COMMUNITY COLLEGE

OF RHODE ISLAND

Office of the General Counsel

September 14, 2026

Sent via email:
aroach@riag.ri.gov

Adam D. Roach, Esq.
Special Assistant Attorney General
State of Rhode Island Office of the Attorney General
150 South Main Street
Providence, Rhode Island 02903

Re: **Solas v. Community College of Rhode Island (APRA Complaint Dated 7/30/2026)**

Dear Special Assistant Attorney General Roach:

I am writing in response to the above-cited Access to Public Records Act ("APRA") complaint that was filed against the Community College of Rhode Island ("CCRI" or "College") by correspondence to your Office dated August 29, 2026. Please be advised that CCRI denies each and every allegation set out in this complaint, and asserts that its August 28, 2026 response (copy enclosed) to the Complainant's emailed August 3, 2026 public records request (copy enclosed) complies with all of the applicable requirements of the APRA.

More specifically, at issue here appears to be the College's redaction of information included in an email from United States Senator Elizabeth Warren to Professor Emily Cumminsky, a faculty member at the College1. In this email, it is clearly stated that all of its content is under a claim of copyright as of 2025, by Warren for Senate. As such, and as the Rhode Island Office of the Attorney General (the "Office") has found, this copyrighted information is exempted from disclosure under sections 38-2-2(4)(B) and 38-2-2(4)(S) of the Rhode Island Access to Public Records Act. In Law Office of Richard S. Humphrey v Rhode Island Department of Health, PR 16-06 (February 23, 2016), the Office found that a training manual that was covered under a claim of copyright constituted "[t]rade secrets and commercial or financial information obtained from a person, firm or corporation which is of a privileged or confidential nature…" and was exempted from disclosure under §32-2-2(4)(B) of the Act. Similarly, the copyrighted information that was included in the email in the instant matter is also a trade secret of the copyright holder, and is therefore covered by this same exemption.

In addition, as the Office recently indicated in its Advisory Opinion, *In re City of Providence*, ADV PR 25-01 (January 9, 2025), citing *Weisberg v. United States Department of Justice*:

[1] It should be noted that the College only redacted that portion of the email which was covered by the claim of copyright that was included in it.

> "By its literal terms, the Copyright Act gives a copyright holder the 'exclusive' right to reproduce or authorize reproduction of the copyrighted work. 17 U.S.C. App. §106(1)(1976). In actions for infringement, the courts are afforded a broad range of remedies, including: the imposition of statutory or actual damages, 17 U.S.C. App. §504; impoundment or destruction of 'all copies…found to have been made or used in violation of the copyright owner's exclusive rights,' 17 U.S.C. App. §503; and injunctive relief 'operative throughout the United States,' 17 U.S.C. App. §502. Weisberg v. U.S. Dept. of Justice, 631 F. 2d 824, 829 (D.C. Cir. 1980).[3]

This, as the Office noted in *In re the City of Providence*, not only brings documents covered under a claim of copyright under §38-2-2(4)(B)'s exemption, but also brings them under §38-2-2(4)(S)'s exemption (exempting "[r]ecords, reports, opinions, information, and statements required to be kept confidential by federal law or regulation or state law or rule of court"), to the extent disclosure would be prohibited by federal copyright law. Since Warren for Senate and not the College has the exclusive right to reproduce or authorize reproduction of the copyrighted work, the College therefore has no legal right under the federal copyright law to release that information in response to this Public Records Request, and its reliance on these two exemptions to disclosure is in accord with the requirements of the APRA.[2]

Moreover, it is also noted that the concern highlighted by the Office in *Law Office of Richard S. Humphrey v Rhode Island Department of Health, In re City of Providence*, and *Zurier v. Office of the General Treasurer*, PR 23-30 (March 15, 2023) regarding the *Critical Mass* case is also present in the instant matter. As the Court noted in *Critical Mass,* "[u]nless persons having necessary information can be assured 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." (See *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F. 2d 871, 877) Indeed, if the APRA is interpreted to somehow circumvent federal copyright protection, then the College's ability to obtain information in the future would be hindered (and it would be forced to subject itself to possible liability by releasing such information in response to a public records request under the APRA)[3]. If one knows that its claim of copyright in certain information will not be honored due to a public records request, then one will not send copyrighted information to a public entity. Clearly, hindering a public entity's ability to receive information is not the intent of the APRA (and is why the above-cited exemptions have been included in the Act).

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[2] It must also be noted that this copyrighted information does not shed any light on the operation of the College.

[3] Without waiving the forgoing, the College also questions whether the email in question (the redacted portion), which was sent to Professor Cumminsky by United States Senator Elizabeth Warren, would also be exempted from public disclosure under §32-2-2(4)(M) of the Act ("[c]orrespondence of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities").

Accordingly, the Community College of Rhode Island respectfully requests that this APRA complaint be denied and dismissed.

Please let me know if you require any additional information regarding this matter.

Very truly yours,

Ronald A. Cavallaro
General Counsel

c: Complainant, Nicole Solas
(Sent via email: nicolesolas@gmail.com)
Enclosures

Public Records Request of August 3, 2026

and

CCRI's response dated August 28, 2026

From: Nicole Solas <nicolesolas@gmail.com>
Sent: Monday, August 3, 2026 9:43 PM
To: PublicRecordsRequest <publicrecordsrequest@ccri.edu>
Subject: [External]:

This is an APRA request for all emails sent to and sent by eclarkhuggins@ccri.edu containing the word, transgender, from January 1, 2025 to December 31, 2025.

COMMUNITY COLLEGE
OF RHODE ISLAND

Office of the General Counsel

August 28, 2026

Sent Via Email
nicolesolas@gmail.com

Ms. Nicole Solas

Re: Access to Public Records Act Request – "emails sent to and sent by eclarkhuggins@ccri.edu containing the word, transgender..."
Dated: 8/3/26 and Received: 8/4/26

Dear Ms. Solas:

The College responds to your above-cited public records request as follows:

> *"This is an APRA request for all emails sent to and sent by eclarkhuggins@ccri.edu containing the word, transgender, from January 1, 2025 to December 31, 2025."*

A document that is responsive to this request is enclosed. Please note that information included in this email that is covered and protected under a claim of copyright, and which is exempted from disclosure under R.I.G.L. §38-2-2(4)(B)[1] and §38-2-2(4)(S)[2] has been redacted from the enclosed document[3].

Specifically, the information redacted from the enclosed email of March 5, 2025, from Elizabeth Warren to Emily Cummiskey, which contains the word "transgender" is published under a claim of copyright, as of 2025, by Warren for Senate.

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[1] "Trade secrets and commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature."
[2] "Records, reports, opinions, information, and statements required to be kept confidential by federal law or regulation or state law, or rule of court."
[3] See R.I.A.G. decisions: *Law Office of R. Humphrey v. R.I. Department of Health*, PR16-06, and Zurier v. Office of the General Treasurer, PR 23-30.

Lastly, to the extent that this response could in any way be considered a denial of your request, please note that in accordance with R.I. General Laws §38-2-8 you may appeal this determination to Dr. Rosemary Costigan, President, Community College of Rhode Island, the R.I. Department of Attorney General, or the R.I. Superior Court for the county in which the records are maintained.

Very truly yours,

Ronald A. Cavallaro
General Counsel

RAC/afc
Enclosure

Outlook

[External]:Ugliness, distraction, and crazy stories

From Elizabeth Warren <info@e.elizabethwarren.com>
Date Wed 3/5/2025 7:31 PM
To Cummiskey, Emily <eclarkhuggins@ccri.edu>

You don't often get email from info@e.elizabethwarren.com. **Learn why this is important**

CAUTION: This email was generated from outside of CCRI. Please do not click on links or attachments unless you have verified legitimacy of this email.

[redacted]

Paid for by Warren for Senate

PO Box 171375, Boston, MA 02117

RI Attorney General's

Public Records Decisions

and

Advisory Opinion

(cited in the College's response)

State of Rhode Island

DEPARTMENT OF ATTORNEY GENERAL
150 South Main Street- Providence, RI 02903 (401) 274-4400 - TDD (401) 453-0410

Peter F. Kilmartin
Attorney General

VIA EMAIL ONLY

February 23, 2016
PR 16-06

Allyson M. Quay, Esquire

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")[1]; 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 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,

Lisa A. Pinsonrieault
Special Assistant Attorney General
Extension 2297

LP/pl

Cc: Stephen Morris, Esquire

APRA

[1] 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.

State of Rhode Island

OFFICE OF THE ATTORNEY GENERAL
150 South Main Street- Providence, RI 02903
(401) 274-4400 www.riag.ri.gov

Peter F. Neronha
Attorney General

VIA EMAIL ONLY

March 15, 2023
PR 23-30

Samuel D. Zurier, Esquire[1]

Eileen Cheng, Esquire
Legal Counsel, Office of the General Treasurer

Re: **Zurier v. Office of the General Treasurer**

Dear Attorneys Zurier and Cheng:

We have completed our investigation into the Access to Public Records Act ("APRA") complaint filed by Attorney Samuel D. Zurier ("Complainant") against the Office of the General Treasurer ("Treasurer"). For the reasons set forth herein, we find that the Treasurer did not violate the APRA.

Background & Arguments

The Complainant submitted a six-part APRA request, with multiple subparts to the Treasurer seeking the following, in pertinent part, pertaining to certain investments made in connection with the Employees' Retirement System of Rhode Island ("ERSRI"):

"1. With regard to ERSRI's payment of investment manager fees and expenses in FY2020 to Paine Schwartz Food Chain Fund IV, L.P. (referred to below as 'Pain IV'), ***, please provide all documents that refer or relate to the following:

a. The calculation of Paine IV's fees and expenses charged to ERSRI;
b. Backup documentation and/or data to support the calculation of Paine IV's fees and expenses charged to ERSRI;
c. The calculation of credits (if any) that Paine IV offset against fees and expenses charged to ERSRI;
d. Backup documentation and/or data to support the calculation of credits (if any) to offset the fees and expenses Paine IV charged to ERSRI.

2. All performance reports or letters, quarterly and annual, provided by Paine IV that refer or relate to performance of the fund and/or portfolio companies in which the fund is invested delivered [sic] to ERSRI from January 1, 2020 forward.
3. For the period of FY 2020, all documents that refer or relate to McKinsey & Company and (i) ERSRI received from Paine IV and/or (ii) refer or relate to Paine IV.

4. With regard to ERSRI's payment of investment manager fees and expenses in FY 2020 to Paine Schwartz Food Chain Fund V, L.P. (referred to below as 'Paine V'), *** please provide all documents that refer or relate to the following:

The calculation of Paine IV's [sic] fees and expenses charged to ERSRI;

Backup documentation and/or data to support the calculation of Paine V's fees and expenses charged to ERSRI;

The Calculation of credits (if any) that Paine V offset against fees and expenses charged to ERSRI;

Backup documentation and/or data to support the calculation of credits (if any) to offset the fees and expenses Paine V charged to ERSRI.

5. All performance reports or letters, quarterly and annual, provided by Paine V that refer or relate to performance of the fund and/or portfolio companies in which the fund is invested delivered [sic] to ERSRI from January 1, 2020 forward.
6. For the period of FY 2020, all documents that refer or relate to McKinsey & Company and (i) ERSRI received from Paine V and/or (ii) refer or relate to Paine V." (Parentheticals in Original).

The Treasurer responded to the request producing records responsive to Parts 1(a)-(d) and 4(a)-(d), with limited redactions to ILPA[2] spreadsheets pursuant to R.I. Gen. Laws § 38-2-2(4)(B) ("Exemption B") "to protect trade secrets and/or commercial or financial information obtained from a person, firm, or corporation that is of a privileged or confidential nature." In response to Parts 2 and 5 of the request, the Treasurer directed the Complainant to a webpage on the Treasurer's website for responsive information. [3] In connection with Parts 2 and 5, the Treasurer also withheld "financials and quarterly reports" as confidential pursuant to Exemption (B) and indicated that no portion of these documents was reasonably segregable.

The Treasurer also withheld documents responsive to Parts 3 and 6 pursuant to Exemption (B) and indicated that the withheld documents were not reasonably segregable.

The Complainant filed an administrative appeal with the Treasurer appealing "the non-production of quarterly reports and the non-production of any documents referring to McKinsey on the ground that Treasurer had not produced excerpts from the relevant documents with segregable non-exempt material." See R.I. Gen. Laws § 38-2-3(b). The Complainant's administrative appeal also requested a Vaughn index, or privilege log, describing the withheld document and specific reasons for withholding. The Treasurer's response to the administrative appeal reiterated its decision to invoke Exemption (B) to withhold the quarterly reports and documents referencing McKinsey, including the quarterly reports and "Private Placement Memorandum." With regard to Complainant's request for a Vaughn index, the Treasurer replied, "our office does not provide 'privilege logs' or the like in response to public records requests."

Dissatisfied with the Treasurer's response, the Complainant filed a fifty-five (55) page Complaint with this Office (inclusive of Exhibits 1-8), in which he narrows his challenge to the Treasurer's APRA response in two respects: first, he challenges the use of Exemption (B) to withhold the quarterly reports, and second, he argues that the Treasurer should have been required to produce a *Vaughn index*.

With respect to the quarterly reports, Complainant argues that the financial information the Treasurer claims is exempt has been "disclose[d] publicly and in great detail" by the Paine Schwartz company "as part of its solicitation of public money." Specifically, Complainant maintains that, "[b]ecause Paine Schwartz chooses to disclose performance information publicly when it is soliciting business, [Complainant] contends that the same information cannot be withheld on the basis of a claim that it is 'of a kind that would customarily not be released to the public by the person from whom it was obtained.' *See Providence Journal Co. v. Convention Center Authority*, 774 A.2d 40, 45 (R.I. 2001)." Complainant contends that "Paine Schwartz disclosed extensive commercial and financial information about its investment choices and performance in a May 23, 2018 presentation to the ERSRI Investment Commission soliciting its investment in Paine V," including disclosing the identity of "portfolio companies," thus "demonstrat[ing] that this data of past performance, including the performance of named individual companies, did not have 'trade secret' or commercial competitive value."

Complainant also argues that the Treasurer cannot withhold the requested quarterly reports as the Treasurer discloses this "quarterly performance information for both Paine Schwartz funds" and the "Treasurer already produced to [Complainant] the overall performance data on a quarterly basis."

Next, Complainant contends that "it is worth noting that much of [McKinsey & Company's] association with Paine Schwartz is a matter of public record," citing the McKinsey & Company website and the above-mentioned May 23, 2018 presentation to the State Investment Commission. Complainant argues that "Paine Schwartz's public announcement of its relationship with McKinsey as part of its solicitation for State business amounts to a waiver by it (and McKinsey) of any claims of confidentiality with regard to its subsequent reports to the Treasurer." (Parenthetical in original).

Finally, Complainant asks this Office "to consider the value of requiring Treasurer (and future government agencies subject to APRA requests) to produce a *Vaughn index*, so that future inquirers will have a clearer understanding of the types of documents involved and the basis for claiming exemption from APRA." (Parenthetical in original).[4]

Senior Legal Counsel, Kara D. DiPaola, Esquire,[5] submitted a substantive response to the Complaint on behalf of the Treasurer[6], consisting of Exhibits A-G and affidavits from General Counsel, Amy L. Crane, Esquire, and Chief Investment Officer, Andrew Junkin. As an initial matter, the Treasurer maintains that the only documents responsive to Complainant's request for records referencing "McKinsey & Company" are "the identified quarterly reports." In responding to the Complainant's request, the Treasurer gathered and reviewed all documents responsive to the Complainant's request, worked with the internal Investment Team as well as Paine Schwartz, to determine which documents, or parts thereof, could be released.

The Treasurer argues that the quarterly reports at issue "fit squarely within" Exemption B as they "contain underlying portfolio information, including strategic investing plan and strategies and confidential statements of the fund as well as the identities of underlying portfolio companies. The public disclosure of underlying holdings would impair the ability of fund managers to maximize their performance thereby harming the investment performance of the pension fund." The quarterly reports "present very specific information about private portfolio companies in which [ERSRI] is invested, including financial metrics, acquisition prices, add-on acquisition targets, future outlooks, and go-forward strategic plans." The Treasurer states that, within the Paine Schwartz fund, "one portfolio develops and manufacturers new proprietary biopesticides" and:

uarterly report documents how each product is performing by region, new products in development, trial success, patent status and/or FDA approval process. The reports include go-to-market initiatives for approved products and updates on manufacturing capabilities and sales."

:asurer contends that, "[r]eleasing this information to the public, which includes competitors of either Paine Schwartz or their underlying portfolio companies, would be detrimental to the business success of the underlying portfolio companies, and thereby cause direct harm to the value and performance of ERSRI's investments." Further, "[t]he specific information contained in the quarterly reports is not publicly available and the reports themselves have been clearly and heavily marked 'confidential' by Paine Schwartz."

The Treasurer argues that the quarterly reports "also contain confidential financial statements of the fund" and "no portion of the documents contain reasonably segregable information that is releasable." "The information that is made available to the [State Investment Commission], and which is conditioned on the presence of confidentiality restrictions, is essential to maintaining the SIC's/ERSRI's investments, performing due diligence and properly monitoring investments." "[D]isclosure of these records would impair the [Treasurer's] ability to obtain necessary information in the future." "The requested quarterly reports are primary materials containing data imperative to understanding the health of each investment." The Treasurer further contends that, "[w]ithout an obligation of confidentiality in certain aspects of pension investments, the SIC would not have the ability to gain access to the necessary information to make prudent investments, nor would it have the ability to invest in strong performing funds at all, ultimately harming the members of the retirement system, the State of Rhode Island, and the taxpayers."

The Treasurer maintains that it is also "contractually prohibited from releasing the requested documents in their entirety." The agreement between ERSRI and Paine Schwartz "specifically contemplates delivery to ERSRI of the quarterly and annual reports that are the subject of Complainant's complaint and characterizes the quarterly reports" as confidential.

The Treasurer acknowledges Complainant's argument that the Paine Schwartz website contains information about its portfolio companies and fund performance, but counters that this disclosure is of a "general, high-level" nature, "offer[ing] a glimpse into Paine Schwartz's investment process" but "does not identify the particular details of each investment, the portfolio construction, the underlying investment thesis and strategic plan for each investment, or any other information contained in the requested quarterly reports." "The information contained in the quarterly reports addressed herein is not otherwise publicly revealed." The Treasurer maintains that the presentations made to the SIC by Paine Schwartz, which are publicly available, "contain[] information at a higher level than is sought from the quarterly reports." The Treasurer "maintains information to a much more specific degree, and while high-level, general information may be released, the specific, granular details as are discussed herein are not disclosed publicly."

At this Office's request, the Treasurer provided the withheld quarterly reports for our *in camera* review. These documents consisted of eight .PDF reports totaling approximately 700 pages.

We acknowledge Complainant's rebuttal as well as Exhibit 9.

Four months after the Complainant filed the Complaint with this Office, he requested an opportunity to submit an additional twenty-eight (28) pages of information (inclusive of Exhibits 10-11) in support of his allegations. This supplemental filing consisted of "a slide deck that Paine Schwartz presented to ERSRI on June 22[, 2022] concerning the practices of a new investment fund ('Food Chain Fund VI') *** [and] a June 2022 memo prepared by the Treasurer's staff concerning the possible investment of ERSRI funds in Paine Schwartz Food Chain Fund VI." (Parenthetical in original). Complainant argues that these documents support his prior arguments for four reasons, summarized below:

1. "Slide 2 contains the disclaimer that the presentation was 'for the exclusive use of the Rhode Island State Investment Commission,' yet became publicly available. Thus, Paine Schwartz "does not have reasonable expectations that the 'confidential' information it provides to ERSRI is exempt from" APRA.

2. "Slide 11 contains a list of portfolio companies, further reinforcing [Complainant's] argument that the list of specific companies within Funds IV and V is not a confidential trade secret."

3. In its June 2022 solicitation to ERSRI, "Paine Schwartz represents the performance of its prior funds, including Food Chain IV *** [and] represents the performance of a particular portfolio company." Thus, Complainant argues that "[b]ecause all of this information is public, the information [Complainant] seeks about the portfolio companies in Food Chains IV and V *** should not be deemed confidential."

4. The memorandum prepared by the Treasurer's staff "stated that the Paine Schwartz Food Chain Fund IV yielded a net internal rate of return of 9.63%," but Paine Schwartz represented in its June presentation "that the net internal rate of return for the same fund was between 10% and 11%" thus creating a discrepancy requiring "greater transparency of the actual investment performance."

The Treasurer filed an objection to this supplemental filing contending that the information and exhibits contained in Complainant's supplemental briefing "would improperly expand the record of the underlying appeal" as these documents "came into existence months after the initial APRA request" and the initial round of briefing in the initial Complaint process. The Treasurer contends that the additional exhibits proffered by Complainant "relate to a fund (Fund VI) that was not contemplated in the initial APRA request ***. These documents are unrelated to the instant appeal, and should not be accepted into the record." The Treasurer also maintains that Complainant's supplemental briefing and exhibits "do not offer new evidence" as "Complainant has already offered the arguments contained in his request in his appeal." Finally, the Treasurer states that the State Investment Commission "will continue to do business during the pendency of this Complaint," which would allow Complainant to "propose exhibit after exhibit *** opening the door to a stream of never-ending additions to the record that are tangentially related to the underlying APRA request."

<u>*Relevant Law*</u>

When we examine an APRA complaint, our authority is to determine whether a violation of the APRA has occurred. *See* R.I. Gen. Laws § 38-2-8. In doing so, we must begin with the plain language of the APRA and relevant caselaw interpreting this statute.

The APRA provides that all records maintained by public bodies are subject to public disclosure unless the document falls within one of the twenty-seven (27) enumerated exemptions. *See* R.I. Gen. Laws § 38-2-2(4)(A)-(AA). One exemption is relevant to this matter.

The APRA 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." R.I. Gen. Laws § 38-2-2(4)(B). Before proceeding, we believe it appropriate to discuss the nature of Exemption (B), its scope, and the appropriate analytical framework on which the parties express disagreement.

First, in *Food Marketing Institute v. Argus Leader Media,* 139 S.Ct. 2356 (2019), the United States Supreme Court recently had the opportunity to analyze the application of the Freedom of Information Act ("FOIA") Exemption 4, which in all material respects mirrors R.I. Gen. Laws § 38-2-2(4)(B). [7] Specifically, FOIA's Exemption 4 exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *Argus Leader,* 139 S.Ct. at 2361 (citing 5 U.S.C. 552(b)(4)). The respondent in *Argus Leader* sought the release of "the names and addresses of all retail stores that participate in the SNAP [USDA national food-stamp program] and each store's annual SNAP redemption data," which the USDA denied in-part on the grounds that this data is customarily kept private due to competitive significance. *Id.* at 2360-61. The Supreme Court rejected the lower court's imposition of a "substantial competitive harm" requirement to exempt commercial information under Exemption 4 as such a requirement does not appear in the plain, ordinary text of the statute. *See id.* at 2366 ("So, just as we cannot properly *expand* Exemption 4 beyond what its terms permit *** we cannot arbitrarily *constrict* it either by adding limitations found nowhere in its terms." (internal citations omitted) (emphases in original)).

The last time the Rhode Island Supreme Court had the opportunity to examine Exemption (B) was prior to *Argus Leader*, adopting the *Critical Mass* test, which is substantively similar to the analysis in *Argus Leader*. 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 FOIA Exemption 4, which mirrors R.I. Gen. Laws § 38-2-2(4)(B). 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 because 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").

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. *See 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 Treasurer's argument and affidavits of Attorney Crane and Mr. Junkin 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 Exemption (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.").

Having established the legal framework surrounding Exemption (B), we now turn to analyze the Treasurer's application of Exemption (B) to the documents it withheld.

<u>Findings</u>

To begin, it cannot be ignored that the Treasurer is contractually prohibited from disclosing "any information or matter relating to the Partnership and its affairs or any information or matter related to any Portfolio Investment (the foregoing, collectively 'Partnership Information')" and the confidentiality agreement "specifically contemplates delivery to ERSRI of the quarterly and annual reports as Partnership Information."

We note that, within the context of Exemption (B) a "contractual obligation to maintain the confidentiality of documents, by itself, [is not dispositive and] cannot supersede the APRA. *See The Providence Journal v. Office of General Treasurer*, PR 14-15. While such a contractual prohibition is not dispositive, the existence of a contractual prohibition and the measures taken by Paine Schwartz to maintain confidentiality, is a relevant consideration to determine whether the quarterly reports are "of a kind that would customarily not be released to the public by the person from whom it was obtained." *Id.* (citing *Convention Center Authority*, 774 A.2d at 47).The reason for our conclusion is the Rhode Island Supreme Court's holding requires this Office to review the totality of the circumstances and conclude that the redacted "financial or commercial information provided to the Government on a voluntary basis is 'confidential'" if it 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 46; *see also Argus Leader*, 139 S.Ct at 2363. Here, the Rhode Island Supreme Court's non-disclosure holding in *Convention Center Authority* is once again relevant and applies in this case with equal force: "It was established * * * that 'customers who contract with the [Authority] do not expect that the documents and financial information they provide will be disclosed to the public." *Id.* at 48; *see also Argus Leader*, 139 S.Ct. at 2363 ("Presumably to induce retailers to participate in SNAP and provide store-level information it finds useful to its administration of the program, the government has long promised them that it will keep their information private."). It is likewise clear that the entities involved in this contractual agreement "do not expect that the documents and financial information they provide will be disclosed to the public." *Convention Center Authority*, 774 A.2d at 48.

Next, Complainant argues that the information in the quarterly reports has already been released to the public by Paine Schwartz and thus Paine Schwartz, and by extension, the Treasurer, has waived the ability to exempt the information contained therein as a confidential trade secret under Exemption (B).[8] However, the Treasurer has provided evidence that the information Paine Schwartz disclosed to the SIC, pursuant to its contractual agreement, is a generalized, high-level version of the itemized, detailed and particularized information contained in the specific quarterly reports provided by Paine Schwartz to the Treasurer that are the subject of Complainant's request. In fact, Complainant makes no argument that the "particular details of each investment, the portfolio construction, the underlying investment thesis and strategic plan for each investment" contained in the subject quarterly reports, is already in the public domain or is of a kind that "would customarily" be released to the public by Paine Schwartz. More importantly, having reviewed the totality of the evidence - including our *in camera* review of the subject reports, which confirms the Treasurer's description of the contents - and arguments submitted, as well as the relevant case law, we conclude that the information in the withheld quarterly reports is "of a kind that would customarily not be released to the public by the person from whom it was obtained." *Id.*

We also consider the Treasurer's argument that if the particular information in the quarterly reports were released to the public it "would be detrimental to the business success of the underlying portfolio companies, and thereby cause direct harm to the value and performance of ERSRI's investments." As the *Critical Mass* court explained, the purpose of Exemption 4 (and here, Exemption (B)) was to "encourag[e] cooperation with the Government by persons having information useful to officials." *Critical Mass Energy Project,* 975 F.2d at 878. Accordingly, the argument that disclosure of this information would hinder the government's ability to obtain similar information in the future was precisely the basis of the decision in *Critical Mass*. *Id.* 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 decisions will be impaired").

Further, our analysis is consistent with a substantively similar issue examined in *The Providence Journal v. Office of the General Treasurer*, PR 14-15. There, a request was made for Due Diligence Reports received from Cliffwater, LLC, which the Treasurer provided, redacting certain commercial and financial information pursuant to Exemption (B). Based upon the totality of the evidence, the redacted material was "of a kind that would customarily not be released to the public by the person from whom it was obtained." *See The Providence Journal,* PR 14-15 (quoting *Convention Center Authority*, 774 A.2d at 47). Much of the commercial and financial information redacted in the Due Diligence Reports mirrors the information contained in the withheld Paine Schwartz Quarterly Reports such as individual fund "portfolio characteristics, investment history, management structure, industry specialization and investment strategies." *Id.* In PR 14-15, we ultimately found no violation with respect to the redactions made.

We do question, however, whether only the names of each individual portfolio companies referenced in the quarterly reports can be made public. The Complainant makes only a passing reference to the names/identities of these companies and the Treasurer makes no argument that the identities of the companies themselves constitutes "[t]rade secrets and commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature." R.I. Gen. Laws § 38-2-2(4)(B). It is unclear to us whether the Complainant seeks this information, i.e., the names of the portfolio companies referenced in the quarterly report and if this information is reasonably segregable. *See* R.I. Gen. Laws § 38-2-3(b). If the Complainant seeks the names of the portfolio companies referenced in the quarterly report, he should communicate or clarify this request to the Treasurer. The Treasurer will then have ten (10) business days to either provide the names of the portfolio companies to the Complainant or otherwise respond consistent with the APRA and this finding. If the Complainant is dissatisfied with the Treasurer's response, the Complainant may notify this Office.

Nonetheless, all of the above emphasizes that while we agree that Rhode Island citizens have an interest in knowing how the ERSRI investments perform, it is readily apparent that much of the high-level information is already in the public domain either through the ERSRI website and publicly filed reports or through the SIC. Equally apparent is that the specific quarterly reports provided by Paine Schwartz to ERSRI contain additional information beyond that which is publicly available that constitutes "trade secrets" or "commercial or financial information of a privileged or confidential nature" within the meaning of the APRA. Accordingly, for the reasons explained herein, and consistent with the relevant case law, we find that the Treasurer's withholding is consistent with Exemption (B) and find no violation.

Lastly, regarding Complainant's argument that the Treasurer should be compelled to produce a *Vaughn* index or "privilege log" enumerating the redacted and withheld documents and specifying the reasons for claiming Exemption (B), we note that court's have generally held that, "the FOIA places the burden on the agency to establish its right to withhold information under one of the enumerated FOIA Exemptions. An agency *may* do so through producing a *Vaughn* index, which is an affidavit that indexes and specifically describes withheld or redacted documents and explains why each withheld record is exempt from disclosure." *Schoenman v. F.B.I.*, 604 F. Supp. 2d 174, 196 (D.D.C. 2009) (internal citations omitted) (emphasis added). While we agree that the APRA does require a public body denying, in whole or in part, access to public records to state in writing "the specific reasons for the denial," R.I. Gen. Laws § 38-2-7(a), the nature by which a public body fulfills this statutory obligation may vary depending on the facts of each case. Here, the Treasurer made clear it was withholding the financial quarterly reports and it provided the basis for doing so. Accordingly, no additional log or index was necessary for the Treasurer to satisfy its obligation that it provide "the specific reasons for the denial." R.I. Gen. Laws § 38-2-7(a). This Office encourages public bodies to be as transparent as possible when responding to APRA requests to facilitate better public understanding of government records and actions and there may be circumstances where a *Vaughn* index or privilege log may be the best method to achieve that end.

Conclusion

Although this Office has found no violation and will not file suit in this matter, nothing within the APRA prohibits the Complainant from filing an action in Superior Court seeking injunctive or declaratory relief. *See* R.I. Gen. Laws § 38-2-8(b). We are closing the file as of the date of this letter.

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

Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL

By: */s/ Kayla E. O'Rourke*
Kayla E. O'Rourke, Esquire

/s/ Adam D. Roach
Adam D. Roach, Special Assistant Attorney General

APRA

[1] The Complainant is a member of the General Assembly. The APRA governs the public at-large's access to government records and does not provide a heightened interest to a Complainant based upon their individualized interest in the requested documents. In other words, our finding is governed by the APRA and we make no determination whether the Complainant may be entitled to access the requested records in his role as a member of the General Assembly.

[2] We understand that "ILPA" stands for the Institutional Limited Partners Association.

[3] http://data.treasury.ri.gov/organization/investments.

[4] The Complainant also raises an argument that there is a public interest in disclosing the quarterly reports that outweighs any "business interest" in withholding. However, unlike R.I. Gen. Laws § 38-2-2(4)(A)(i)(b), the plain language of Exemption (B) does not contemplate a "balancing test" whereby the public interest in disclosure is weighed against the privacy interest implicated. *See* R.I. Gen. Laws § 38-2-2(4)(B). The APRA requires this Office to apply the relevant case law to the plain language of the statute and the facts of each complaint. *See* R.I. Gen. Laws § 38-2-8(b). Accordingly, the Complainant's "public interest" versus "business interest" argument is of no moment, and we need not analyze the same. *See Direct Action for Rts. & Equal. v. Gannon*, 713 A.2d 218, 225 (R.I. 1998) ("We also reject DARE's contention that if any document falls within the APRA's enumerated exceptions, the United States and the Rhode Island Constitutions, as well as the terms of the APRA, require the administrative agency to demonstrate that the relevant privacy interests outweigh the public's right to access the records.").

[5] At the time this finding was issued, Attorney DiPaola had left her position with the Treasurer's Office.

[6] We note that there has been a change in administration of the Office of the General Treasurer since the Complainant submitted his request. Nevertheless, our review must consider the circumstances surrounding the Treasurer's reasoning for denying access to the responsive records at the time the denial was made. *See Newport Daily News v. Department of Public Safety*, PR 12-25 (citing *Bonner v. United States Department of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (R.B. Ginsburg, J.) ("court review properly focuses on the time the determination to withhold is made ***[t]o require an agency to adjust or modify its FOIA responses based on post-response occurrences could create an endless cycle of judicially mandated reprocessing")). There has been no indication that the new Treasurer administration would reach a different conclusion on the non-disclosure of the quarterly reports. Rather, when this Office requested the reports for its *in camera* review, the Treasurer emphasized its desire and duty to keep said reports from being publicly disclosed.

[7] We reference FOIA because the Rhode Island Supreme Court has made clear 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).

[8] No authority has been presented to support a waiver argument and there is at least some Rhode Island authority that counters a waiver argument. *See Fuka v. Department of Environmental Mngt.*, PC 2007-1050 (R.I. Super. April 17, 2007) (Indeglia, J.) ("Simply because the DEM has previously released this information does not strip the licensees of the privacy protections normally afforded to such information."). Because of the discussion, *infra*, we need not address this issue head-on.

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Peter F. Neronha
Attorney General

VIA EMAIL ONLY

January 9, 2025
ADV PR 25-01

Nicholas P. Poulos, Esquire
Associate City Solicitor, City of Providence

Re: **In re City of Providence**

Dear Attorney Poulos:

This Office is in receipt of the City of Providence's ("City") Access to Public Records Act ("APRA") advisory opinion request. By letter dated November 15, 2023, the City sought this Office's advice concerning APRA requests that implicate "blueprint[s] or site plan[s]." The City notes that such records regularly come into the City's possession through its Department of Inspections and Standards, its Department of Planning and Permitting, and its Fire Department. The City states that:

> "Under 17 U.S.C. § 102(a)(8), 'architectural works' are granted copyright protection. 'Architectural works' include 'the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings.' 17 U.S.C. § 101. Unless an exception applies, the copyright holder 'has the exclusive right to … reproduce the work in copies.' *Id.* At 106(1). Naturally, the City has concerns with disseminating copies of copyrighted design plans."[1]

Additionally, the City states that "[n]othing under copyright law appears to prevent the City from allowing *access* to plans requested under the APRA, and the City provides the public access to inspect documents pursuant to R.I.G.L. § 38-2-3(a). Our concern stems from our obligation to provide copies of these documents." (Emphasis is original). The City sets forth that its "preferred solution is … to allow requesters to inspect the documents, and if the requester photographs the document with their own camera, that would be their own choice."

In sum, the City states that it "wishes to clarify its obligations with respect to providing requesters copies of copyrighted architectural plans or the ability to photocopy or photograph them." As such, the scope of this advisory opinion is limited to Section 102(a)(8) of the Copyright Act ("architectural works") and "providing requesters … the ability to photocopy or photograph" such records under the APRA.

In examining whether a particular document or record is or is not considered a public record pursuant to the APRA, we are mindful that our mandate is not to substitute this Office's independent judgment concerning whether a requested document should be publicly disclosed, 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. *See* R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate and simply provide guidance based upon the plain language of the APRA and relevant case law.

Although precedent addressing copyright law in the context of the APRA is limited at the state court level, federal courts have addressed the issue as it applies to the Freedom of Information Act (FOIA).[2]

In *Weisberg v. United States Department of Justice*, the United States Court of Appeals for the D.C. Circuit summarized a copyright holder's rights and potential available remedies, stating in a footnote that:

> "By its literal terms, the Copyright Act gives a copyright holder the 'exclusive' right to reproduce or authorize reproduction of the copyrighted work. 17 U.S.C.App. s 106(1) (1976). In actions for infringement, the courts are afforded a broad range of remedies, including: the imposition of statutory or actual damages, 17 U.S.C.App. s 504; impoundment or destruction of 'all copies . . . found to have been made or used in violation of the copyright owner's exclusive rights,' 17 U.S.C.App. s 503; and injunctive relief 'operative throughout the United States,' 17 U.S.C.App. s 502. *Weisberg v. U.S. Dept. of Justice*, 631 F.2d 824, 829 (D.C. Cir. 1980). [3]

In that same decision, the D.C. Circuit noted that a copyright holder might successfully sue a public body for copyright infringement following production of copywritten material, and that a FOIA ruling directing production of the same "would not necessarily serve as a bar [to such an action]." *Id* at 829.

Although non-binding within our jurisdiction, the Supreme Court of Connecticut in *Pictometry International Corp. v. Freedom of Information Commission* was similarly deferential to copyright protections, noting "the constitutional principle that, when a federal law and a state law conflict and compliance with both laws is impossible, the federal law will preempt the state law." *See Pictometry International Corp. v. Freedom of Information Com'n* 307 Conn. 648, 672 (Conn. 2013). The Court held that when a state public records law "and the Copyright Act impose such conflicting legal obligations, the Copyright Act is a 'federal law' for purposes of the federal law exemption," thus allowing a public body to charge a licensing fee for the reproduction of copywritten records incurred pursuant to copyright law (which conflicted with the state public records law). *See id.* at 658.

Additionally, the United States Supreme Court noted that while the Copyright Act "does not expressly render anyone liable for infringement committed by another … [it] does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity … vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another." *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984). In other words, the Court did not rule out vicarious liability under the Copyright Act, which could potentially render a public body liable for the infringement actions of an APRA requester.

While the APRA does not expressly refer to copyright, it does exempt "[t]rade secrets" and this Office has previously examined a situation wherein a requester sought copywritten material. In *Law Office of Richard S. Humphrey v. Rhode Island Department of Health*, PR 16-06, the requester sought records related to the "Intoxilyzer I-900 [training] manual." In withholding this training manual, the Rhode Island Department of Health [RIDOH] invoked R.I. Gen. Laws § 38-2-2(4)(B) ("Exemption (B)") [4], stating that "[g]iven 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 privilege or confidentiality." In upholding RIDOH's denial of the manual, this Office noted that "disclosure [of the training manual] would hinder the government's ability to obtain similar information in the future," (citing *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 877 ("[u]nless persons having necessary information can be assured 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"). While not within the ambit of copyright law specifically, this Office has upheld similar APRA denials made pursuant to Exemption (B). *See, e.g., Zurier v. Office of General Treasurer*, PR 23-30 (finding that "financials and quarterly reports" of a private equity firm were properly withheld under Exemption (B)).

Here, the City states that its "preferred solution" when a requester seeks copywritten material is to "allow requesters to inspect the documents [without providing copies of the same], and if the requester photographs the document with their own camera, that would be their choice to own."

This Office's purview in this matter is limited to applying and interpreting the APRA. *See* R.I. Gen. Laws § 38-2-8(b). Here, we decline to conclude that an entire category of records maintained by the City is per se exempt without examining the particular circumstances regarding the particular blueprints or site plans at issue, such as whether any particular plans have already been made public or shared in a manner that would limit any copyright protections afforded to them. But as a general matter, it appears that the above-referenced precedent and Exemption (B) would likely provide a basis for the City to exempt such records from production under the APRA, assuming that the nature and circumstances of the particular records at issue are consistent with considering them to be of the type that are not normally publicly distributed. *See Harris v. City of Providence*, PR 17-17 (applying Exemption (B) to exempt records that "are of a kind that 'would customarily' not be released to the public by the person from whom it was obtained" or where disclosure "would 'cause substantial harm to the competitive position of the person from whom the information was obtained'") (quoting *The Providence Journal v. Convention Center*

Authority, 774 A.2d 40, 47 (R.I. 2001)). As such, it appears the City may be able to invoke Exemption (B) to deny access to such records under the APRA. We also note that Exemption (S) could apply to the extent disclosure would be prohibited by federal copyright law. *See* R.I. Gen. Laws § 38-2-2(4)(S) (exempting "[r]ecords, reports, opinions, information, and statements required to be kept confidential by federal law or regulation or state law or rule of court").

When records are public under the APRA, our Office has noted that:

> "the APRA seems to contemplate a public body having the option to provide the records or an *opportunity to come in to inspect and/or copy the records* in response to an APRA request, although the public body must comply with the delivery method selected by the requester if doing so is not unreasonably burdensome. *See* R.I. Gen. Laws § 38-2-3(a) ("every person or entity shall have the right to inspect and/or copy those records at such reasonable time as may be determined by the custodian thereof"); R.I. Gen. Laws § 38-2-3(k) ("At the election of the person or entity requesting the public records, the public body shall provide copies of the public records electronically, by facsimile, or by mail in accordance with the requesting person or entity's choice, unless complying with that preference would be unduly burdensome due to the volume of records requested or the costs that would be incurred."). (Emphasis added). *See Chrostowski v. Town of South Kingstown*, PR 24-50.

As such, if records are public under the APRA, then the APRA provides the requester with the option to elect to receive the records electronically unless it would be unduly burdensome due to the volume or costs of doing so. The City has not provided information indicating that producing the blueprints or site plans electronically or by mail would be "unduly burdensome due to the volume of records requested or the costs that would be incurred." R.I. Gen. Laws § 38-2-3(k). It thus appears that the City would have no basis to limit a requester to in-person inspection of the records if the records are in fact public under the APRA. However, if the records are not public under the APRA and are exempt pursuant to Exemption (B), (S), or any other exemption, then the City would have no obligation to make the records available at all and any access it chose to provide (and the means of providing such access) would be totally at the City's discretion. Accordingly, if the requested records are exempt, then nothing in the APRA would prevent the City from limiting access to the records to in-person inspection.

This Office frequently notes that the APRA is a floor and not a ceiling. Although copywritten materials could in certain instances be permissibly withheld pursuant to Exemption (B), we regularly encourage public bodies "to be as transparent as possible." *See Amaral v. BHDDH and DOA*, PR 24-13. Consequently, the City's "preferred solution" in allowing for in-person inspection is certainly preferable to withholding records in whole or in part, at least from a transparency perspective. We do caution, however, that there may be circumstances where there are legitimate reasons to apply an APRA exemption and not provide public access to records. While we of course encourage public bodies to be "as transparent as possible," our precedent also establishes that the non-production of records is lawful if a violation of federal law would come about otherwise. *See Cote v. City of Warwick*, PR 16-39 ("the disclosure of these documents, even in the redacted manner sought, would violate federal law"); *see Higgins v. Lonsdale Fire District*, PR 15-20 ("the disclosure of these documents, even in the redacted manner sought, would violate federal law"). Although beyond the scope of this finding, we note as a general matter that the precedent cited above also appears to contemplate potential liability for a party that facilitates copyright infringement. The City's submission asserts that "if the requester photographs the document with their own camera, that would be their own choice." Assuming that the records in question are exempt under the APRA, we take no position on whether the City should (or can, under federal copyright law) nonetheless make the records publicly available in some form, and we leave that determination to the City.

Finally, we frequently stress that "communication between the parties is key, as communication between a requester and a public body can often promote understanding, clarify ambiguities, and resolve disputes." *See Belford v. Foster Glocester School District*, PR 24-10. Communication between public bodies and third-party copyright holders is similarly important. The City states that protected architectural works come into the City's possession through its Department of Inspections and Standards, its Department of Planning and Permitting, and its Fire Department. Seemingly, these copyright holders are readily identifiable, and the City could therefore seek permission to reproduce or provide access to such copywritten works in response to an APRA request even if the City believes the records may be exempt. This would promote transparency while also being mindful of the legitimate interests a copyright holder may have in nondisclosure.

This advisory opinion is based upon the specific facts as related and is intended to provide guidance only to the questions posed. Should the facts differ in any respect, it may affect this Office's interpretation and ultimate opinion concerning whether such action would result in a violation of the APRA. This advisory opinion does not abrogate any rights that this Office is vested with pursuant to R.I. Gen. Laws § 38-2-8, and is strictly limited to this Office's interpretation of the APRA as raised in the APRA advisory request. This advisory opinion does not consider the City's responsibility under any other state or federal law, rule, regulation, or ordinance. This opinion also does not shield the City from a complaint filed in the Superior Court by a member of the public or entity filed pursuant to R.I. Gen. Laws § 38-2-8, or any other statute.

We hope that this advisory opinion is of assistance, as this Office is committed to ensuring that public bodies comply with the APRA. We thank you for your interest in keeping government open and accountable to the public.

Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL

/s/ Adam D. Roach
Adam D. Roach
Special Assistant Attorney General

APRA

[1] The City stresses that it is not its intention to request that this Office "opine on copyright law," and asks this Office to assume for the purposes of this advisory opinion that "we are not seeking to assert the *City's* copyright" but are seeking guidance instead as to documents "the City possesses for which *someone else* owns the copyright." (Emphasis added).
[2] We reference FOIA caselaw because the Rhode Island Supreme Court has made clear 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).
[3] We note as a general matter that use of copywritten material is permitted in limited circumstances under the "fair use" doctrine. "Fair use is a defense to an infringement claim, depending on the following statutory factors: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount of the work used, and (4) the economic impact of the use." *See Black's Law Dictionary* (9th ed. 2009).
[4] Exemption (B) 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."