THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS SUPERIOR COURT

Docket No. 219-2014-CV-00386

New Hampshire Right to Life

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Jackie Pelletier

v.

New Hampshire Director of Charitable Trusts Office

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New Hampshire Attorney Generals Office

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New Hampshire State Board of Pharmacy

&

New Hampshire Department of Health & Human Services

NHRTL & PELLETIER'S TRIAL BRIEF

This is a Right to Know action under RSA 91-A for four different categories of documents that have been requested from the state: (1) documents regarding abortion clinic buffer zones from the Attorney General's Office, (2) Board of Pharmacy documents (3) Pharmaceutical protocols and (4) financial data from the Director of Charitable Trusts. The state agencies have refused to produce the requested documents or, in many cases, give reasons for the non-disclosure. The Supreme Court has recognized that when "a public entity seeks to avoid disclosure of material under the Right to Know Law, that entity bears a heavy burden to shift the balance toward non-disclosure." *Hampton Police Assoc. v. Town of Hampton*, 162 N.H. 7, 11-12

(2011). The state has the burden of demonstrating that statutory exemptions apply and failure to make the requisite showing must result in disclosure. See *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540, 551 (1997) ("The judicial remedy of summary disclosure may be appropriate where a public agency has improperly withheld agency records... Imposition of heavy penalties for violating the Right–to–Know Law may be appropriate to ensure the broadest possible access to public records.") In this case, the state has not met its burden and the Court should order production of the documents and award of attorneys' fees and costs.

I. Attorney General Office's Abortion Clinic Buffer Zone Documents

On July 28, 2014, petitioners requested documents from the Attorney General's Office regarding its communications with abortion clinics and documents regarding abortion clinics. See Exhibit C to Complaint. On September 4, 2014, the Attorney General's Office [AGO] responded producing some documents but refusing to produce other documents. See Exhibit D to Complaint. Pursuant to RSA 91-A:4(IV), a denial of a public records request must include written reasons for such denial. AGO's response vaguely cites the entire exemption provision and states that the withheld "information includes, ***but is not limited to***, personal contact information and attorney work product." (emphasis added) See Exhibit D to Complaint.

On September 4, 2014, Petitioners requested the AGO identify what categories of documents it was withholding and the basis for the AGO's reasoning. In particular, the plaintiffs requested that the AGO identify which documents it was withholding on the basis of work product and which documents it was withholding under the alleged "including but not limited to" exception. See September 4, 2014 email attached as Exhibit 5, p. 2. The AGO refused to respond for over a month. On October 11, 2014, the plaintiffs repeated the request that the AGO "provide an

explanation of the documents you are withholding and the basis for the withholding so we may properly evaluate whether there is a basis for the claimed exemption." See Exhibit 5. The AGO "respectfully declined" to provide an explanation of its redactions "absent a court order." Exhibit 5.

In its Answer, submitted to this Court on December 8, 2014, the AGO once again refused to identify what documents it was withholding or provide justifications for its withholdings. Once again, the AGO stated that it was withholding documents because it contains information that may be exempt from disclosure "including, ***but is not limited to***, personal contact information and attorney work product." See Answer, ¶ 64.

The Supreme Court has held that the agency seeking to withhold documents bears a heavy burden of providing an "explanation full and specific enough to afford the [petitioners] a meaningful opportunity to contest, and the [superior] court an adequate foundation to review, the soundness of the withholding." *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540, 549 (1997). The AGO did not provide any explanation for its withholdings. Where the AGO has been given an opportunity to give rationales for its withholdings but has refused to do so, the AGO has waived any applicable exemptions and must produce all responsive documents. *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540, 551 (1997)(it is "proper for the court to order summary disclosure of all documents inadequately described.")

a. AGO Has Not Met Its Burden of Showing Withheld Documents Are Work Product

The AGO has the burden of proving each document it is withholding is actually privileged work product. When "a public entity seeks to avoid disclosure of material under the Right to Know Law, that entity bears a heavy burden to shift the balance toward non-disclosure."

Hampton Police Assoc. v. Town of Hampton, 162 N.H. 7, 11-12 (2011). The AGO has failed to show all of the withheld documents are in fact privileged work product.

The New Hampshire Supreme Court has defined work product to be limited to the mental impressions of an attorney.

> [W]ork product of an attorney consists generally of his mental impressions, conclusions, opinions, or legal theories, witness statements that contain purely factual information do not fall within the ambit of the doctrine. State v. Zwicker, 151 N.H. 179, 191 (2004).

Statements from third party potential witnesses are not protected work product. Nevertheless, the AGO is withholding documents and communications from third party abortion clinic workers. For example, on July 8, 2014, the AGO received the Affidavit of Meagan Gallagher from Planned Parenthood. See attached as Exhibit 1. The AGO has improperly withheld this affidavit.[1]

Similarly, the state has failed to produce the DVDs it obtained from Planned Parenthood of the Pennacook Street sidewalk. See attached as Exhibit 4. These DVDs do not show the mental impressions of attorneys but rather people praying on a public sidewalk in Manchester. There is no basis for claiming a work product privilege for these DVDs.

Finally, the AGO is claiming work product privilege for unknown other documents. This may include documents such as AGO emails recounting facts learned. Such documents and emails must also be disclosed, even if they partially contain attorney work product, in redacted form. See State v. Chagnon, 139 N.H. 671, 676-77 (1995)(holding that reports containing both facts and attorney impressions must be produced with attorney impressions redacted).

[1] The fact that the state had considered calling Ms. Gallagher as a witness but chose not to call her as a witness is irrelevant. In the Zwicker case, the Supreme Court upheld requiring production of summaries of expected witnesses holding that the facts that a party's witness may testify to is not an attorney's mental impressions but the facts of a third party. State v. Zwicker, 151 N.H. 179, 192 (2004).

b. AGO Has Not Met Its Burden For Personal Privacy Redactions

The plaintiffs have a right to know who is providing facts to the state and how to contact that person to challenge the facts or obtain more information. For example, Attorney Jennifer Frizzell, a lobbyist and spokesperson for Planned Parenthood, appears to have several telephone calls and emails with the AGO. The AGO has redacted Ms. Frizzell's email address for "personal privacy" reasons. See Exhibit 1. Attorney Frizzell is well known lobbyist and publishes her contact information on the lobbyists forms available on the secretary of state's website. See Exhibit 2. Ironically, the State redacts Ms. Frizzell's email address from emails sent directly to the AGO but does not redact Ms. Frizzell's email address that is included in Ms. Frizzell's press releases. See Exhibit 3. The AGO has not met its burden of demonstrating a basis for redacting contact information on the basis of personal privacy.[2]

c. AGO Has Not Met Its Burden for Documents for Undisclosed Reasons

In addition to the documents withheld or redacted for personal privacy or work product reasons, the AGO has also withheld documents for undisclosed reasons. AGO's response to the right to know request vaguely cites the entire exemption provision and states that the withheld "information includes, ***but is not limited to***, personal contact information and attorney work product." (emphasis added) See Exhibit D to Complaint. Petitioners requested of what additional information was being withheld and the basis for the withholding and the AGO refused to provide a basis for the claimed withholding or identify what documents it was withholding.[3] In particular the AGO stated:

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[2] Similarly the AGO has redacted contact information for the directors of the Lovering and Concord Feminist abortion clinics. See Exhibit 1. Again, there is no basis to redact contact information as both of these individuals were listed as witness and are the executive directors of their respective abortion clinics.

[3] Given the AGO's responses it is difficult to ascertain the extent of its withholdings. Nevertheless, it appears that the withholdings include, but are not limited to, email such as pages 1 and 3 to 14 of AGO Elizabeth Lahey's emails.

> We identified the categories for the exemptions and, absent a court order, are not required to provide a Vaughn Index. See *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 583 (2006). Accordingly, I respectfully decline your request. See Exhibit 5.

In fact, even after the filing of this action the AGO continues to refuse to indicate what documents it is withholding or the basis for the withholdings stating that it has withheld an unknown number of documents "including, ***but is not limited to***, personal contact information and attorney work product." See Answer, ¶ 64.

"The purpose of the Right-to-Know Law is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies and their accountability to the people." *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 581 (2006). *Murray* does not stand for the proposition that the state can refuse to produce documents or refuse to even give a reason for the documents it is refusing to produce until ordered by the Court to do so as alleged in the AGO's October 13, 2014 email. See Exhibit 5. In fact, the Supreme Court stated in *Murray* that agencies must explain their alleged exemptions "clear enough to permit a court to ascertain how each category of documents, if disclosed, could interfere with the investigation." *Id.* The AGO has not provided a clear reason for the withheld documents – it has provided no reason at all. Where the AGO has been given an opportunity to give rationales for its withholdings but has refused to do so, the AGO has waived any applicable exemptions and must produce all responsive documents. *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540 (1997).

See attached as Exhibit 6. (AGO's production included documents with page numbers that skipped from 2 to 13). Page 17 discusses the unproduced legislative history and aforementioned DVDs so the missing emails may be discussing the unproduced DVDs.

III. Board of Pharmacy Documents

On July 14, 2014, petitioners submitted a Right to Know Request to the New Hampshire Board of Pharmacy pursuant to RSA 91-A. See Exhibit E attached to Petition. In particular, petitioners requested Board of Pharmacy documents related to the six Planned Parenthood clinics licensed under RSA 318:42(VII).

In previous years, the BOP responded by producing redacted or unredacted[4] copies of the Limited Retail Drug Distributorship licenses and all of the supporting documentation. In 2014, BOP produced some documents but refused to produce other documents claiming an exemption under RSA 91-A:5 and RSA 318:30, I. See Exhibit F to Petition. In particular, the BOP refused to identify the basis for redacting what appears to be a handwritten note of BOP staff and refused to produce supporting documentation on the basis of RSA 318:30, I.

a. BOP Has Not Met Burden of Justifying Redactions on LRDD Applications

On each of the six LRDD applications, the BOP has redacted what appears to be a handwritten notation of BOP staff on the upper left hand corner of the application sheet. See attached as Exhibit 7. BOP has asserted RSA 91-A:5 (in its entirety) as the basis for this redaction. Nevertheless, RSA 91-A:5 does not provide a basis for redacting government agency's notations on a license application. Furthermore, contrary to the argument raised in the State's Answer,¶ 69, the previous action of *NHRTL v. Board of Pharmacy*, Docket No. 2012-CV-00774, Merrimack Cty. Super. Ct. (April 3, 2013) did not consider the redacting of notations by BOP staff. The 2012 Right to Know action was concerned with the redaction of site manager identities at the clinics. The Superior Court did not consider redactions of BOP staff notations but only whether BOP could redact the identities of abortion clinic site managers and consulting

[4] In 2011, the BOP produced mostly unredacted applications. See Exhibit 14. In 2012, the BOP produced license applications with certain names redacted but then, on April 29, 2013, produced a complete certified record including not redacting the previously redacted names. See Exhibit 8.

pharmacists. Regardless, even the site manager and consulting pharmacist personal privacy finding of that prior Superior Court decision is inapplicable as, on April 29, 2013, (subsequent to the April 3, 2013 decision, and while NHRTL's motion for reconsideration was pending) the BOP produced completely unredacted copies of the 2012 license applications. See attached as Exhibit 8. Therefore, there was no need to appeal the Superior Court's April 3, 2013 decision as the BOP produced all of the requested documents before the end of the appeal period.

The BOP has not even attempted to justify[5] its personal privacy redactions in response to the plaintiff's 2014 requests that are at issue in this case and therefore those arguments have been waived.

b. The BOP Has Not Met Its Burden of Justifying the Withholding of Documents Pursuant to RSA 318:30, I

The BOP has also withheld supporting documents on the basis that the documents relate to a pending disciplinary investigation against licensee Planned Parenthood. See Exhibit F to Petition. When seeking to withhold documents on the basis of a pending disciplinary investigation, "The key question in the analysis is whether revelation of the documents could reasonably be expected to interfere with enforcement proceedings." *Murray v. New Hampshire Div. of State Police, Special Investigation Unit*, 154 N.H. 579, 583 (2006). The BOP has refused to, "***absent a court order***," identify what types of documents are being withheld in response to

[5] Speculation about negative consequences that may result from disclosure of names is unwarranted as the BOP disclosed the names from the 2011 and 2012 applications and no negative consequences resulted from that public records release. See Exhibit 14 & 8. Furthermore, in 2013, the BOP argued and the Merrimack Superior Court ruled that abortion clinic employees were entitled to heightened privacy interests due to the First Circuit's finding of the necessity of abortion clinic buffer zones in the case of *McCullen v. Coakley*. See April 3, 2013 Order, p. 7-9. On June 26, 2014, the United States Supreme Court unanimously reversed the First Circuit. The public has an interest in whether the Board of Pharmacy is properly regulating LRDDs pursuant to RSA 318:42(VII). The public interest in disclosure is heightened now that these LRDD licensee employees are being paid by state taxpayer dollars. *Union Leader Corp. v. New Hampshire Ret. Sys.*, 162 N.H. 673, 684 (2011)(privacy interest in names is lessened when they are recipients of taxpayer funds). Theses employee salaries were not being paid by state taxpayer dollars in April 2013 but pursuant to Executive Council actions in June 2013 and January 2014, the abortion clinic employee salaries are being paid by a state grant. See Exhibit 12. Therefore, the public has a heightened interest in disclosure that outweighs any privacy interest.

what disciplinary investigation. See Exhibit H to Petition. The BOP has not even identified how few pages are at issue. At the very least, the BOP must identify what disciplinary investigation, the dates of the investigation and non-exempt details about the withheld documents such as the sender, recipient and date of the withheld documents. The BOP must also show how disclosure would interfere with any ongoing investigation. As the Supreme Court indicated in the *Murray* decision, "The categorization should be clear enough to permit a court to ascertain how each category of documents, if disclosed, could interfere with the investigation." *Murray v. New Hampshire Div. of State Police,* 154 N.H. 579, 583 (2006). Refusing to provide any information about the withheld documents "***absent a court order***" clearly fails to meet its burden of justification.

RSA 318:30 exempts from disclosure only those documents that exist only because of a pending disciplinary investigation pursuant to RSA 318:30. It does not exempt documents created before or after the disciplinary investigation or for investigations brought under different statutes. In this case, NHRTL had filed a complaint with the BOP on April 17, 2012 which resulted in a disciplinary investigation by the BOP into Planned Parenthood in the spring and summer of 2012. This investigation was closed on October 26, 2012. See attached as Exhibit 9. Therefore, any documents related solely to the BOP's disciplinary investigation pursuant to RSA 318:30 would be prior to October 26, 2012. The Right-to-Know request at issue in this case specifically only requested documents since July 1, 2013. See Exhibit F to Petition. Therefore, BOP cannot withhold documents on the basis on a disciplinary investigation that closed on October 26, 2012.[6]

[6] NHRTL had appealed the BOP's disciplinary determination of October 26, 2012. Although the Supreme Court accepted the case solely on the issue of standing, and, in a decision dated May 22, 2014, determined that NHRTL did not have standing under RSA 541 to bring the appeal, the BOP had produced the entire disciplinary file in April 2013 and therefore documents prior to 2013 are not at issue.

NHRTL (together with taxpayers Betty Buzzell and Robert Carbone) had also filed a petition for a Declaratory Judgment pursuant to RSA 491:22 in the Cheshire Superior Court on October 25, 2013, regarding the BOP's unlawful action on Planned Parenthood licenses. This was not, however, an action pursuant to RSA 318:30, but a Declaratory Judgment action pursuant to the taxpayer standing[7] provision of RSA 491:22. Therefore, any factual information relating to the Buzzell action in Cheshire County would not be exempt pursuant to RSA 318:30, I.[8]

Finally, the BOP has not met its burden of showing the withheld documents relate solely to a disciplinary investigation pursuant to RSA 318:30, I. In fact, in its Answer, ¶ 47, the BOP states that it is "without sufficient information to either admit or deny" that "some documents withheld by the BOP were not unique to any disciplinary investigation." [9] The statute only exempts "Board investigations and any information obtained by the board pursuant to such investigations." There is no evidence that any investigation was pending or that the Board commenced any investigation subsequent to the July 1, 2013 date for the Right-to-Know Request. The BOP has not even attempted to meet its burden of showing that the withheld documents were created for a RSA 318:30 investigation. If the withheld documents relate to Planned Parenthood's request for a Limited Retail Drug Distributorship licenses pursuant to RSA

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[7] On August 22, 2014 the New Hampshire Supreme Court declared the legislature's expansion of taxpayer standing unconstitutional and therefore dismissed the case of Buzzell, Carbone & NHRTL v. Board of Pharmacy on October 23, 2014.

[8] Whether the documents may be exempt from disclosure for other reasons is not before the Court as the BOP has not asserted any other claimed exemptions.

[9] The BOP's refusal to confirm that the documents it was withholding under an allegation that they were part of a disciplinary file were in fact part of a disciplinary file is bad faith pursuant to RSA 91-A:8, I. Under *Murray*, the burden is on the state to provide enough specification to allow meaningful review and the Court held in *Murray* that a 1 page description of the 20 categories of documents was insufficient to meet the state's burden. In the present case, the BOP has not even bothered to review its own documents to confirm that all of the documents it was withholding was unique to any disciplinary investigation. The 2012 disciplinary investigation (which was initially withheld but then produced to NHRTL in April 2013) contained less than 20 pages unique to the disciplinary investigation. Any 2013 disciplinary investigation likely contained even fewer pages.

318:51-b, then the documents would not be exempt from disclosure just because they may have made their way into a disciplinary file as well. "[M]erely because a piece of paper has wended its way into an investigative dossier created in anticipation of enforcement action, an agency ... cannot automatically disdain to disclose." *Murray v. New Hampshire Div. of State Police*, 154 N.H. 579, 583 (2006). Likewise, the BOP cannot refuse to produce all documents relating to Planned Parenthood even if it established that there was an ongoing disciplinary investigation into Planned Parenthood.[10]

When the BOP was asked to justify its non-disclosure under RSA 318:30, I, the BOP ironically refused to provide any justification by citing *Murray v. New Hampshire Div. of State Police* 154 N.H. 579, 583 (2006). See Exhibit H to Petition. The citation to *Murray* is ironic as the state in *Murray* was held to have failed to meet its burden. *Murray v. New Hampshire Div. of State Police*, 154 N.H. 579, 584, (2006) ("we conclude that the respondents have not met their burden to demonstrate how disclosure of the requested documents could reasonably be expected to interfere with any investigation or enforcement proceedings.) While *Murray* did hold that a *Vaughn* index or in camera review may not be required in every case,[11] it did not hold that the state could simply refuse to provide ***any*** justification. Subsequent to *Murray*, the Supreme Court upheld an exemption where the agency provided an affidavit that "precisely define[d] the nature of the documents, [and] explain[ed] how disclosure of such documents could interfere with the investigation." *38 Endicott St. N., LLC v. State Fire Marshal, New Hampshire Div. of Fire*

[10] Pursuant to *Murray*, an agency must not only show that there was an investigation but also that an enforcement action was reasonably anticipated. The BOP has made no showing that an enforcement action against the Planned Parenthood licensee is reasonably anticipated.

[11] As previously stated, how the BOP may justify withholdings and redactions will largely depend on the number of pages at issue. Where there are likely less than 20 pages original to any disciplinary investigation (which BOP has not even established existed) then there is little burden in requiring a *Vaughn* index to justify the BOP's withholdings.

Safety, 163 N.H. 656, 665 (2012). Nevertheless, the BOP has not made any effort to comply with either part of the *Murray* test. It has not shown that the withheld documents were unique to a disciplinary investigation under RSA 318:30 nor has it shown that release of those documents would interfere with enforcement that is reasonably anticipated. Where the BOP has been given multiple opportunities[12] to give rationales for its withholdings but has repeatedly refused to do so, the BOP has waived any applicable exemptions and must produce all responsive documents. *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540, 551 (1997) ("The judicial remedy of summary disclosure may be appropriate where a public agency has improperly withheld agency records... Imposition of heavy penalties for violating the Right–to–Know Law may be appropriate to ensure the broadest possible access to public records.")

IV. Pharmaceutical Protocols

Petitioners also requested from the New Hampshire Department of Health and Human Services [DHHS] a copy of the pharmaceutical protocols required of LRDD licensees under RSA 318:42, VII(a). On October 28, 2014, DHHS provided a heavily redacted copy of the protocols approved on June 21, 2013. See attached as Exhibit 10. The redactions are substantially similar to the earlier requested pharmaceutical protocols which redacted entire pages of pharmaceutical procedures in their entirety. See Exhibit G to Complaint. The unredacted section headings make clear that the document provides the procedure for complying with state and federal pharmaceutical regulations. See Exhibit 10, 11[13] & Exhibit G. Different entities should have substantially similar pharmacy protocols. There is no exemption from the

[12] The BOP did not provide any justification for its nondisclosure in July 31, 2014 response (see Exhibit F), in its August 1, 2014 email (see Exhibit H) or even in its December 8, 2014 Answer, ¶¶ 46-48.

[13] Exhibit 11, the Joan Lovering abortion clinic pharmaceutical protocols, were produced by the AGO as part of the buffer zone files. Nevertheless, NHRTL has made requests for not just PP's pharmaceutical protocols but also the Lovering and Concord abortion clinics.

Right-to-Know law for pharmaceutical protocols required by statute. Nevertheless, DHHS, citing *Perras v. Clements*, 127 N.H. 603 (1986) and *Hampton Police Assoc. v. Town of Hampton*, 162 N.H. 7 (2011), alleges that the redactions constitutes exempt "proprietary[14] and commercial information."

DHHS has not met its burden of justifying its blanket redaction of the pharmaceutical protocols. First, *Hampton Police Assoc. v. Town of Hampton*, 162 N.H. 7 (2011) does not support DHHS's position. *Hampton* involved a request for a Town's attorney billing records. The Court did not apply the balancing test for confidential documents as it held that the billing records were not per se protected by an attorney client privilege. Second, *Perras v. Clements*, 127 N.H. 603 (1986) is likewise inapplicable. *Perras* involved requests for property appraisals from the state while the state was "still in the process of litigation and/or condemnation." *Id.* at 606. Subsequent to *Perras*, the Court decided *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540, 551 (1997), in which the Court upheld the disclosure of the alleged confidential commercial documents. The Court also set the standard for allegedly exempt commercial information in the future.

DHHS first has the burden of proving that the pharmaceutical protocols are commercial information. The Supreme Court has held that "terms 'commercial or financial' encompass information such as 'business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition." *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540, 553 (1997). "[N]ot all information generated by a commercial entity is 'financial or commercial.'" *Id.* It is important to remember that "[t]he party resisting disclosure 'bears a heavy burden to shift the balance toward nondisclosure'" *Union Leader*, 142

[14] "Proprietary" information is not listed as an exemption in RSA 91-A:5, IV. It is understood that the state meant confidential commercial information.

N.H. at 554. Courts must "resolve questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents [and] construe provisions favoring disclosure broadly, while construing exemptions narrowly." *Murray v. New Hampshire Div. of State Police*, 154 N.H. 579, 581 (2006). In that vein, the Court has instructed that "in defining the terms "confidential, commercial, or financial . . . [a]n expansive construction of these terms must be avoided, since to do otherwise would 'allow[ ] the exemption to swallow the rule and is inconsistent with the purposes and objectives of [RSA chapter 91–A].'" *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540, 552 (1997).

DHHS has not even attempted to show that pharmaceutical protocols, demonstrating how licensees comply with state and federal pharmaceutical regulations, constitute commercial information. They are analogous to and part of a license application and therefore not exempt under the Right-to-Know law. Even if DHHS could establish that the redactions are confidential, commercial or financial information, DHSS would also have to show that "the benefits of non-disclosure to the government" outweigh any benefit in disclosure to the public. *Union Leader*, 142 N.H. at 553-554. In *Perras*, the government showed that its interest in non-disclosure of appraisals in pending land condemnation litigation would harm the government by weakening the government's bargaining position. In *Union Leader*, the government was unable to show that commercial market analysis of condominium sales, balance sheets, income statements and credit reports from loans that have already been consummated should be exempt. Likewise, DHHS is unable to show that pharmacy protocols relating to a LRDD license granted months or years ago is exempt from disclosure.

In other cases, the government has shown that disclosure would "impair the [State's] ability to get information in the future." *Union Leader*, 142 N.H. at 554. Nevertheless, the pharmaceutical protocols at issue in this case are required by RSA 318:42(VII)(a) and therefore their disclosure would not impede DHHS's ability to collect the information in the future. The DHHS has not stated any benefits of non-disclosure. [15]

Finally, disclosure of the various[16] pharmaceutical protocols would show the public how DHHS and the BOP implement RSA 318:42(VII) to protect public safety. For many years, neither DHHS or BOP enforced RSA 318:42(VII). It was not until 2012 when NHRTL exposed DHHS and BOP's failures that the state began collecting the statutorily required pharmacy protocols. See 2012 Memo of Clifford attached as Exhibit 13 ("up until last week, none of the LRDDs licensed by this Board had NH DHHS approved Policies and Procedures" as required by

[15] DHHS has not asserted personal privacy as a justification for redacting any names on the pharmaceutical protocols and it is unclear if there are names of the RNs who are given specific exemptions to dispense prescription drugs in the both sets of redacted documents. See Exhibit 10 & exhibit G to Complaint. While it appears that DDHS has waived a personal privacy argument by not making the argument, it would be unsuccessful in the argument if it was made. The NH Supreme Court has recognized that public interest in whose salaries are being paid by using public funds trumps any privacy interest of the employees in keeping their identities confidential. *Prof'l Firefighters of N.H. v. Local Gov't Ctr.*, 159 N.H. 699 (2010)(private employee's privacy interest in their salary information is outweighed by public interest where LGC is largely subsidized by public funds); *Union Leader Corp. v. N.H. Retirement Sys.* 162 N.H. 673 (N.H. 2011)(retiree's privacy interest in their pensions is outweighed by public interest in disclosure). Although Judge McNamara had determined in his April 3, 2013 Order, p. 9, that PP employees identities as former federal grantees (at that time) was not a public interest as the BOP was not paying their salaries, the facts have changed since that time. In January 2014, DHHS awarded contracts to PP, the Concord abortion clinic and the Joan Lovering abortion and agreed to use taxpayer dollars to pay the salaries of the RNs who are being given special exceptions pursuant to the pharmaceutical protocols. See attached as exhibit 12. Therefore, pursuant to *Prof'l Firefighters of N.H. v. Local Gov't Ctr.*, 159 N.H. 699 (2010), public interest in disclosure of identities outweighs any privacy interest where DHHS is paying the RNs salaries.

[16] In addition to Planned Parenthood's pharmaceutical protocols, NHRTL has requested the protocols of the Concord, Lovering and Weeks clinics.

RSA 318:42(VII)(a))[17] Disclosure of what pharmacy protocols are acceptable to DHHS will show how DHHS is or is not implementing its regulatory duty.[18]

V. Financial Data From the Director of Charitable Trusts

It is undisputed that on September 11, 2014, Kurt Wuelper, the then president of New Hampshire Right to Life, visited the Director of Charitable Trusts Office and sought to obtain copies of the financial reports and audits of the Planned Parenthood, Joan Lovering and Concord Feminist abortion clinics. It is also undisputed that, on December 4, 2014, while this litigation was pending, the Director of Charitable Trusts produced copies of the requested financial data. See Email of Blodgett attached as Exhibit 15. Therefore, the state is no longer contesting the production of these financial documents. Nevertheless, the state is still liable for payment of reasonable attorneys' fees and costs pursuant to RSA 91-A:8. The state knew or should have known that it had to produce the Concord Feminist abortion clinic financial report. The state's records indicate that it received the financial report on August 18, 2014. See attached as Exhibit 16. There was no reason why the report was not given to NHRTL on September 11, 2014 or why it took until December 4, 2014 to produce a copy of the financial report.

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[17] The BOP had initially sought to redact the last paragraph of the Clifford Memorandum on the basis that it constitute an invasion of privacy. As the Court can see, the last paragraph shows that the BOP was not performing its regulatory duty as required by the statute and should not have been initially witheld.

[18] Pursuant to the Nurse Formulary adopted under RSA 326, nurses may not dispense the abortion pill in excess of the 49 days considered safe by the FDA safety protocols. Over a dozen mothers have died by failure to follow the FDA safety protocols. Nevertheless, several clinics in NH advertise that the abortion pill is being dispensed by their nurses up to 63 of pregnancy. The public has a right to know if DHHS is properly interpreting the FDA safety protocols.

VI. Plaintiffs Are Entitled to Costs and Attorneys' Fees Necessitated by Bringing this Action

RSA 91-A:8, I provides for an award of an attorneys' fees when an agency knew or should have known that its actions violated RSA 91-A. First, the DCT knew or should have known that it was required to produce the financial data of the Concord Feminist abortion clinic when requested and no later than September 11, 2014 office visit by Mr. Wuelper.[19] "The time period for responding to a Right–to–Know request is absolute." *ATV Watch v. New Hampshire Dep't of Res. & Econ. Dev.*, 155 N.H. 434, 440 (2007) There is no basis for delaying production of this document, marked received by the DCT on August 18, 2014, until almost four months later on December 4, 2014. See *ATV Watch v. New Hampshire Dep't of Res. & Econ. Dev.*, 155 N.H. 434, 443 (2007)(statute requires production of documents within 5 days and good faith delayed disclosure is still a knowing violation of RSA 91-A entitling petitioner to attorneys fees if he was represented by an attorney).

An award of attorneys' fees is also appropriate for the redactions and withholding of buffer zone documents, BOP applications and pharmaceutical protocols. For each of these requests the state not only refused to disclose documents it was required to disclose under RSA 91-A, it refused to provide reasons for the withholdings or redactions "absent a court order." See Exhibit 5 (Attorney Lahey refusing to provide explanation of withholdings "absent a court order") and Exhibit H to Complaint (Attorney Godleski refusing to provide explanation of withholdings "absent a court order"). RSA 91-A does not provide that the state agency can withhold documents and withhold the reasons for doing so until ordered to disclose the reasons by a court. RSA 91-A:4, IV provides that "If a public body or agency is unable to make a public record available for immediate inspection and copying, it shall, within 5 business days of

[19] Mr. Wuelper's September 11, 2014 office visit was an appointment made with the DCT the week before on September 4, 2014.

request, make such record available, [or] deny the request ***in writing with reasons*** . . ." (emphasis added). The Supreme Court has held that the reasons given for non-disclosure must be "full and specific enough to afford the [petitioners] a meaningful opportunity to contest, and the [superior] court an adequate foundation to review, the soundness of the withholding. . . ." *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540, 549 (1997). The state agencies have not come even close to justifying the non-disclosure. In fact, for the buffer zone documents, the AGO would not even identify all the reasons insisting it could withhold on unstated reasons "including but not limited to." Therefore, an award of costs and attorneys fees is required[20] in this case.

VII. Conclusion

Courts must "resolve questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents [and] construe provisions favoring disclosure broadly, while construing exemptions narrowly." *Murray v. New Hampshire Div. of State Police*, 154 N.H. 579, 581 (2006).

WHEREFORE, Petitioners respectfully requests that this Court:

A. Order that Respondents produce all responsive documents without redaction;

B. Rule and find that Petitioner is entitled to its reasonable attorney's fees; and

C. Grant such further relief as is reasonable and just.

[20] An award of attorneys' fees is also mandated for the state improperly claiming exemptions as explained throughout this Trial Brief.

Respectfully submitted,
New Hampshire Right to Life &
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By their Attorneys,
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