

The Defendant maintains that pursuant to Article I, section 24, Florida Constitution, *Yolmans, supra*, and *Muldowny, supra*, counsel was entitled to review and obtain copies of the relevant portions of the operator's manual in a reasonable manner. Ormond Beach cites Attorney General Opinion #2003-26 which states:

A more recent opinion by this office, Attorney General's Opinion 97-84, struck a balance between the copyright law and Florida's Public Records Law that recognized the doctrine of "fair use," that is, even if a record is copyrighted, federal law permits copying under certain conditions. For example, notwithstanding the exclusive rights of the copyright owner, "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."

In an effort to avoid making records custodians the guarantors of compliance with "fair use," the 1997 opinion suggests that records be made available and that individuals seeking to make copies of their own use be informed of the requirements of the federal copyright law. The opinion counsels records custodians that they "should advise individuals seeking to copy such records of the limitations of the federal copyright law and the consequences of violating its provisions." The opinion does not advise a records custodian to reproduce copyrighted material for distribution but suggests measures to be taken to protect the custodian from liability in the event that materials which are subject to the copyright law and the public records law are copied for unauthorized purposes.

The defense argues that they are not utilizing the copies for commercial purpose and are entitled to obtain relevant copies of the manual under the fair use doctrine and also need the copies to properly prepare and present a defense.

III. CONCLUSIONS and RULING:

The Court agrees that Defendant is entitled to a reasonable opportunity to inspect and copy the requested documents pursuant to Florida Constitution, Article I, section 24 and/or Defendant's fundamental right to due process of law. Should the police department decline to make copies of the requested documents or portions thereof then the Defendant or his representative should be allowed reasonable access to the documents and a copy machine subject to the normal fees allowed by Chapter 119. The Court further notes that based upon the arresting officer's stipulation the citation was dismissed.

* * *

13 Fla. L. Weekly Supp. 627a

Criminal law -- Driving under influence -- Discovery -- Intoxilyzer software source code -- Where, by demonstrating only mere possibility that requested Intoxilyzer software source

code will help defense, defense has failed to meet burden of showing that requested information is material to case preparation, and each party has equal access to source code in possession of Intoxilyzer manufacturer, motion to compel production of source code is denied -- Public records -- Manufacturer is not private entity subject to Public Records Act -- Entering into contract to provide professional services to state agency does not constitute acting on behalf of public agency

STATE OF FLORIDA, v. JAMES SPALDING, et al., KEITH ALEXANDER, THOMAS ALTMAN, WILLIE ANDERSON, PEKKA ANTOSALO, ROBERT ARTHUR, TOMAS BAILONSALAMNO, THOMAS BARLEY, JODI BEALE, BRENDA BECKMAN, CARLOS BENTURO, STEPHEN BOND, GLENN BOOKSPAN, ROBERTO CALDERON, JASON CARRIER, ROBERT CARSON, ERIC COHEN, MAUREEN COLE, TERRY COLE, STEPHEN CONGEMI, DONALD COOK, MARY COOK, FABIANO DEALMEIDA, DONIS DELEONHERRERA, JOHN DELMASTRO, JASON EMERICK, BENJAMIN FIELD, FREDERICK FINIZIO, CARLOS GARCIAMORALES, JAMES GERGELY, RANDALL GLOVER, JAMES GURLEA, ASHLEY HAMBY, CHAD HEMMINGER, JOSE JIMINEZ, RICHARD KING, GREGORY LANDMAN, JAMES LEWIS, GEORGE LIVESAY, NATHAN MADDOX, ALEJANDRO MANRIQUE, JOHN MAUGHAN, GEORGE MAULDEN, IGNACIO MEDINA, TERRI MERSHON, STEVEN MESSIER, BRIAN MILLER, JACK MILLER, JACQUELYN MILLER, STACEY MILLER, MERRIDETH MOHR, JULIUS NELSON, HARRY OLSON, MIGUEL PASCUALMIGUEL, YONY PEREZ, ALEXANDRA PFLIEGER, MARCO RECINOSMAYEN, CALVIN PIERRE, FELIX RESTO, SCOTT RICHMAN, RUTILIO RIVERA, TIMOTHY ROBARGE, ARLEEN RODRIGUEZ, PATRICK SAMY, LEROY SMITH, MATTHEW SMITH, RANDAL SMITH, SHAWN SMITH, LISA SNOOK, KENNETH STEWART, KEVIN STOCKEL, SAMUEL SUAZOPALMA, GEORGE TAYLOR, LYNN TURCOTTE, DANIEL TURNER, PATRICK WALSH, JOHN WEST, JACQUELINE WHALEN, HAROLD WILLIAMS, EDWARD WILSON, ROBERT WRIGHT, Defendants. County Court, 15th Judicial Circuit in and for Palm Beach County, Criminal Division. Case Nos. 05-034808 TC A08 "M", 05-028795TC A02 "B", 05-026112TC A02 "P", 05-024467MM A02 "P", 05-031925TC A04 "L", 05-027632TC A02 "P", 05-021280TC A02 "L", 05-024441TC A02 "L", 05-022539TC A02 "C", 05-020579TC A02 "P", 06-001244MM A04 "B", 02-002744TC A02 "C", 05-022784TC A02 "C", 05-017047TC A02 "P", 05-023761TC A02 "C", 05-026396TC A02 "B", 05-030561TC A04 "B", 05-017705TC A08 "P", 05-026380TC A02 "P", 05-027962TC A04 "B", 05-031200TC A02 "L", 03-019759TC A02 "M", 05-031957TC A04 "C", 05-029809TC A02 "L", 03-030497TC A02 "P", 05-030575TC A04 "B", 05-001066TC A02 "C", 05-028058TC A02 "C", 05-024214TC A02 "M", 99-023032TC A04 "L", 05-022278MM A08 "C", 05-034943TC A02 "L", 05-016584MM A02 "P", 05-028999TC A02 "P", 04-023224TC A02 "C", 05-024010MM A02 "L", 04-018811TC A04 "M", 05-027320TC A02 "M", 04-014849TC A04 "L", 05-032269TC A02 "C", 05-032589TC A02 "B", 05-024126MM A08 "B", 05-024126MM A08 "B", 05-028370TC A02 "M", 05-026603MM A02 "C", 05-035760TC A04 "B", 05-031415TC A04 "P", 05-017510TC A04 "L", 05-030071MM A02 "L", 05-020835TC A08 "C", 05-031624TC A08 "C", 04-000977TC A04 "P", 04-004466TC A02 "P", 05-023356TC A02 "L", 05-037548TC A02 "P", 05-012987TC A02 "L", 05-027247TC A08 "B", 06-002883TC A02 "E", 05-027649TC A04 "M", 05-024699TC A04 "L", 05-014647TC A04 "M", 05-037666TC A04 "B", 05-024442TC

A04 "P", 05-028133TC A04 "M", 05-021418TC A02 "M", 06-000302MM A04 "P", 05-035637TC A02 "P", 05-017551MM A08 "B", 05-010222MM A04 "E", 05-026480TC A04 "P", 05-030121TC A02 "B", 05-032684TC A02 "C", 05-031277TC A04 "M", 05-035960TC A08 "B", 04-016418TC A02 "P", 05-011768TC A04 "P", 05-015345TC A04 "C", 05-037188TC A04 "L", 03-026064TC A02 "M", 05-031954TC A04 "L", 05-012544TC A04 "C". February 28, 2006. Paul Damico, Joseph Marx, Mark Eissey, and Paul O. Moyle, Judges. Counsel: Elizabeth Parker, Assistant State Attorney, West Palm Beach. Brian P. Gabriel, Palm Beach Gardens. William Paul, Assistant Public Defender, West Palm Beach. Mitchell J. Beers, Palm Beach Gardens. John Garcia, West Palm Beach. Bonnie Willis Hutton, Jupiter. Ira D. Karmelin, West Palm Beach. Glenn H. Mitchell, West Palm Beach. Edward Reagan, West Palm Beach. Richard Springer, Palm Springs. Frederick Susaneck, West Palm Beach. William Wallshein, Lake Worth.

ORDER ON DEFENDANTS' MOTION TO COMPEL

PRODUCTION OF SOFTWARE SOURCE CODE

THIS CAUSE came before the Court for an en banc hearing on February 10, 2006 on Defendants' Motion to Compel Production of Software Source Code (Motion). After carefully examining and considering the motions, all applicable legal authorities and hearing the testimony of witnesses and argument of counsel, it is hereby

ORDERED AND ADJUDGED as follows:

PROCEDURAL HISTORY AND RELEVANT

FACTUAL BACKGROUND

In each case, the Defendants were arrested by law enforcement officers and charged with driving under the influence in violation of Florida Statute §316.193. Palm Beach County law enforcement officers utilized the Intoxilyzer 5000 to analyze the breath alcohol content of samples taken from the Defendants. The Intoxilyzer 5000 is manufactured by CMI, Inc., a Kentucky corporation. At the heart of the central processing unit of the Intoxilyzer 5000 is the Erasable Programmable Read Only Memory (EPROM). EPROMS contain all of the programmed functions for the Intoxilyzer 5000.

As of July 1, 1992, the Legislature delegated to the Florida Department of Law Enforcement (FDLE) the task of evaluating the Intoxilyzer 5000 as part of its role in administering Florida's Implied Consent Program. Florida's Implied Consent Law provides that only approved breath testing machines may be used to establish impairment. *See* Florida Statute §316.1932. In 1993, the FDLE approved the Intoxilyzer 5000 for evidentiary use. *See* Rule 11D-8.003, F.A.C.

The Defendants claim that the Intoxilyzer 5000 has undergone "substantial changes and modifications. . ." that affect the operation of the machine. (P. 3, Motion). The Defendants are asking this Court to compel the State to produce the source code for the EPROMS, along with

the FDLE approved software EPROM. All parties stipulated that the source code for the EPROMS is trade secret information. The Defendants argue, however, that they are entitled to the software source code because Fla. Stat. §316.1932(1)(f)(4) provides that, when a person tested on an approved machine requests “full information” concerning the test, it is to be made available (P. 4, Motion). The Defendants also argue that they are entitled to the requested information because CMI is a private agency subject to Florida's Public Records Request. Conversely, the State contends that the Defendants' motion is legally insufficient.

ANALYSIS AND LEGAL RULINGS

All Defendants chose to participate in discovery. Rule 3.220(b)(1) of the Florida Rules of Criminal Procedure provides that the prosecutor “shall disclose to the defendant and permit the defendant to inspect, copy, test, and photograph” information and material “within the *state's possession or control . . .*” (Emphasis added). We find *Lopez v. Singletary*, 634 So.2d 1054 (Fla. 1993) (*Lopez*) persuasive. In *Lopez*, the defendant requested access to the records of the polygraph examiner and the doctor. The defendant argued that the state had a duty to produce those records. The Court disagreed and stated that, “the state attorney is not responsible for giving access to outside agencies' records, but, instead, requests must be made directly to those agencies.” *Id.* at 1058; *citing Hoffman v. State*, 613 So.2d 405 (Fla. 1992). None of the Defendants have made an attempt to obtain the software source code directly from CMI, Inc. Instead, the Defendants are asking this Court to compel the State to obtain the software source code from an outside agency. Based on *Lopez*, we decline to do so. *See also, State v. Miranda*, 777 So.2d 1173 (Fla. 3d DCA 2001) (State was not required to produce documents within the custody and control of federal agencies).

The burden to show entitlement to discovery rests squarely with the Defendants. The Defendants must show “*materiality*” to the preparation of the defense in order to secure an order requiring further discovery.” *Eagan v. DeManio*, 294 So.2d 639, 640 (Fla. 1974). Upon a showing of materiality, subsequent discovery shall be only “as justice may require.” *Id.*; *see also*, Rule 3.220(f), Fla. R. Crim. P.

Evidence is material if it “tends to negate the guilt of the accused as to the offense charged.” *James v. State*, 453 So.2d 786, 789 (Fla. 1984); *see also*, Rule 3.220, Fla. R. Crim. P. The “mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality.” *Id.* at 789. Moreover, there is no obligation for the state to turn over information where a defendant and the state have the same access to the information. *Id.* at 790. In the instant case, the defense failed to meet its burden in proving that the requested information is material to the preparation of its case. The evidence and testimony presented demonstrated only a mere possibility that the requested information would help the defense. *See also, State v. Fuller*, 12 Fla. L. Weekly Supp. 811a (Fla. 18th Jud. Cir. May 11, 2005) (the court found that the opinions of Dr. Myler¹ concerned possible, speculative or hypothetical effects of changes to the EPROMS). Furthermore, each party has the same access to the requested information. This Court, therefore, finds that the defense is not entitled to the discovery requested.

Additionally, the Defendants argue that, pursuant to *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla. 1992) (*Schwab*), CMI, Inc. is a private entity subject to Florida's Public Records Act. In *Schwab*, the Florida Supreme Court utilized the "totality of factors" approach to determine whether a private entity is subject to the Public Records Act. The factors to be considered include, but are not limited to: 1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether services contracted for are an integral part of the public agency's chosen decision-making process; 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; 6) the extent of the public agency's involvement with, regulation of, or control over the private entity; 7) whether the private entity was created by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for who's benefit the private entity is functioning. *Schwab* at 1031. An agency is defined as a private entity "acting on behalf of any public agency." *Id.*; citing Fla. Stat. §119.011(2). In this case, CMI, Inc. does not fall under the statutory definition of an agency. Moreover, none of the above-mentioned factors are applicable to the facts of this case. The defense relies on the alleged contract between CMI, Inc. and the State. However, as the Court held in *Schwab*, a private corporation does not act "on behalf of" a public agency merely by entering into a contract to provide professional services to the agency. *Id.* Thus, we hold that there was no evidence presented to demonstrate that CMI, Inc. is a private entity subject to the Public Records Act.

Accordingly, the Defendants' Motion to Compel Production of Software Source Code is DENIED.

¹Dr. Myler was the sole witness for the defense at the hearing in this case.

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Pat Gleason	Thanks all.... I am not sure that I will include the...	06/28/2011 03:40:02 PM
Joslyn Wilson	These are not unreported cases but are availabl...	06/28/2011 03:20:14 PM
Kimberly Money	Hello,	06/28/2011 03:16:04 PM