



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

February 23, 2016  
PR 16-06

Allyson M. Quay, Esquire  
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**Re: Law Office of Richard S. Humphrey v. Rhode Island Department of Health**

Dear Attorney Quay:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Rhode Island Department of Health (“DOH”) is complete. By correspondence dated July 8, 2015, you allege the DOH violated the APRA when it refused to provide records responsive to your April 30, 2015 APRA request, wherein you sought copies of categories of documents related to the Intoxilyzer I-9000 manual. It appears you were provided with a number of documents, including the DOH Operator’s Manual, the Rules and Regulations Pertaining to Preliminary Breath Testing and Standards for the Determination of the Amount of Alcohol and/or Drugs in a Person’s Blood by Chemical Analysis of the Breath and/or Blood, and documents related to breath analysis instrument inspections. The document that you were not provided and that is at issue in this case is the Intoxilyzer I-9000 Training Manual.

In response to your complaint, we received a substantive response from the DOH’s legal counsel, Thomas J. Corrigan, Jr., Esquire, who also provided his response in affidavit form. Attorney Corrigan states, in pertinent part:

“The record in dispute is a training manual - not the operator’s manual – for the Intoxilyzer I-9000 alcohol tester sold by CMI, Inc.

Pursuant to R.I. Gen. Laws § 38-2-2(4), the training manual is a document or book or other material ‘made or received pursuant to law or ordinance or in connection with the transaction of official business by the agency.’ The Department’s use of the CMI, Inc. product and its manual would be the connection with the Department’s official business. However, pursuant to R.I. Gen. Laws § 38-2-2(4)(B), some such records are deemed not public, such as

‘[t]rade secrets and commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature.’

\* \* \*

Given that the Intoxilyzer training manual is under claim of copyright as of 2013, it is argued that the manual has trade secrets or commercial information from a corporation, and further that the copyright creates a right of either privilege or confidentiality. When CMI trains staff of the Department of Health, it uses a PowerPoint and states that the contents thereof cannot be shared with other parties. CMI clearly intends to keep their training manual and its contents a trade secret, at least within a limited group outside of the corporation.

The Department created a manual for use by police, and there is a PowerPoint that the Department uses to train police. The Complainant was provided with these two documents.”

We note you provided no rebuttal.

At the outset, we note that in examining whether a violation of the APRA has occurred, we are mindful that our mandate is not to substitute this Department’s independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the DOH violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

A review of the cover of the Intoxilyzer I-9000 Training Manual, which is the only page of the Training Manual provided to this Department, reveals the following language:

“Copyright 2013 by CMI Inc. No part of this work covered by the copyright herein may be reproduced or copied in any form, by any means – graphical, electronic, mechanical, including photocopying, taping, or any form of information storage and or retrieval systems without the expressed written consent of CMI Inc.”

It also appears that a Supervisor in Forensic Breath Analysis at the DOH, Mr. Albert Giusti, emailed your APRA request to CMI, Inc. on June 10, 2015. A representative of CMI Inc. emailed Mr. Giusti on June 10, 2015 and indicated “CMI does not provide a copy of the manual [CMI uses] to train [its] customers. [CMI’s Corporate Counsel/Compliance Officer] is contacting the attorney that made the request and letting him know that the CMI manual is not made available.”

The APRA states that, unless exempt, all records maintained by any public body shall be public records and every person shall have the right to inspect and/or to copy such records. See R.I. Gen. Laws § 38-2-3(a). Among the twenty-seven (27) exceptions to the APRA is R.I. Gen.

Laws § 38-2-2(4)(B), which exempts from public disclosure, “[t]rade secrets and commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature.”

In Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871 (D.C. Cir. 1992), which is cited with approval by the Rhode Island Supreme Court in The Providence Journal Company v. Convention Center Authority, 774 A.2d 40 (R.I. 2011), the plaintiff sought the release of certain safety reports that had been provided to the Nuclear Regulatory Commission by the Institute of Nuclear Power Operations “on the understanding that the documents would be treated as confidential.” *Id.* at 872. The Court of Appeals for the District of Columbia reviewed Exemption 4 to the Freedom of Information Act (“FOIA”), which in all material respects mirrors R.I. Gen. Laws § 38-2-2(4)(B). Specifically, FOIA’s Exemption 4 exempts from public disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” *Id.* at 872 (citing 5 U.S.C. 552(b)(4)). *Cf.* R.I. Gen. Laws § 38-2-2(4)(B)(exempting “[t]rade secrets and commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature”).

The Court of Appeals examined the legislative history of Exemption 4 and this legislative history is particularly helpful in placing the present matter in its proper context. Specifically, the Court of Appeals noted that when Exemption 4 was considered, a Senate Committee report explained that:

“[t]his exemption is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained.” *Id.* at 872-73.

The Critical Mass Court continued that:

“[t]he ‘financial information’ exemption recognizes the need of government policymakers to have access to commercial and financial data. Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired.

Apart from encouraging cooperation with the Government by persons having information useful to officials, [Exemption 4] serves another distinct but equally important purpose. It protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication.” *Id.* at 877.

The Court of Appeals further examined the above two purposes served by the FOIA (or in this case the APRA) exemption – efficient Government operations and maintaining the confidentiality of persons supplying the information. *Id.* at 873. As to the governmental interest, the Court elucidated that “[u]nless persons having necessary information can be assured that it

will remain confidential, they may decline to cooperate with officials[,] and the ability of the Government to make intelligent, well informed decisions will be impaired.” Id. The Court continued that “[t]his exemption is intended to encourage individuals to provide certain kinds of confidential information to the Government.” Id. Turning to the private interests, the Court added that Exemption 4 “protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication.” Id. Thereafter, the Court concluded that the legislative history “firmly supports the inference that [Exemption 4] is intended for the benefit of persons who supply information as well as the agencies which gather it.” Id.

While prior cases considered the legal test for disclosing financial or commercial information required to be provided to the Government, Critical Mass considered the legal test for disclosing financial or commercial information voluntarily provided to the Government. The purpose served by the exemption of such documents voluntarily provided, the Court explained, was to “encourag[e] cooperation with the Government by persons having information useful to officials.” Id. at 878. Moreover, the Court noted that:

“[u]nless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials[,] and the ability of the Government to make intelligent, well-informed decisions will be impaired.” Id. at 877.

The Court of Appeals further added that “when t[he] information is volunteered, the Government’s interest is in ensuring its continued availability.” Id. In this type of situation, the Court related that:

“the presumption is that [the public’s] interest will be threatened by disclosure as the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation. In those cases, the private interest served by Exemption 4 is the protection of information that, for whatever reason, ‘would customarily not be released to the public by the person from whom it was obtained.’” Id. at 878.

The Court of Appeals concluded by explaining that it is “a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will both jeopardize its continuing ability to secure such data on a cooperative basis and injure the provider’s interest in preventing its unauthorized release.” Id. at 879. As a result, the Court established the so-called Critical Mass test and determined that “financial or commercial information provided to the Government on a voluntarily basis is ‘confidential’ for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public from whom it was obtained.” Id. at 879. On this basis, the Court determined that the requested safety reports voluntarily provided to the Nuclear Regulatory Commission were exempt from disclosure since, in the Court’s opinion, disclosure would threaten continuing access. Id.

Critical Mass is significant to our analysis for several reasons. First, it provides the legislative history and rationale supporting Exemption 4. Second, as noted above, the plain language of

Exemption 4 and the plain language of R.I. Gen. Laws § 38-2-2(4)(B) are in all material respects identical. Third, the Rhode Island Supreme Court has observed that “[b]ecause APRA generally mirrors the Freedom of Information Act \* \* \* we find federal case law helpful in interpreting our open record law.” Pawtucket Teachers Alliance v. Brady, 556 A.2d 556, 558 n.3 (R.I. 1989). Fourth, and most importantly, the Rhode Island Supreme Court has expressly adopted the Critical Mass test. See The Providence Journal v. Convention Center Authority, 774 A.2d 40, 47 (R.I. 2001) (“We agree with the holding in Critical Mass and its progeny and adopt the test set forth therein, including the protection afforded to commercial and financial information that the provider would not customarily release to the public.”). As such, this Department must apply the Critical Mass test.

In the case that adopted the Critical Mass test, The Providence Journal v. Convention Center Authority, the Rhode Island Supreme Court considered several documents requested by a Providence Journal reporter Michael Stanton pertaining to a Celebrity Golf Invitational Tournament hosted by the Westin Hotel and the Verrazano Day Banquet held at the Convention Center Authority. Mr. Stanton was denied various documents comprising the final contracts as well as documents that reflected the negotiations that led to the final agreements. Convention Center Authority, 774 A.2d at 43. After a lawsuit was filed by The Providence Journal, the Convention Center Authority presented an argument that is similar to the Office’s argument in this case:

“[t]he affiants [submitted by the Convention Center Authority] collectively detailed what they believed to be the anticompetitive effects of publicly disclosing the information sought by the Journal. Each affiant separately reached the conclusion that the information requested by the Journal contained confidential commercial and financial information of a sort that is not typically shared with the public.” Id. at 43-44.

On appeal, the Rhode Island Supreme Court examined R.I. Gen. Laws § 38-2-2(4)(B) and noted that FOIA contained “a similar exemption.” Id. at 46. Following this observation, the Court continued and, as noted supra, adopted the test set forth in Critical Mass. Id. at 47. In particular, the Supreme Court explained that with respect to financial or commercial information provided to the Government on a voluntary basis, such information was exempt from disclosure “if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.” Id.

Based upon the foregoing, the Court concluded that with the exception of the final contracts, the remaining documents reflecting the negotiation process “must, of necessity, include confidential financial information that would not customarily be disclosed and cannot be redacted.” Id. at 48. Accordingly, this information was deemed exempt from disclosure. Id. at 48 (“It was established, through affidavit that ‘customers who contract with the [Authority] do not expect that the documents and financial information they provide will be disclosed to the public \* \* \* [I]t is commonly understood during negotiations that the information shared by the customers \* \* \* will remain confidential.’”).

Here, no evidence or argument has been made by you that the Intoxilyzer I-9000 Training Manual does not represent “financial or commercial information” or that the Intoxilyzer I-9000 Training Manual is “required” to be provided to the Government. For this reason, the appropriate test to apply in this situation is, in the words of the Supreme Court, to determine whether the “financial or commercial information” is “of a kind that would customarily not be released to the public by the person from whom it was obtained.” Convention Center Authority, 774 A.2d at 47.

Respectfully, you provide no evidence or argument that the Intoxilyzer I-9000 Training Manual is of a kind that “would customarily” be released to the public by the person from whom it was obtained. Id. In fact, you never expressly make the argument that the Intoxilyzer I-9000 Training Manual would customarily be released to the public by the person, firm, or corporation, i.e., CMI, Inc., from whom it was obtained.

Other cases have determined that when information was prepared by a private party and shared with a governmental entity – like this case – such information was generally a consideration in favor of non-disclosure. See Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 529-30 (D.C. Cir. 1979)(documents were not disclosed because release of information would disclose data supplied to government from a person outside the government); Judicial Watch, Inc. v. Export-Import Bank, 108 F.Supp.2d 19, 28 (D.D.C. 2000)(“documents prepared by the federal government may be covered by Exemption 4 if they contain summaries or reformulations of information supplied by a source outside of the government”)<sup>1</sup>; New Hampshire Right to Life v. Department of Health and Human Services, 976 F.Supp.2d 43 (D.N.H. 2013)(the District Court held that a not-for-profit family planning organization’s manual for operating clinics was “commercial” in nature, for purposes of the FOIA exemption for confidential commercial information, where the release of the information would likely enable the organization’s competitors to copy its model and compete for patients, funding, staff and providers).

All of the above lead to the conclusion that the Intoxilyzer I-9000 Training Manual is “of a kind that would customarily not be released to the public by the person from whom it was obtained.” Convention Center Authority, 774 A.2d at 47. Indeed, Attorney Corrigan states that the Intoxilyzer I-9000 Training manual is “under claim of copyright as of 2013, it is argued that the manual has trade secrets or commercial information from a corporation, and further that the copyright creates a right of either privilege or confidentiality.” Moreover, “CMI clearly intends to keep their training manual and its contents a trade secret, at least within a limited group outside of the corporation.” Such reasoning – that disclosure would hinder the government’s ability to obtain similar information in the future – was precisely the basis of the Court of Appeals’ decision in Critical Mass. See Critical Mass, 975 F.2d at 877 (“[u]nless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials[,] and the ability of the Government to make intelligent, well-informed

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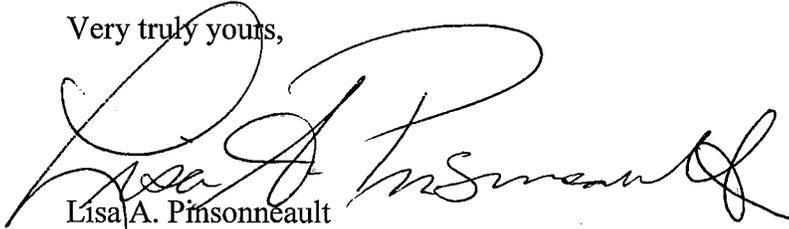
<sup>1</sup> Both Gulf & Western Industries and Judicial Watch were cited with approval by the Rhode Island Supreme Court in Convention Center Authority. See Convention Center Authority, 774 A.2d at 48.

decisions will be impaired"). As such, the DOH did not violate the APRA when it denied your APRA request.

Although the Attorney General has found no violations, nothing within the APRA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws § 38-2-8(b). Please be advised that we are closing this file as of the date of this letter.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Lisa A. Pinsonneault', written over a large, stylized cursive flourish.

Lisa A. Pinsonneault  
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LP/pl

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