant to Public Officers Law §87(2)(b), because the disclosure would be an unwarranted invasion of privacy under Public Officers Law § 89(2). The request for release of tapes and *122122 transcripts of radio communications was turned down on the first and third grounds above. The denials were appealed, and the appeal was granted in part and denied in part. The denials on appeal added as grounds to those of the original denials that disclosure would deprive persons of the right to a fair trial, pursuant to Public Officers Law § 87(2)(e) (ii), and that the tapes and transcripts of radio transmissions were intra-agency materials not subject to disclosure. By stipulation, respondent agreed that it does not assert that the intra-agency exemption applies "to the 911 calls from the public". The administrative appellate decision was a final determination by respondent, and thus this proceeding ensued.

Several proposed petitioners-intervenors moved to intervene as parties in this proceeding/action, pursuant to CPLR 7802 (d), 1012, or 1013; amend the "Summons and Complaint" to add them as party petitioners; and allow them to serve their proposed verified petition; or, in the alternative, permit them to appear as amici curiae in this proceeding. By stipulation, the parties agreed to the latter relief and agreed to the "admission into the record" of the affidavits of the proposed petitioners-intervenors.

The proposed petitioners-intervenors are nine persons each of whom had a husband or son who perished in the destruction of the World Trade Center on September 11. One proposed petitioner-intervenor had a firefighter son, four had husbands who worked for AON Corporation, one had a husband who was employed by Fiduciary Trust Company, one had a son employed by Cantor Fitzgerald Incorporated, and two were parents of a son who was an employee of Bloomberg, LLP attending a conference at Windows on the World at 1 World Trade Center on September 11. Each proposed petitioner-intervenor seeks to intervene in support of the petition in order to learn more information from the sought-after material as to the last moments of his or her husband's or son's lives.

Intervention as of right, pursuant to CPLR 1012(b), is more limited than permissive intervention, pursuant to CPLR1013. CPLR 7802(d) is the most liberal in that it permits "other interested persons to intervene." (*see Matter of Greater New York Health Care Facilities Assn. v DeBuono*, 91 N.Y.2d 716,720.) However, "interested" means more than generally interested in the result of an article 78 proceeding. A person must have a legally cognizable claim to intervene under CPLR 7802(d) as a party intervenor in an article 78 proceeding (*see id.* at 718, 720-721; *123123 *Ferguson v Barrios-Paoli*, 279 A.D.2d 396, 398-399 [1st Dept 2001]).

A party may assert a claim under FOIL in an article 78 proceeding where he or she has been denied access to a requested record after exhausting his or her administrative appeals (Public Officers Law § 89 [b]). Petitioners-intervenors made no such requests, and thus brought no such administrative appeals. Therefore, they have no article 78 claim and cannot be permitted to intervene as parties to this proceeding. The parties and proposed intervenors have stipulated that they may appear before this court as amici curiae. That agreement included the admission of their affidavits before the court for consideration. Therefore, the family members have still played the important role of bringing before the court their desires to waive any right of privacy which respondent has attempted to assert on their behalf.

Under FOIL, there is "a broad standard of open disclosure" by government agencies, and documents

in government possession are presumed to be discoverable, unless the agency can demonstrate that a specific statutory exemption bars disclosure *(Matter of Mantica v New York State Dept. of Health* , 94 N.Y.2d 58, 61). Exemptions under FOIL must be construed narrowly, and the government agency resisting disclosure has the burden of showing that an exemption applies (*Matter of Hanig v State of N.Y. Dept. of Motor Vehicles* , 79 N.Y.2d 106, 109).

The parties dispute the meaning of "compiled for law enforcement purposes" in Public Officers Law § 87(2)(e). As the United States Supreme Court has held in *John Doe Agency v John Doe Corp.* (493 U.S. 146, 153) in interpreting the same words in the law enforcement provision of the Federal Freedom of Information Act, after which the FOIL clause was patterned *(Matter of Fink v Lefkowitz* ,47 N.Y.2d 567, 572 n [1979]; *Matter of Legal Aid Socy. v New York City Police Dept.* , 274 A.D.2d 207, 214 n 4 [1st Dept 2000]), "compiled" means the time when the reply to a FOIL request has to be performed, not when the documents are originally collected and assembled by the government agency. The law enforcement exception is to prevent, among other things, the disclosure of documents under FOIL that would interfere with either law enforcement investigations or judicial proceedings (Public Officers Law § 87 [e] [i]) or would deprive a person of the right to a fair trial or impartial adjudication (Public Officers Law § 87 [e] [ii]). The important point in time as to "compiling" of documents is *124124 not when they are created or initially received, but when they would be gathered for disclosure under FOIL. That is the time when their disclosure would have an effect on law enforcement investigations, judicial proceedings, or a person who is to be or is being tried.

Fairness in law enforcement investigations and judicial proceedings is a fundamental principle of our democratic society. This court would not permit any improper interference with either the investigation of the claims alleged against Zacarias Moussaoui; the prosecution thereof, including the imposition of any appropriate punishment, if he is found guilty; or his right to a fair trial.

However, as stated above, respondent has the burden of demonstrating the applicability here of the law enforcement exemption to disclosure sought under FOIL. That the United States District Judge in *United States v Moussaoui* (see 2002 WL 1990 900, *1, 2002 US list LEXIS 1654, *2 [ED Va. Aug. 29, 2002]) and rule 57 of the Rules of the United States District Court for the Eastern District of Virginia may have prohibited the prosecution and defense in that criminal prosecution from making certain disclosures to the public or press does not remove the obligation of respondent to meet its burden in this proceeding.

Respondent has not met its burden as to the claimed law enforcement exemption. The allegation of depriving persons of a fair trial was only added in a totally conclusory fashion in the administrative appellate determination of the FOIL request and is not specified in this proceeding. The claim of interference with law enforcement investigations or judicial proceedings is supported by the United States Attorney's Office but not specifically enough. The Assistant United States Attorney states that the items requested under FOIL are potential evidence in the guilt and penalty (if there is a conviction) phases of the trial of Zacarias Moussaoui, but that it cannot be specified what tapes will be introduced into evidence at trial and what witnesses will be called in that trial. He also asserts that during any penalty phase of the Moussaoui trial, the Government intends to call as witnesses members of respondent "whose testimony will likely be similar to the content of the NYFD oral histories of these same witnesses." He states that all of the sought-after records have been turned over to the Moussaoui defense. Respondent has not shown that there would be any harm by the disclosure sought. Respondent's speculation that disclosure would taint the jury pool for the *125125 trial is just that, speculative, especially as there has already been so much pretrial publicity as to the World Trade Center attacks and the accusations against Zacarias Moussaoui, and vigorous voir dire of the prospective jurors can weed out

those who cannot serve as fair jurors.

Respondent had claimed in this proceeding that those interviewed for the oral histories were promised that their statements would be kept confidential. Respondent later stipulated that such claim was withdrawn because respondent learned that only some interviews contained such a promise. The oral histories were prepared for historical purposes, as well as to investigate and assess the response of respondent to the World Trade Center event. Personal expressions of feelings in the oral histories should not be disclosed because they do not fall under any exception of Public Officers Law § 87(2)(g)(i)-(iv). Public Officers Law § 87(2)(g)(i)-(iv) provide:

"2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that: * * *

"(g) are inter-agency or intra-agency materials which are not:

"i. statistical or factual tabulations or data;

"ii. instructions to staff that affect the public;

"iii. final agency policy and determinations;

"iv. external audits, including but not limited to audits performed by the comptroller and the federal government"

Certain parts of the oral histories were opinions and recommendations by those interviewed. The opinions and recommendations of even lower level employees, given "as part of the consultative or deliberative process of government decision making" are exempt from disclosure under Public Officers Law § 87 (2)(g) (*see Matter of Gould v New York City Police Dept.*, 89 N.Y.2d 267, 277; *Matter of Xerox Corp. v Town of Webster*, 65 N.Y.2d 131). Thus, denial of disclosure of those parts was proper. However, the factual parts of the oral histories should be disclosed.

Public Officers Law § 87(2)(b) exempts disclosure of records under FOIL which, if they were disclosed, "would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article". Public Officers Law § 89(2)(b) provides: *126126

(b) An unwarranted invasion of personal privacy includes, but shall not be limited to:

i. disclosure of employment, medical or credit histories or personal references of applicants for employment;

ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;

iii. sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes;

iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or

v. disclosure of information of a personal nature reported in confidence to an agency and not relevant

to the ordinary work of such agency; or

vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law.

Respondent has not shown that any of the information sought would fall under any of the specific categories of Public Officers Law §89(2)(b), but by the terms of the statute the list is not exhaustive.

The 911 tapes and transcripts contain communications made by people using that emergency telephone number in extreme circumstances, and for many it was the last words of their lives. Their calls for help in extremis should be protected as private utterances for the sake of both the victims who died, and their surviving family members and others who cared about them (*cf. New York Times Co. v National Aeronautics and Space Admin.*, 920 F.2d 1002, 1004 [DC Cir 1990, en banc] [the court remanded the case to the District Court for a determination as to whether the tapes of the voices of the deceased members of the Challenger crew should be released by NASA under the Freedom of Information Act, and recognized the potential privacy implications of same in holding that NASA did not have to disclose any information as to a particular individual which constituted an unwarranted invasion of privacy]; *see generally Matter of Dobranski v Houper*, 154 A.D.2d 736, 737-738 [3rd Dept 1989]). The same protection should be *127127 afforded to those who, thankfully, survived but made their telephone calls under the same horrible circumstances.

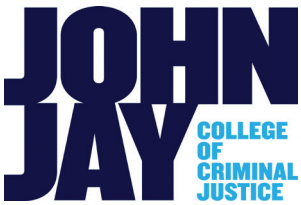
The 911 calls made by husbands and sons of the nine families who are amici curiae should be disclosed, so that they will have the opportunity to hear their loved ones, as desired by the amici, due to their waiver of the privacy exemption. There is no privacy exemption as to the portion of the tapes and transcripts which consist of the words of dispatchers and 911 operators, and members of respondent's units, as they were performing their jobs at the time as public employees, and thus were not entitled to any expectation of privacy for their part of the conversations (*cf., Matter of Journal Publ. Co. v Office of Special Prosecutor* , 131 Misc.2d 417,424 [Sup Ct, N.Y. County 1986] [public officials have less of a right to and expectation of privacy than do members of the public]). Respondent contended that some operators or dispatchers expressed disbelief, shock, and terror. It was the job of the operators and dispatchers to deal often with emergency circumstances, which surely can be difficult, for the operators particularly, although the magnitude of the World Trade Center event was extraordinary for the operators and dispatchers. Nevertheless, their communications are not entitled to a privacy exemption.

The portions of the operator, dispatch, and units reporting communications which consist of intra-agency material should not be disclosed. Respondent states that parts of the dispatch records include "discussions as to secure routes into Manhattan; interim discussions as to where command posts should be set up; reports establishing the process of setting up roll call; and the need to set up relay communications so units could determine what was happening elsewhere on the site." Those are at least in part "instructions to staff that affect the public" (Public Officers Law § 87 [g] [ii]), which should be disclosed, as should factual portions of the dispatch calls.

Pursuant to Public Officers Law § 89(4)(c), the court can award reasonable attorney's fees and other litigation costs to a person who has substantially prevailed in a proceeding challenging the denial of a FOIL request, provided that the court determines that the record sought clearly has significant interest to the public and that the government agency lacked a reasonable legal basis for withholding the record. An award of such fees is discretionary (*Matter of Powhida v City of Albany*,147 A.D.2d 236, 238 [3rd Dept 1989]). Here, respondent had reasonable legal bases for withholding parts of the material *128128 sought. Thus, attorney's fees and litigation costs should not be awarded to petitioners.

Freedom of access by the press and public to government information preserves a free society. Unless the government proves that there is a reason that information should be withheld, government records sought by way of a FOIL request must be provided. The press and public should be permitted to obtain as much non-exempt information as available in relation to one of the most poignant episodes of our lifetimes.

Therefore, this court declared in its separate decision and order that the following records are subject to disclosure, and respondent shall allow petitioners to inspect and copy at their expense (Public Officers Law § 87 [b] [iii]) the 911 tapes and transcripts of the September 11 calls of the husbands and sons of the nine amici curiae; the tapes and transcripts of the operators', dispatchers', and units reporting portions of all other calls and communications on September 11, except for the parts that constitute intra-agency materials; and the factual portions of the oral histories. Petitioner's request for attorney's fees and litigation costs was denied.



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