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 General's Office

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New Hampshire State Board of Pharmacy

&

New Hampshire Department of Health & Human Services

RESPONDENTS' TRIAL BRIEF

The Respondents, the New Hampshire Director of Charitable Trusts Office ("DCT"); the New Hampshire Attorney General's Office ("AGO"); the New Hampshire State Board of Pharmacy ("NH BOP"); and the New Hampshire Department of Health and Human Services ("DHHS"), by and through counsel, the Office of the Attorney General, file this Trial Brief subsequent to the Right to Know hearing held on January 12, 2015.

The Petitioners filed Right to Know requests under RSA 91-A for four different categories of documents from the State.[1] Specifically, the Petitioners requested: (1) documents from the AGO related to the ongoing litigation involving abortion clinic buffer zones; (2) documents from the NH BOP related to six Planned Parenthood clinics; (3) the pharmaceutical protocols of Planned Parenthood of Northern New England (PPNNE) in the possession of the DHHS; and (4) the financial data of these reproductive health centers from the DCT.

The Petitioners claim that the State agencies have either refused to produce the requested documents or have refused to give sufficient reasons for the non-disclosure. The Petitioners argue that the State has not met its burden to demonstrate that the statutory exemptions apply and that failure to do so should result in the Court ordering production of the documents and an award of attorneys' fees and costs.

I. THE STATE IS NOT LEGALLY REQUIRED TO PROVIDE A VAUGHN INDEX WHEN RESPONDING TO RIGHT TO KNOW REQUESTS

As a preliminary matter, the Respondents will address a claim related to the requirement of a Vaughn Index that the Petitioners assert regarding multiple right to know responses and reiterated at oral argument. With respect to Rights to Know request

[1] As argued in its Answer, the Respondents again contend that the Petitioners have failed to set forth factual allegations in their Petition to show that all four Right to Know requests apply to both Petitioners. In fact, there is no allegation that Petitioner Jackie Pelletier was involved in the requests made to DCT, BOP, or DHHS. Those requests were made by Attorney Michael Tierney, which the Respondents understood to be made on behalf of Petitioner New Hampshire Right to Life ("NHRTL"). Additionally, the requests made to the AGO was made by Attorney Tierney in relation to a federal court case in which Jackie Pelletier is a party, but NHRTL is not a party. Although the Respondents continue to deny that both Petitioners made all four Right to Know requests, for the purposes of efficiency in this Trial Brief, the Respondents will refer to all requests as being made by "the Petitioners."

served upon AGO and NH BOP, the Petitioners requested a Vaughn Index related to the items being withheld. The State has consistently rejected such requests in this matter and others as it is not a statutory requirement of a public agency under RSA 91-A. In response to the denial of creating and producing a Vaughn Index for Right to Know requests, the Petitioners claims that the Respondents have somehow waived exemptions under RSA 91-A. *See* Petition at ¶ 39, 48.

The Petitioners' interpretation of a mandatory Vaughn Index is simply an incorrect legal analysis of RSA 91-A. Each time the Petitioners request a Vaughn Index, the Respondents refer them to the legal citation of *Murray v, N.H. Div. of State Police*, 154 N.H. 579, 582 (2006). In *Murray*, the New Hampshire Supreme Court made clear that a state agency is not required "to justify its refusal on a document-by-document basis" and that, although an *in camera* review or Vaughn Index of documents may be ordered by the Court to justify an agency's decision, such measures are not required. *See id.*

In all cases, the public body bears the burden of proving that a record is not subject to public release. Here, the State has proven with respect to all four requests that the documents are exempt under the attorney work product doctrine, RSA 318:30, and/or RSA 91-A:5, IV. However, should the Court determine that any of the disputed evidence cannot be reviewed effectively, it may order that the party resisting disclosure prepare a detailed document index pursuant to *Vaughn v. Rosen*, 157 U.S. App. D.C. 340, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), in order to determine whether the documents in question are exempt from the Right-to-Know law. *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540 (1997).

Due to the minimal amount of documents in dispute, the State contends that an *in camera* review is appropriate. *Chagnon*, 139 N.H. at 677 (citation and quotation omitted) (determining that if the Court finds that the documents "fall[ ] within the two extremes, [it] must examine it *in camera*, decide which portions are discoverable, and order a copy of the [document] consisting of those portions to be delivered to the side requesting it"). Specifically regarding the DVDs sought in the buffer zone litigation, an *ex parte in-camera* review of records whose release may cause an invasion of privacy, is appropriate. *Union Leader Corp.,* 141 N.H. at 478. Notably, "[w]hile an *in camera* review or the preparation of a *Vaughn* index may be sufficient to justify an agency's refusal to disclose, such measures are also not necessarily required. . . . [G]enaric determinations of likely interference often will suffice." *Murray*, 154 N.H. at 583.

II. THE ATTORNEY GENERAL'S OFFICE FULLY COMPLIED WITH RSA 91-A IN RESPONDING TO THE PETITIONERS' RIGHT TO KNOW REQUEST FOR INFORMATION REGARDING "ABORTION CLINIC BUFFER ZONE" DOCUMENTS

On July 28, 2014, Attorney Michael Tierney filed a Right to Know request seeking documents from the AGO regarding its communications with certain reproductive health centers and documents from these women's health centers. By way of brief background, during the summer of 2014, the AGO received information, documents, and had communications with certain feminist health centers in order to prepare for federal court litigation around the constitutionality of RSA 132:38, the "abortion buffer zone" statute. At the time, the "abortion buffer zone" litigation was highly publicized in the media following a recent United States Supreme Court decision

regarding a similar statute in Massachusetts. A Complaint and a Petition for Injunction regarding the constitutionality of the New Hampshire statute had been filed in federal court, to which the AGO, on behalf of the State, was to respond. A preliminary injunction hearing was scheduled for July 25, 2014. In anticipation of the hearing, the State gathered documents and produced an exhibit list to Attorney Tierney, who was representing the plaintiffs in that action. However, the hearing was cancelled, only some exhibits were produced, and the federal court entered an indefinite stay of the litigation. Attorney Tierney subsequently filed his Right to Know request.

On September 4, 2014, Attorney Elizabeth Lahey from the AGO responded to Attorney Tierney's Right to Know request and produced certain documents. *See* Petition Exhibit D. Attorney Lahey specifically stated that some documents were "redacted or withheld because they contain information that is exempt from disclosure under RSA 91-A." Attorney Lahey then stated that the information that had been redacted or withheld was exempt under RSA 91-A:5, IV, and included, but was not limited to, "personal contact information and attorney work product." *See id.* In response, Attorney Tierney, via email, requested that the AGO identify what categories of documents it was withholding and the basis for its reasoning. *See* Petitioner's Trial Brief Exhibit 5. On October 13, 2014, Attorney Lahey responded to Attorney Tierney's email, stating that the AGO had "identified the categories for the exemption and, absent a court order, [is] not required to provide a *Vaughn* Index. *See Murray v. N.H. Div. of State Police*, 154 N.H. 579, 583 (2006)." *See id.*

The Petitioners now argue that the AGO has not provided an explanation for its withholding, and thus has waived any applicable exemptions and must produce all responsive documents. However, the September 4, 2014 response complied with the notice requirements of RSA 91-A:4, IV in that it informed the Petitioners that documents were being withheld and the reason for such withholding.

The New Hampshire Supreme Court "resolve[s] 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." *WMUR v. N.H. Dept. of Fish and Game*, 154 N.H. 46 (2006) (*quoting Goode v. N.H. Legislative Budget Assistant*, 148 N.H. 551, 553 (2002)). However, "[t]he public's right of access to governmental proceedings . . . is not absolute. . . . It must yield to reasonable restrictions." *Hughes v. Speaker of the New Hampshire House of Representatives*, 152 N.H. 276, 290 (2005) (*citing Petition of Union Leader*, 147 N.H. 603, 604-05 (2002); N.H. Const. Pt. I, art. 8).

Here, the AGO stated to Attorney Tierney that certain information was withheld or redacted because it constituted, among other things, attorney work product. Governmental records which are made privileged by statute, court rule, or common law, are appropriately treated as exempt from disclosure under the Right-to-Know law. *See Professional Fire Fighters of New Hampshire v. New Hampshire Local Government Center*, 163 N.H. 613 (2012) (determining that communications protected under the attorney-client privilege fall within the exemption in the Right-to-Know law for confidential information).

In New Hampshire, the work product doctrine protects any document from discovery that is "the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation." *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 274 (1966). The work product of an attorney generally consists of "his mental impressions, conclusions, opinions or legal theories." *Id.* at 275 (quotations omitted). "It may consist of correspondence, memoranda, reports, . . . exhibits, trial briefs, drafts or proposed pleadings, plans for presentation of proof, statements, and other matters, obtained by him or at his direction in the preparation of a pending reasonably anticipated case on behalf of a client." *Id.* (quotations and citations omitted).

While here the information sought is not in response to a discovery request, it is clear that the Petitioners are attempting to circumvent the discovery process of ongoing litigation and obtain privileged information through other means. However, the same protections apply and exempt the records from disclosure.

The Petitioners specifically cite an affidavit from a Planned Parenthood employee, which was on the federal litigation exhibit list, but was not produced in response to the Right to Know request. While the Petitioners argue that statements from third party potential witnesses are not protected work product, this document does, in fact, constitute attorney work product, as it was prepared solely in anticipation of litigation. Although the affidavit likely contained some factual information not protected by the work product doctrine, *see State v. Chagnon*, 139 N.H. 671, 675-76 (1995) (determining that witness statements that contain purely factual information should not be considered work product), the attorneys' decision to create such an affidavit and their choice of facts to

include or not include, clearly is attorney work product. The compelled disclosure of such documents would force counsel to disclose information that might reveal his or her reasoning in the case or could indicate the attorneys' mental impressions and strategies for litigating their case. Although the affidavit was listed as an exhibit, the attorneys involved in the litigation could have made a strategic decision to not use the affidavit at the hearing or could have used other exhibits in its place. As such, it is speculative, at best, if Attorney Tierney would have ever seen such a document in that litigation.

Moreover, had Attorney Tierney sought to discover this affidavit, or other privileged attorney work product documents through the ongoing litigation, he would have been required to show a "substantial need of the materials in the preparation of the party's case and the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." N.H. Super. Ct. R. 35(b)(2). Attorney Tierney cannot not now obtain the same document, or other documents prepared in anticipation of litigation protected by the work product doctrine, which are part of the AGO's open case file, in a Right to Know request.

While there is little case law on this subject, the Pennsylvania courts have recently addressed a similar issue. In *City of Allentown v. Brenan*, 52 A.3d 451, 452 (Pa. Commw. Ct. July 25, 2012), the City of Allentown had been involved in federal litigation surrounding an alleged conspiracy by the City and a third party. *Id.* at 452. "The parties engaged in extensive discovery, with [the] Plaintiffs making numerous allegations that [the] Defendants did not provide complete responses or produce certain requested documents." *Id.* After the plaintiffs filed a motion to compel, the federal court agreed

with the defendants that producing documents regarding communication with the alleged conspirators was not required under the Federal Rules of Civil Procedure because the discovery period had ended. *Id.* In an effort to circumvent the Federal Rules, Brenan, who had represented the plaintiffs in the federal litigation, filed a Right-To-Know request for the same documents. *Id.* at 452-53. The City once again denied the request, this time on the grounds that the records were exempt from being disclosed on the basis of the federal court's discovery Order. *Id.* at 453. Brenan, the requester, appealed to the Office of Open Records (OOR), which determined that the federal court's Order did not prevent the disclosure of the records in discovery. *Id.* at 454. The City filed a petition for review with the trial court, alleging that the OOR erred. *Id.* The trial court affirmed the OOR's determination. *Id.* On appeal, the Commonwealth Court agreed with the trial court and OOR, finding that a federal court order will only exempt public records from disclosure when the order explicitly protects those documents from disclosure under the Right-To-Know Law. *Id.* at 454-55.

While here there is no federal court order either compelling the production of these documents or protecting them from disclosure, it is possible that such orders may be forthcoming should the federal court litigation continue. As such, the documents should remain as protected attorney work product and should not be disclosed in a Right to Know request. *See Commonwealth v. Fremont Investment & Loan*, 944 N.E.2d 1019 (Mass. 2011) (determining that documents sought by an individual under Massachusetts' public records law, which were subject to a protective order in an enforcement action

brought by the Massachusetts' attorney general, were not required to be disclosed, as the public records law did not abrogate judicial protective orders).

The Petitioners also claim that the AGO has failed to produce DVDs it obtained from Planned Parenthood in the "abortion buffer zone litigation." These DVDs show the sidewalk on Pennacook Street in Manchester, outside the Planned Parenthood clinic. The Petitioners argue that these DVDs do not contain the mental impressions of attorneys and therefore cannot be considered attorney work product and as such, must be disclosed.

Again, by way of brief background, the DVDs to which the Petitioners refer were obtained by the AGO in the summer of 2014 in preparation for the federal "abortion buffer zone" litigation. The State concedes that the DVDs themselves do not contain the attorneys' mental impressions and therefore do not constitute work product. Again, however, as stated above, the attorneys' strategic decision to either include or exclude the DVDs as part of their case is in fact, attorney work product.

In addition, the State previously stated to the Petitioners that these DVDs were not produced because they were exempt under RSA 91-A:5, IV. More specifically, the DVDs contain information disclosure of which "would constitute an invasion of privacy." RSA 91-A:5, IV; s*ee Lamy v. NH Public Utilities Commission*, 152 N.H. 106 (2005).

The New Hampshire Supreme Court adopted the United States Supreme Court's view that disclosure of information about private citizens in government files that reveals nothing about an agency's conduct is not within the purpose of the Right-to-Know law. *Lamy*, 152 N.H. at 108 (the names and addresses of PSNH's residential customers are private and disclosure does not inform the public about the conduct of the PUC.

However, PSNH's business customers do not have a privacy interest and their names and addresses must be disclosed under the Right-to-Know law.); *Professional Firefighters of N.H. v. Local Gov't Ctr., Inc.*, 159 N.H. 699, 709–10 (2010) (employers' names and salary information provides insight into the operations of the entity and must be disclosed); *see also U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749, 773 (1989). However, "[i]nvasion of privacy" will not be so broadly construed as to defeat the purpose of the Right-to-Know law. *Mans v. Lebanon School Board*, 112 N.H. 160 (1972).

When determining whether disclosure of governmental records constitutes an invasion of privacy, the court uses a three-step analysis. *Lamy*, 152 N.H. at 109. First, the court considers "whether there is a privacy interest at stake that would be invaded by the disclosure." *Lambert v. Belknap County Convention*, 157 N.H. 375, 382 (2008). Second, the court "assess[es] the public's interest in disclosure." *Id.* at 383. "Disclosure of the requested information should inform the public about the conduct and activities of their government[, and if it] does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released." *Id.* (quotation omitted). Finally, the court "balance[s] the public interest in disclosure against the government's interest in non-disclosure and the individual's privacy interest in non-disclosure." *Id.* (citation omitted); *see also NHCLU v. Manchester*, 149 N.H. 437, 440 (2003); *Union Leader Corp. v. City of Nashua*, 141 N.H. 473 (1996); *Brent v. Paquette*, 132 N.H. 415 (1989) (balancing the competing

interests of society against those of school children and their parents and determined that disclosure of the names and addresses would be an invasion of privacy).

In this case, as stated to the Petitioners in response to their Right to Know request, the disclosure of these DVDs would constitute an invasion of privacy. While the DVDs may show people praying on a public sidewalk in Manchester, they could also potentially show Planned Parenthood patients entering and exciting the building and could show the security measures taken by Planned Parenthood to ensure safety at its facility. The disclosure of this information would breach both the confidentiality Planned Parenthood seeks to maintain with its patients and its desire to protect its patients and employees. This clearly is a privacy interest that would be invaded by disclosure. Significantly, however, disclosure of this information would not "inform the public about the conduct and activities of its government," as the State is not involved whatsoever in the installation or maintenance of these security cameras, nor are the patients or employees of Planned Parenthood in any way affiliated with the State. As such, when balancing the various interests, it is clear that the individuals who are potentially exposed in the DVDs, as well as Planned Parenthood's safety concerns, have a strong privacy interest in non-disclosure that significantly outweighs the public's interest in disclosure.

Additionally, the AGO is subject to any federal or state statutes and regulations establishing the confidentiality of certain types of information. One such example is communication between a physician and patient. *See* RSA 329:26. Should the DVDs disclose the identities of Planned Parenthood patients, the AGO would be required to maintain that confidentiality.

While the State concedes that the DVDs were placed on the exhibit list in the "abortion buffer zone" litigation, the State had not yet decided if, in fact, the DVDs would be shown at trial, and was purely providing notice to the plaintiffs in that case. Additionally, if it was determined that the DVDs were to be used, it is likely that they would have been viewed under seal, so as to maintain their confidential nature. As such, the DVDs cannot now be disclosed through a Right to Know request.

The Petitioners further argue that the AGO has redacted contact information in some documents, but has not redacted the contact information in other documents, and that it has refused to disclose many emails and "unknown other documents." The State agrees that the public contact information should have been disclosed and contends that a mistake occurred in redacting that information. However, again, as stated previously to the Petitioners, the internal communications between attorneys and staff in the AGO regarding this ongoing litigation are not required to be disclosed under RSA 91-A:5,

III. THE NEW HAMPSHIRE BOARD OF PHARMACY FULLY COMPLIED WITH RSA 91-A IN RESPONDING TO NHRTL'S RIGHT TO KNOW REQUEST FOR INFORMATION REGARDING PPNNE

RSA 318:42, VII provides for the "dispensing of noncontrolled prescription drugs by registered nurses in clinics operated by or under contract with the department of health and human services, or by such nurses in clinics of nonprofit family planning agencies under contract with the department of health and human services[.]" One of the requirements for dispensing such medications is that the clinic possesses a current limited retail drug distributor's license under RSA 318:51-b. *See* RSA 318:42, VII(d). For the relevant time period of this Petition, PPNNE has applied to the "NH BOP" for limited

retail drug distributorship licenses for its six New Hampshire locations. Since 2012, New Hampshire Right to Life ("NHRTL") serves a Right to Know request on NH BOP annually for the documentation related to these applications and licenses.

In a letter, dated July 14, 2014, NHRTL submitted a Right to Know request on the NH BOP requesting: (1) copies of PPNNE's 2014-2015 Limited Retail Drug Distributorship Licenses and; (2) any documentation related to PPNNE either sent or received by the NH BOP since July 1, 2013. *See* Petition Exhibit E. This Right to Know Request was similar in nature to prior requests made by NHRTL for the 2012-2013 Limited Retail Drug Distributorship Licenses related to PPNNE and the 2013-2014 Limited Drug Distributorship Licenses related to PPNNE.

In accordance with RSA 91-A:4, by email, dated July 16, 2014, the NH BOP acknowledged the Right to Know request and provided copies of the licenses issued by NH BOP to PPNNE. *See* Exhibit A (Email from M. Dempsey to M. Tierney with attachments). Also, on July 16, 2014, the NH BOP indicated it would provide any additional documents within 30 days. *See* Exhibit B (Email from M. Dempsey to M. Tierney). By letter dated July 31, 2014, NH BOP fully responded to the request. *See* Exhibits C (Letter from A. Godlewski to M. Tierney with attachments).[2] The NH BOP provided the Limited Retail Drug Distributorship Applications with redactions for NH BOP internal notations and the identity of PPNNE employees; however, NH BOP inserted "John Doe" to inform NHRTL whether the PPNNE individuals worked at more

[2] NHRTL's Trial Brief Exhibit 7 is not a complete copy of the Right to Know Response provided by NH BOP.

than one location. *See id.* In addition, NHRTL did not produce communications between itself and PPNNE that were exempt from disclosure under RSA 318:30, I.[3] In its letter, dated July 31, 2014, NH BOP specifically indicated that documents exempt under RSA 318:30, I were not being produced. *See id.* This letter complied with the notice requirements of RSA 91-A:4, IV in that it informed NH RTL that documents were being withheld and the reason for such withholding (RSA 318:30, I).

It is important to note that NH BOP's response in July 2014 was consistent with its prior responses that were found by Judge McNamara to be in accordance with RSA 91-A:4. *See* Exhibit D. On November 19, 2012, NHRTL brought a Right to Know Petition in Merrimack Superior Court against NH BOP. Among its claims, NHRTL argued that the redactions made to the Limited Retail Drug Distributorship Applications were improper. NH BOP claimed that the names of individuals associated with PPNNE were properly redacted under RSA 91-A:5, IV as the disclosure of such information would constitute an invasion of privacy. NH BOP also asserted that certain investigatory materials were exempt under RSA 318:30.

In an Order, dated April 4, 2013, the Court (McNamara, J.) agreed with NH BOP's legal position. *See* Exhibit D. The Court held that NH BOP "met its burden to demonstrate that there is a privacy interest at stake in the disclosure of the identities of PPNNE's site managers, consultant pharmacists, and medical directors. The employees and independent contractors have a privacy interest in their identities. See Lamy, 152 N.H. at 109." *See* Exhibit D at 7. In essence, the Court found that the release of the

[3] There are approximately 15 pages of documents exempt from disclosure under RSA 318:30, I.

identities could "result in harassment, from any member of the public, and/or safety concerns." *See id.*

The same privacy interests in the identities of PPNNE employees and independent contractors that existed in 2012 and 2013 exist today. In *Lamy*, the New Hampshire Supreme Court recognized that there is a valid privacy interest in the disclosure of a person's name and address. *See* 152 N.H. at 109. It is also consistent with federal law which attached great significance to the privacy interest of employee's information such as names and home addresses. *See e.g., Painting and Drywall Work Preservation Fund, Inc. v. Dep't of Housing & Urban Dev.*, 936 F.2d 1300 (D.C. Cir. 1991); *Hopkins v. United States Dep't of Housing &Urban Dev.*, 929 F.2d 81 (2d Cir. 1991); *Sheet Metal Workers Int'l Ass'n . Local Union No. 19 v. United States Dep't of Veteran Affairs*, 135 F.3d 891 (3d Cir. 1997).

NH BOP respectfully requests that this Court, consistent with Judge McNamara's prior ruling, find that the redactions made to the Limited Retail Drug Distributorship Applications were proper under RSA 91-A:5, IV.[4]

[4] At the hearing this Court held on January 12, 2015, Attorney Tierney represented that NH BOP provided the 2012 Limited Retail Drug Distributorship Applications in unredacted form obviating the need to appeal Judge McNamara's decision. This is not factually correct. At the hearing held on January 2, 2013 before Judge McNamara, NH BOP agreed to insert "John Doe" and assign numbers so that NH RTL could discern whether individuals worked at multiple PPNNE locations. The same system was used by NH BOP in responding to the July 2013 and July 2014 request. *See* Exhibits E (2013 Response) and C (2014 Response). To the extent, NH RTL has an unredacted copy of any Limited Retail Drug Distributorship Application of PPNNE (NH RTL Trial Brief Exhibit 8) is was due to mistake and provided prior to the production of redacted applications by NH BOP in August 2012. It was in no way provided as a result of a Court Order as, Judge McNamara's denial of NH RTL's motion for reconsideration makes clear the redactions were proper. *See* Exhibit F.

With respect to RSA 318:30, in 2012, NH BOP redacted a portion of a memo, known in Judge McNamara's Orders as the Clifford Memorandum, as it related to an investigation by the Board of Pharmacy and was exempt from disclosure under RSA 318:30. Judge McNamara ordered an in camera review of the Clifford Memo and, in its Order, dated May 16, 2013, the Court found the redaction to be proper. *See* Exhibit F.

RSA 318:30 provides the NH BOP with authority to investigate licensees. RSA 318:30, I specifically provides that "Board investigations and any information obtained by the board pursuant to such investigations **shall be exempt from public disclosure provisions of RSA 91-A, unless such information subsequently becomes the subject of a public disciplinary hearing**." *See id.* (emphasis added). Contrary to NH RTL's claim, the investigation need not be pending for the exemption to apply nor did NH BOP inform NH RTL that it was pending. Rather, the statute provides that the information remains exempt from disclosure absent a public disciplinary hearing. Similar to the information withheld in 2012, the documentation NH BOP withheld from disclosure under RSA 91-A in July 2014 related to an investigation that did not become the subject of a public disciplinary hearing. Thus, NH BOP has properly withheld the documents within the plain language of RSA 318:30.[5] If this Court wants to conduct an *in camera* review of the documents, it may do so, however, as a matter of public record, there have

[5] NHRTL is incorrect in claiming that NH BOP must show how disclosure of the documents would interfere with any ongoing investigation. RSA 318:30 injects no such requirement. Rather, the statute is intended to keep investigations confidential unless, and only unless, they become the subject of a public disciplinary hearing.

been no NH BOP public disciplinary hearings related to PPNNE since 2012 so this Court can rule that the requirement of RSA 318:30 are met as a matter of law.

IV. THE NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES FULLY COMPLIED WITH RSA 91-A IN RESPONDING TO NHRTL'S RIGHT TO KNOW REQUEST FOR INFORMATION REGARDING PPNNE'S PROTOCOLS

As part of the Limited Retail Drug Distributorship License, the drugs must be dispensed under a written protocol that is approved by the Department of Health and Human Services. *See* RSA 318:42, VII(a). Similar to the requests for application materials from NH BOP, NHRTL annually makes requests upon the New Hampshire Department of Health and Human Services ("DHHS") for a copy of PPNNE's written protocols. The request that is the subject of this petition was made by NHRTL upon DHHS by email on October 11, 2014. *See* Exhibit G. In accordance with RSA 91-A:4, IV, DHHS responded within 5 business days of the request. *See* Exhibit G. On October 28, 2014, DHHS provided a redacted copy of PPNNE's protocols that had been approved by DHHS. *See* Exhibit H. DHHS explained that the redactions were made under RSA 91-A:5, IV. Specifically, DHHS explained that the protocols contained proprietary and commercial information of PPNNE. *See id.* DHHS provided the statutory exemption as well as case law supporting its position. *See id.*

It is important to note that the production DHHS made in 2014 in response to the Right to Know request is the same position DHHS has taken when NH RTL requested the information in 2012. *See* Exhibit I (Letter from Frank Nachman with redacted

documents). In fact, in his Order in the Merrimack Superior Court case, Judge McNamara noted that, in response to NH RTL's request for PPNNE's protocols:

> DHHS responded on October 12, 2012 and provided the Petitioner with twelve redacted pages of protocols. The DHHS asserted that the remainder of the protocols was confidential and exempt from disclosure under RSA 91-A:5, IV. Specifically, the DHHS did not provide any information related to the internal personnel practices and confidential commercial information as well as the personnel information identifying specific employees from the New Hampshire Professional Dispensing List.

In that case, Judge McNamara did not rule upon whether the redactions were substantively proper because NHRTL had failed to sue DHHS as a party. *See* Exhibit E at 12. However, this is not the first time NHRTL has brought this issue of PPNNE's protocols before a court for review. In, *New Hampshire Right to Life v. Department of Health and Human Services,* Civil No. 11-cv-585-JL, the United States District Court for the District of New Hampshire addressed this specific issue and held the redactions to be proper. *See* Exhibit J.

In the federal action, NHRTL brought suit against the United States Department of Health and Human Services for documents withheld under the Freedom of Information Act ("FOIA"). Specifically, in March 2012, NH RTL made a request for PPNNE's protocols submitted to the Office of Assistant Secretary of Health. The protocols are titled, PPNNE's Manual of Medical Standards and Guidelines. These are the same protocols submitted by PPNNE to DHHS under RSA 318:42, VII(a).

In its decision, the federal court held that the protocols setting forth how PPNNE would provide services related to commercial activity that was exempt under FOIA. *See* Exhibit J at 11. In addition, the Court determined the protocols to contain confidential

information. The Court found that PPNNE does not share its medical protocols with the public and noted that each page of the protocol is marked confidential. *See id.* at 15. As part of the pleadings in the federal case, Helen Reid, the Director of PPNNE submitted an affidavit setting forth that the protocols are part of a manual that constitutes intellectual property protected by copyright law. *See* Exhibit K.

DHHS' position regarding PPNNE's protocols is consistent with the United States Department of Health and Human Services and is supported by the federal court's decision. The same exemptions relied upon by the federal court under FOIA exist under RSA 91-A:5, IV. The plain language of the state right to know statute exempts from disclosure "records pertaining to confidential, commercial, or other financial information[.]" *See* RSA 91-A:5, IV. The New Hampshire Supreme Court has held that it looks to FOIA for guidance in interpreting RSA 91-A. *See 38 Endicott St. N. v. State Fire Marshal*, 163 N.H. 656, 660(2012)(citations omitted). Both the federal and state law supports the protection of third party information that is confidential and commercial and has been provided to the government.[6] The protection of confidential information from nondisclosure must be balanced against the benefits of disclosure to the public. *See Hampton Police Assoc. v. Town of Hampton*, 162 N.H. 7, 14 (2011). Here, it is clear that PPNNE has a substantial interest in protecting its copyrighted materials from disclosure as it competes with other businesses for the patients it serves as well as funding, staff, and providers. *See* Exhibit K. In contrast, there is no public benefit by the disclosure as, the

[6] Judge LaPlante's decision sets forth the federal case law that is consistent with state law supporting the exemption for confidential commercial information. *See* Exhibit J.

medical protocols have been inspected and approved by the state agency (DHHS) charged with insuring their compliance. As such, PPNNE's medical protocols are commercial and confidential information exempt from disclosure under RSA 91-A:5, IV.

It is relevant to note that NH RTL makes no reference of the federal court decision in its Petition before this Court. Presumably, it is because the Court ruled directly contrary to the position it advocates in this litigation. Regardless, DHHS respectfully requests that this Court adopt the reasoning set forth by Judge LaPlante and hold that DHHS' redactions of PPNNE's protocols submitted under RSA 318:42 to be proper.[7]

V. THE DIRECTOR OF CHARITABLE TRUSTS FULLY COMPLIED WITH RSA 91-A IN RESPONDING TO NHRTL'S RIGHT TO KNOW REQUEST FOR INFORMATION REGARDING REPRODUCTIVE HEALTH CENTERS' FINANCIAL DATA

Although the Petitioners originally argued that the DCT had not fully complied with RSA 91-A by not producing financial reports and audits it had in its possession, at the hearing on January 12, 2015, the Petitioners conceded that all documents regarding the financial data of the reproductive health centers that had been requested had, in fact, been produced. As such, this claim is now moot.

[7] In its Petition, NHRTL claims that NH BPO, the Attorney General's Office and HHS violated RSA 91-A in refusing to provide unredacted copies of the protocols. *See* Petition at ¶ 8. By email, dated October 17, 2014, NHRTL was informed that NH BOP and the Attorney General's Office do not have a copy of PPNNE's protocols so to claim that these two state agencies have violated Right to Know by not producing documents NHRTL knows they do not possess is a frivolous argument.

VI. THE PETITIONERS ARE NOT ENTITLED TO ATTORNEYS' FEES AND COSTS

The Petitioners further argue that they are entitled to reasonable attorneys' and costs, pursuant to RSA 91-A:8. However, because the State has fully complied with the requirements of RSA 91-A, such an award is not warranted.

If a public body, public agency or officer, employee or other official thereof violates the Right-to-Know law, such public body or public agency will be required to pay for attorney's fees and costs incurred in a lawsuit under RSA 91-A if the court finds that the "lawsuit was necessary in order to enforce compliance with [RSA 91-A]," or to "address a purposeful violation of [RSA 91-A]." RSA 91-A:8, I. Additionally, fees are only awarded if the Court "finds that the public body, public agency, or person knew or should have known that the conduct engaged in was in violation of [RSA 91-A] or if the parties, by agreement, provide that no such fees shall be paid." RSA 91-A:8, I; *see also WMUR Channel Nine v. N.H. Dept. of Fish & Game*, 154 N.H. 46 (no attorneys' fees awarded where the public agency did not know the conduct was a violation due to state of case law); *Goode v. N.H. Office of the Legislative Budget Assistant*, 145 N.H. 451 (2000) (request for attorney's fees properly denied where the record, the trial court's findings, and the area of law revealed that the defendant neither knew nor should have known that its conduct violated the statute); *New Hampshire Challenge Inc. v. Commissioner, N.H. Dept. of Education*, 142 N.H. 246 (1997) (holding that attorneys' fees are mandated if necessary findings are made); *Voelbel v. Town of Bridgewater*, 140 N.H. 446 (1995) (award of attorneys' fees held inappropriate because second factor was not present);

Johnson v. Nash, 135 N.H. 534 (1992) (award of attorneys' fees upheld where selectmen failed to provide proper notice of meeting); and *Chambers v. Gregg*, 135 N.H. 478 (1992) (declining to award fees where the second factor was not present).

In this case, no award of attorneys' fees should be granted because there is no evidence to suggest that any of the State agencies knew or should have known that their actions violated RSA 91-A. The delay in producing certain documents by the DTC to which the Petitioners refer was not a knowing violation of RSA 91-A. On the contrary, the documents had not yet been processed by the DTC at the time they were requested and as such, were not in the file that was given to the Petitioners. When the documents were later processed, the DTC informed the Petitioners that the additional documents were available. This does not constitute a knowing violation of RSA 91-A. Additionally, contrary to the Petitioners' contention, the BOP, DHHS, and the AGO did not "refuse" to produce documents, nor did they "refuse" to provide reasons for its withholdings. Each response given to the Petitioners included the reasons for any withholdings. These notices complied with the requirements of RSA 91-A and do not constitute a knowing violation.

Further, the Petitioners are not entitled to costs. *See ATV Watch v. N.H. Dept. of Resources and Economic Dev.*, 155 N.H. 434, 449 (2007) (noting that proof required for fees is different than the proof required for costs, as "[e]stablishing that the agency 'knew or should have known' that its refusal constituted a Right-to-Know violation is required for an award of legal fees, but not for costs"). The test for awarding the reasonable costs of a lawsuit is whether the lawsuit was necessary in order to make information available

that is subject to disclosure under the Right-to-Know law. *Id.* Here, it has been established that the information is not subject to disclosure under the Right to Know law. As such, the Petitioners have no right to this information, rendering the lawsuit unnecessary.

WHEREFORE, the Respondents respectfully request that this Honorable Court:

(A) Determine that the information sought is not subject to disclosure under RSA 91-A; and

(B) Determine that the State has fully complied with the requirements of RSA 91-A; or alternatively,

(C) Order an in camera review; and

(D) Grant such further relief as may be deemed just and proper.

Respectfully Submitted,

NEW HAMPSHIRE ATTORNEY GENERAL'S OFFICE

NEW HAMPSHIRE STATE BOARD OF PHARMACY

NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES

NEW HAMPSHIRE DIRECTOR OF CHARITABLE TRUSTS OFFICE

By their attorney,

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January 30, 2015

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this day, postage prepaid, to Michael J. Tierney, Esquire, counsel of record.

Mary Ann Dempsey