THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket #2015--0366

New Hampshire Right to Life and Jackie Pelletier

v.

New Hampshire Director of Charitable Trusts Office, et als

OPENING BRIEF OF APPELLEES

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Oral Argument Requested to be Argued by
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TEXT OF APPLICABLE STATUTES AND REGULATIONS

91-A:1 Preamble. – Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter 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.

Source. 1967, 251:1. 1971, 327:1. 1977, 540:1, eff. Sept. 13, 1977.

I. Section 91-A:1-a

91-A:1-a Definitions. – In this chapter:
I. "Advisory committee" means any committee, council, commission, or other like body whose primary purpose is to consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority.
II. "Governmental proceedings" means the transaction of any functions affecting any or all citizens of the state by a public body.
III. "Governmental records" means any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term "governmental records" includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term "governmental records" shall also include the term "public records."
IV. "Information" means knowledge, opinions, facts, or data of any kind and in whatever physical form kept or maintained, including, but not limited to, written, aural, visual, electronic, or other physical form.
V. "Public agency" means any agency, authority, department, or office of the state or of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision.
VI. "Public body" means any of the following:
(a) The general court including executive sessions of committees; and including any advisory committee established by the general court.
(b) The executive council and the governor with the executive council; including any advisory committee established by the governor by executive order or by the executive council.
(c) Any board or commission of any state agency or authority, including the board of trustees of the university system of New Hampshire and any committee, advisory or otherwise, established by such entities.
(d) Any legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto.
(e) Any corporation that has as its sole member the state of New Hampshire, any county, town, municipal corporation, school district, school administrative unit, village district, or other political subdivision, and that is determined by the Internal Revenue Service to be a tax exempt organization pursuant to section 501(c)(3) of the Internal Revenue Code.

Source. 1977, 540:2. 1986, 83:2. 1989, 274:1. 1995, 260:4. 2001, 223:1. 2008, 278:3, eff. July 1, 2008 at 12:01 a.m.; 303:3, eff. July 1, 2008; 303:8, eff. Sept. 5, 2008 at 12:01 a.m.; 354:1, eff. Sept. 5, 2008.

II. Section 91-A:2

91-A:2 Meetings Open to Public. –
I. For the purpose of this chapter, a "meeting" means the convening of a quorum of the membership of a public body, as defined in RSA 91-A:1-a, VI, or the majority of the members of such public body if the rules of that body define "quorum" as more than a majority of its members, whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously, subject to the provisions set forth in RSA 91-A:2, III, for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power. A chance, social, or other encounter not convened for the purpose of discussing or acting upon such matters shall not constitute a meeting if no decisions are made regarding such matters. "Meeting" shall also not include:
(a) Strategy or negotiations with respect to collective bargaining;
(b) Consultation with legal counsel;
(c) A caucus consisting of elected members of a public body of the same political party who were elected on a partisan basis at a state general election or elected on a partisan basis by a town or city which has adopted a partisan ballot system pursuant to RSA 669:12 or RSA 44:2; or
(d) Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting; provided, that nothing in this subparagraph shall be construed to alter or affect the application of any other section of RSA 91-A to such documents or related communications.
II. Subject to the provisions of RSA 91-A:3, all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public. Except for town meetings, school district meetings, and elections, no vote while in open session may be taken by secret ballot. Any person shall be permitted to use recording devices, including, but not limited to, tape recorders, cameras, and videotape equipment, at such meetings. Minutes of all such meetings, including names of members, persons appearing before the public bodies, and a brief description of the subject matter discussed and final decisions, shall be promptly recorded and open to public inspection not more than 5 business days after the meeting, except as provided in RSA 91-A:6, and shall be treated as permanent records of any public body, or any subordinate body thereof, without exception. Except in an emergency or when there is a meeting of a legislative committee, a notice of the time and place of each such meeting, including a nonpublic session, shall be posted in 2 appropriate places one of which may be the public body's Internet website, if such exists, or shall be printed in a newspaper of general circulation in the city or town at least 24 hours, excluding Sundays and legal holidays, prior to such meetings. An emergency shall mean a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer of the public body, who shall post a notice of the time and place of such meeting as soon as practicable, and shall employ whatever further means are reasonably available to inform the public that a meeting is to be held. The minutes of the meeting shall clearly spell out the need for the emergency meeting. When a meeting of a legislative committee is held, publication made pursuant to the rules of the house of representatives or the

senate, whichever rules are appropriate, shall be sufficient notice. If the charter of any city or town or guidelines or rules of order of any public body require a broader public access to official meetings and records than herein described, such charter provisions or guidelines or rules of order shall take precedence over the requirements of this chapter. For the purposes of this paragraph, a business day means the hours of 8 a.m. to 5 p.m. on Monday through Friday, excluding national and state holidays.

III. A public body may, but is not required to, allow one or more members of the body to participate in a meeting by electronic or other means of communication for the benefit of the public and the governing body, subject to the provisions of this paragraph.

(a) A member of the public body may participate in a meeting other than by attendance in person at the location of the meeting only when such attendance is not reasonably practical. Any reason that such attendance is not reasonably practical shall be stated in the minutes of the meeting.

(b) Except in an emergency, a quorum of the public body shall be physically present at the location specified in the meeting notice as the location of the meeting. For purposes of this subparagraph, an "emergency" means that immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action. The determination that an emergency exists shall be made by the chairman or presiding officer of the public body, and the facts upon which that determination is based shall be included in the minutes of the meeting.

(c) Each part of a meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting. Each member participating electronically or otherwise must be able to simultaneously hear each other and speak to each other during the meeting, and shall be audible or otherwise discernable to the public in attendance at the meeting's location. Any member participating in such fashion shall identify the persons present in the location from which the member is participating. No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice.

(d) Any meeting held pursuant to the terms of this paragraph shall comply with all of the requirements of this chapter relating to public meetings, and shall not circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.

(e) A member participating in a meeting by the means described in this paragraph is deemed to be present at the meeting for purposes of voting. All votes taken during such a meeting shall be by roll call vote.

Source. 1967, 251:1. 1969, 482:1. 1971, 327:2. 1975, 383:1. 1977, 540:3. 1983, 279:1. 1986, 83:3. 1991, 217:2. 2003, 287:7. 2007, 59:2. 2008, 278:2, eff. July 1, 2008 at 12:01 a.m.; 303:4, eff. July 1, 2008.

III. Section 91-A:2-a

91-A:2-a Communications Outside Meetings. –

I. Unless exempted from the definition of "meeting" under RSA 91-A:2, I, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III.

II. Communications outside a meeting, including, but not limited to, sequential communications

among members of a public body, shall not be used to circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.

Source. 2008, 303:4, eff. July 1, 2008.

IV. Section 91-A:2-b

91-A:2-b Meetings of the Economic Strategic Commission to Study the Relationship Between New Hampshire Businesses and State Government by Open Blogging Permitted. – [Repealed 2012, 232:14, eff. Dec. 1, 2012.]

V. Section 91-A:3

91-A:3 Nonpublic Sessions. –
I. (a) Public bodies shall not meet in nonpublic session, except for one of the purposes set out in paragraph II. No session at which evidence, information, or testimony in any form is received shall be closed to the public, except as provided in paragraph II. No public body may enter nonpublic session, except pursuant to a motion properly made and seconded.
(b) Any motion to enter nonpublic session shall state on its face the specific exemption under paragraph II which is relied upon as foundation for the nonpublic session. The vote on any such motion shall be by roll call, and shall require the affirmative vote of the majority of members present.
(c) All discussions held and decisions made during nonpublic session shall be confined to the matters set out in the motion.
II. Only the following matters shall be considered or acted upon in nonpublic session:
(a) The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.
(b) The hiring of any person as a public employee.
(c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting. This exemption shall extend to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant.
(d) Consideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.
(e) Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed against the public body or any subdivision thereof, or against any member thereof because of his or her membership in such public body, until the claim or litigation has been fully adjudicated or otherwise settled. Any application filed for tax abatement, pursuant to law, with any body or board shall not constitute a threatened or filed litigation against any public body for the purposes of this subparagraph.
(f) Consideration of applications by the adult parole board under RSA 651-A.
(g) Consideration of security-related issues bearing on the immediate safety of security personnel or inmates at the county correctional facilities by county correctional superintendents or their

designees.
(h) Consideration of applications by the business finance authority under RSA 162-A:7-10 and 162-A:13, where consideration of an application in public session would cause harm to the applicant or would inhibit full discussion of the application.
(i) Consideration of matters relating to the preparation for and the carrying out of emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.
(j) Consideration of confidential, commercial, or financial information that is exempt from public disclosure under RSA 91-A:5, IV in an adjudicative proceeding pursuant to RSA 541 or RSA 541-A.
III. Minutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present, it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself, or render the proposed action ineffective, or pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life. This shall include training to carry out such functions. In the event of such circumstances, information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply.

Source. 1967, 251:1. 1969, 482:2. 1971, 327:3. 1977, 540:4. 1983, 184:1. 1986, 83:4. 1991, 217:3. 1992, 34:1, 2. 1993, 46:1; 335:16. 2002, 222:2, 3. 2004, 42:1. 2008, 303:4. 2010, 206:1, eff. June 22, 2010.

VI. Section 91-A:4

91-A:4 Minutes and Records Available for Public Inspection. –
I. Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5. In this section, "to copy" means the reproduction of original records by whatever method, including but not limited to photography, photostatic copy, printing, or electronic or tape recording.
I-a. Records of any payment made to an employee of any public body or agency listed in RSA 91-A:1-a, VI(a)-(d), or to the employee's agent or designee, upon the resignation, discharge, or retirement of the employee, paid in addition to regular salary and accrued vacation, sick, or other leave, shall immediately be made available without alteration for public inspection. All records of payments shall be available for public inspection notwithstanding that the matter may have been considered or acted upon in nonpublic session pursuant to RSA 91-A:3.
II. After the completion of a meeting of a public body, every citizen, during the regular or

business hours of such public body, and on the regular business premises of such public body, has the right to inspect all notes, materials, tapes, or other sources used for compiling the minutes of such meetings, and to make memoranda or abstracts or to copy such notes, materials, tapes, or sources inspected, except as otherwise prohibited by statute or RSA 91-A:5.

III. Each public body or agency shall keep and maintain all governmental records in its custody at its regular office or place of business in an accessible place and, if there is no such office or place of business, the governmental records pertaining to such public body or agency shall be kept in an office of the political subdivision in which such public body or agency is located or, in the case of a state agency, in an office designated by the secretary of state.

III-a. Governmental records created or maintained in electronic form shall be kept and maintained for the same retention or archival periods as their paper counterparts. Governmental records in electronic form kept and maintained beyond the applicable retention or archival period shall remain accessible and available in accordance with RSA 91-A:4, III. Methods that may be used to keep and maintain governmental records in electronic form may include, but are not limited to, copying to microfilm or paper or to durable electronic media using standard or common file formats.

III-b. A governmental record in electronic form shall no longer be subject to disclosure pursuant to this section after it has been initially and legally deleted. For purposes of this paragraph, a record in electronic form shall be considered to have been deleted only if it is no longer readily accessible to the public body or agency itself. The mere transfer of an electronic record to a readily accessible "deleted items" folder or similar location on a computer shall not constitute deletion of the record.

IV. Each public body or agency shall, upon request for any governmental record reasonably described, make available for inspection and copying any such governmental record within its files when such records are immediately available for such release. If a public body or agency is unable to make a governmental record available for immediate inspection and copying, it shall, within 5 business days of request, make such record available, deny the request in writing with reasons, or furnish written acknowledgment of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied. If a computer, photocopying machine, or other device maintained for use by a public body or agency is used by the public body or agency to copy the governmental record requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the public body or agency. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.

V. In the same manner as set forth in RSA 91-A:4, IV, any public body or agency which maintains governmental records in electronic format may, in lieu of providing original records, copy governmental records requested to electronic media using standard or common file formats in a manner that does not reveal information which is confidential under this chapter or any other law. If copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different method, the public body or agency may provide a printout of governmental records requested, or may use any other means reasonably calculated to comply with the request in light of the purpose of this chapter as expressed in RSA 91-A:1. Access to work papers, personnel data, and other confidential information under RSA 91-A:5, IV shall not be provided.

VI. Every agreement to settle a lawsuit against a governmental unit, threatened lawsuit, or other claim, entered into by any political subdivision or its insurer, shall be kept on file at the municipal clerk's office and made available for public inspection for a period of no less than 10 years from the date of settlement.
VII. Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency.

Source. 1967, 251:1. 1983, 279:2. 1986, 83:5. 1997, 90:2. 2001, 223:2. 2004, 246:2. 2008, 303:4. 2009, 299:1, eff. Sept. 29, 2009.

VII. Section 91-A:5

91-A:5 Exemptions. – The following governmental records are exempted from the provisions of this chapter:
I. Records of grand and petit juries.
I-a. The master jury list as defined in RSA 500-A:1, IV.
II. Records of parole and pardon boards.
III. Personal school records of pupils.
IV. Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.
V. Teacher certification records in the department of education, provided that the department shall make available teacher certification status information.
VI. Records pertaining to matters relating to the preparation for and the carrying out of all emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.
VII. Unique pupil identification information collected in accordance with RSA 193-E:5.
VIII. Any notes or other materials made for personal use that do not have an official purpose, including but not limited to, notes and materials made prior to, during, or after a governmental proceeding.
IX. Preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.

Source. 1967, 251:1. 1986, 83:6. 1989, 184:2. 1990, 134:1. 1993, 79:1. 2002, 222:4. 2004, 147:5; 246:3, 4. 2008, 303:4, eff. July 1, 2008. 2013, 261:9, eff. July 1, 2013.

VIII. Section 91-A:5-a

91-A:5-a Limited Purpose Release. – Records from non-public sessions under RSA 91-A:3, II(i) or that are exempt under RSA 91-A:5, VI may be released to local or state safety officials. Records released under this section shall be marked "limited purpose release" and shall not be redisclosed by the recipient.

Source. 2002, 222:5, eff. Jan. 1, 2003.

IX. Section 91-A:6

91-A:6 Employment Security. – This chapter shall apply to RSA 282-A, relative to employment security; however, in addition to the exemptions under RSA 91-A:5, the provisions of RSA 282-A:117-123 shall also apply; this provision shall be administered and construed in the spirit of that section, and the exemptions from the provisions of this chapter shall include anything exempt from public inspection under RSA 282-A:117-123 together with all records and data developed from RSA 282-A:117-123.

Source. 1967, 251:1. 1981, 576:5, eff. July 1, 1981.

X. Section 91-A:7

91-A:7 Violation. – Any person aggrieved by a violation of this chapter may petition the superior court for injunctive relief. In order to satisfy the purposes of this chapter, the courts shall give proceedings under this chapter high priority on the court calendar. Such a petitioner may appear with or without counsel. The petition shall be deemed sufficient if it states facts constituting a violation of this chapter, and may be filed by the petitioner or his or her counsel with the clerk of court or any justice thereof. Thereupon the clerk of court or any justice shall order service by copy of the petition on the person or persons charged. When any justice shall find that time probably is of the essence, he or she may order notice by any reasonable means, and he or she shall have authority to issue an order ex parte when he or she shall reasonably deem such an order necessary to insure compliance with the provisions of this chapter.

Source. 1967, 251:1. 1977, 540:5. 2008, 303:5, eff. July 1, 2008.

XI. Section 91-A:8

91-A:8 Remedies. –

I. If any public body or public agency or officer, employee, or other official thereof, violates any provisions of this chapter, such public body or public agency shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter, provided that the court finds that such lawsuit was necessary in order to enforce compliance with the provisions of this chapter or to address a purposeful violation of this chapter. Fees shall not be awarded unless 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 this chapter or if the parties, by agreement, provide that no such fees shall be paid.

II. The court may award attorney's fees to a public body or public agency or employee or member thereof, for having to defend against a lawsuit under the provisions of this chapter, when the court finds that the lawsuit is in bad faith, frivolous, unjust, vexatious, wanton, or oppressive.
III. The court may invalidate an action of a public body or public agency taken at a meeting held in violation of the provisions of this chapter, if the circumstances justify such invalidation.
IV. If the court finds that an officer, employee, or other official of a public body or public agency has violated any provision of this chapter in bad faith, the court shall impose against such person a civil penalty of not less than $250 and not more than $2,000. Upon such finding, such person or persons may also be required to reimburse the public body or public agency for any attorney's fees or costs it paid pursuant to paragraph I. If the person is an officer, employee, or official of the state or of an agency or body of the state, the penalty shall be deposited in the general fund. If the person is an officer, employee, or official of a political subdivision of the state or of an agency or body of a political subdivision of the state, the penalty shall be payable to the political subdivision.
V. The court may also enjoin future violations of this chapter, and may require any officer, employee, or other official of a public body or public agency found to have violated the provisions of this chapter to undergo appropriate remedial training, at such person or person's expense.

Source. 1973, 113:1. 1977, 540:6. 1986, 83:7. 2001, 289:3. 2008, 303:6. 2012, 206:1, eff. Jan. 1, 2013.

XII. Section 91-A:9

91-A:9 Destruction of Certain Information Prohibited. – A person is guilty of a misdemeanor who knowingly destroys any information with the purpose to prevent such information from being inspected or disclosed in response to a request under this chapter. If a request for inspection is denied on the grounds that the information is exempt under this chapter, the requested material shall be preserved for 90 days or while any lawsuit pursuant to RSA 91-A:7-8 is pending.

Source. 2002, 175:1, eff. Jan. 1, 2003.

132:38 Prohibited Acts. –
I. No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius up to 25 feet of any portion of an entrance, exit, or driveway of a reproductive health care facility. This section shall not apply to the following:
(a) Persons entering or leaving such facility.
(b) Employees or agents of such facility acting within the scope of their employment for the purpose of providing patient escort services only.
(c) Law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment.
(d) Persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.
II. Reproductive health care facilities shall clearly demarcate the zone authorized in paragraph I and post such zone with signage containing the following language:

Reproductive Health Center
Patient Safety Zone
No Congregating, Patrolling, Picketing, or Demonstrating Between Signs
Pursuant to RSA 132:38

III. Prior to posting the signage authorized under paragraph II, a reproductive health care facility shall consult with local law enforcement and those local authorities with responsibilities specific to the approval of locations and size of the signs to ensure compliance with local ordinances.

IV. The provisions of this section shall only be effective during the facility's business hours.

Source. 2014, 81:2, eff. July 10, 2014.

132:39 Enforcement; Civil Fine. –

I. Prior to issuing a citation for a violation of this section, a police officer or any law enforcement officer shall issue one written warning to an individual. If the individual fails to comply after one warning, such individual shall be given a citation. Failure to comply after one warning shall be cause for citation whether or not the failure or subsequent failures are contemporaneous in time with the initial warning.

II. Any person who violates this subdivision shall be guilty of a violation and shall be charged a minimum fine of $100. In addition, the attorney general or the appropriate county attorney may bring an action for injunctive relief to prevent further violations of this subdivision.

III. This section shall not apply unless the signage authorized in RSA 132:38, II was in place at the time of the alleged violation.

Source. 2014, 81:2, eff. July 10, 2014.

318:30 Investigatory Powers of the Board; Complaints. –

I. The board may investigate possible misconduct by licensees, permittees, registrants, certificate holders, applicants, and any other matters governed by the provisions of this chapter and RSA 318-B. Investigations may be conducted with or without the issuance of a board order setting forth the general scope of the investigation. Board investigations and any information obtained by the board pursuant to such investigations shall be exempt from the public disclosure provisions of RSA 91-A, unless such information subsequently becomes the subject of a public disciplinary hearing. However, the board may disclose information obtained in an investigation to law enforcement or health licensing agencies in this state or any other jurisdiction, or in accordance with specific statutory requirements or court orders.

II. The board may appoint legal counsel, technical advisors or other investigators to assist with any investigation and with adjudicatory hearings.

III. The board may commence a formal or informal investigation, or an adjudicative hearing, concerning allegations of misconduct and other matters within the scope of this chapter on its own motion whenever it has a reasonable basis for doing so, and the type of procedure chosen shall be a matter reserved to the discretion of the board. Investigations may be conducted on an ex parte basis.

IV. (a) The board may administer oaths or affirmations, preserve testimony, and issue subpoenas for witnesses and for documents during any formal investigation or adjudicatory hearing. The board may also subpoena patient records, as provided in paragraph V, during informal

investigations.
(b) Subpoenas not covered by paragraph V shall be served in accordance with the procedures and fee schedules established by the superior court, except that:
(1) Persons licensed or registered by the board shall not be entitled to a witness fee or mileage expenses for travel within the state.
(2) Witness fees and mileage expenses need not be tendered in advance if the subpoena is annotated "Fees Guaranteed by the New Hampshire Board of Pharmacy."
(3) The respondent shall be allowed at least 48 hours to comply.
V. The board may at any time subpoena medical and pharmacy records from its licensees, registrants, and permittees and from physicians, dentists, veterinarians, advanced registered nurses, hospitals, and other health care providers or facilities licensed by or certified in this state. Such subpoenas shall be served by certified mail or by personal delivery to the address shown on the licensee's, registrant's, or permittee's current license, certificate or permit, and no witness or other fee shall be required. A minimum of 15 days' advance notice shall be allowed for complying with a subpoena duces tecum issued under this chapter.
VI. Persons holding or applying for licenses or other privileges granted by the board shall keep the board informed of their current business and residence addresses. A licensee, permittee, or registrant shall receive adequate notice of any hearing or other action taken under this chapter if notice is mailed in a timely fashion to the most recent home or business address furnished to the board by the licensee, permittee, or registrant.
VII. Complaints of licensee misconduct shall be in writing and shall be treated as petitions for the commencement of a disciplinary hearing. The board shall fairly investigate all complaints to the extent and in the manner warranted by the allegations. A complaint which fails to state a cause of action may be summarily denied in whole or in part. Some or all of the allegations in a complaint may be consolidated with another complaint or with issues which the board wishes to investigate or hear on its own motion. If investigation of a complaint results in an offer of settlement by the licensee, permittee, or registrant, the board may settle the allegations against the licensee, permittee, or registrant without the consent of the complainant, provided that material facts are not in dispute and the complainant is given an opportunity to comment upon the terms of the proposed settlement.
VIII. At the commencement of an adjudicatory proceeding, or at any time during a formal or informal investigation, and without issuing a subpoena, the board may mail a statement of the issues being investigated or heard to a licensee or other person who is a proper subject of inquiry and require that licensee or other person to provide a detailed and good faith written response to such statement. The board may also require the licensee or other person to furnish complete copies of appropriate office records concerning any patient whose treatment is relevant to the matters at issue. The licensee or other person shall respond to such request within a reasonable time period of not less than 15 days, as the board may specify in its written request.

Source. 1921, 122:19. PL 210:31. RL 256:31. 1947, 258:1. RSA 318:30. 1979, 155:23. 1981, 484:13. 1985, 324:12. 1988, 106:4. 1989, 258:2. 1992, 97:10. 1994, 333:7, eff. Jan. 1, 1995. 2005, 177:132, eff. July 1, 2005. 2010, 259:7, eff. July 6, 2010.

318:42 Dealing in or Possessing Prescription Drugs. – It shall be unlawful for any person who is not a licensed pharmacist in a pharmacy registered in accordance with the provisions of this chapter to manufacture, compound, dispense, sell, offer for sale or have in possession any prescription drug as defined in RSA 318:1, XVII, provided that this section shall not prevent the following:

VII. 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, provided that:

(a) The drugs are dispensed under a written protocol established by a licensed physician or by an advanced practice registered nurse, and approved by the department of health and human services which provides for responsible supervision over the activities in question and mentions the name of each registered nurse for whom the physician or advanced practice registered nurse is assuming supervisory responsibility. A written copy of the protocol showing the date it was approved by the department of health and human services shall be kept at the clinic at all times and shall be made available during any inspection conducted under RSA 318:8.

(b) The drugs appear on the current formulary approved pursuant to RSA 326-B.

(c) The drugs are dispensed only to bona fide clients of the clinic for their personal needs pursuant to written eligibility criteria established by the department of health and human services.

(d) The clinic, except for clinics operated directly by the department of health and human services, possesses a current limited retail drug distributor's license under RSA 318:51-b.

(e) [Repealed].

329:26 Confidential Communications. – The confidential relations and communications between a physician or surgeon licensed under provisions of this chapter and the patient of such physician or surgeon are placed on the same basis as those provided by law between attorney and client, and, except as otherwise provided by law, no such physician or surgeon shall be required to disclose such privileged communications. Confidential relations and communications between a patient and any person working under the supervision of a physician or surgeon that are customary and necessary for diagnosis and treatment are privileged to the same extent as though those relations or communications were with such supervising physician or surgeon. This section shall not apply to investigations and hearings conducted by the board of medicine under RSA 329, any other statutorily created health occupational licensing or certifying board conducting licensing, certifying, or disciplinary proceedings or hearings conducted pursuant to RSA 135-C:27-54 or RSA 464-A. This section shall also not apply to the release of blood or urine samples and the results of laboratory tests for drugs or blood alcohol content taken from a person for purposes of diagnosis and treatment in connection with the incident giving rise to the investigation for driving a motor vehicle while such person was under the influence of intoxicating liquors or controlled drugs. The use and disclosure of such information shall be limited to the official criminal proceedings.

Source. 1969, 386:1. 1977, 417:21. 1979, 322:21. 1983, 377:11. 1986, 212:2. 1995, 286:24. 1996, 267:2. 2000, 294:4. 2008, 353:1, eff. Sept. 5, 2008.

STATEMENT OF THE FACTS AND OF THE CASE

This is an appeal of the Superior Court's application of RSA 91-A to several public document requests under RSA 91-A. The petitioners, New Hampshire Right to Life and Jackie Pelletier (hereinafter collectively NHRTL), have requested documents from various State agencies regarding tax payer funding of abortion clinics, state regulation of abortion clinics and the creation of anti-free speech buffer zones around abortion clinics. Appx. 1-12. The State agencies[1] unlawfully delayed production of documents, refused to produce the requested documents or, in many cases, even give reasons for the non-disclosure. In this case, the State did not meet its burden and the Superior Court should have ordered production of the documents and awarded NHRTL its' attorneys' fees and costs.

The Verified Complaint in this case was filed on October 20, 2014. Appx. 1. The Answer was filed on December 8, 2014. Appx. 53 Many of the requested records were produced by the State shortly before their Answer. Appx. 131. A hearing was held on January 13, 2015 and the Court set February 2, 2015 as the deadline for parties' briefing. Appx. 135. After briefing, the Superior Court requested *in camera* review of all of the documents a *Vaughn* index or Table of Contents was provided by the State on April 17, 2015. Appx. 463-475. The Court issued an Order, dated May 15, 2015, ordering the State to produce some documents and affirming the State's withholding or redactions or other documents. Add. 1-36. NHRTL filed its Rule 7 Notice of Mandatory Appeal on June 15, 2015.

[1] The state agencies include the Director of Charitable Trusts, the New Hampshire Attorney Generals' Office, the New Hampshire Board of Pharmacy and the New Hampshire Department of Health and Human Services. All of the agencies are represented by the Attorney General's Office and will be hereinafter collectively referred to as "the State."

SUMMARY OF THE ARGUMENT

"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 violated RSA 91-A by wrongfully withholding documents, wrongfully redacting documents and failing to provide documents or reasons for non-disclosure in compliance with the statutory timeframe.

First, the State violated RSA 91-A when it failed to disclose documents and communications it received from third party abortion clinics and other states on the basis of the work product privilege. Although internal communications can be protected by the work product privilege, that privilege does not extend to documents or communications with third parties. *S.E.C. v. Gupta*, 281 F.R.D. 169 (S.D.N.Y. 2012)(government attorney waives work product privilege when she shares documents with third party witness). Second, the State violated RSA 91-A when it withheld a DVD of people on a public sidewalk on the basis that some of the individuals may have been considering consulting with a physician. The physician-patient privilege does not apply to video footage of a public sidewalk. Third, the State improperly redacted budgets, financial statements and the identities of individuals who operated and were employed by publicly funded abortion clinics. Personal privacy does not outweigh the great public interest in disclosure of these budget materials and the identities of who is running and employed by tax payer funded abortion clinics. *Prof'l Firefighters of New Hampshire v. Local Gov't Ctr., Inc.*, 159 N.H. 699, 708 (2010)("LGC employees have no greater privacy interest regarding their individual salary information than traditional public employees."); *United States v. Suarez*, 880 F.2d 626, 630 (2d Cir. 1989) ("[T]here is an obvious legitimate public interest in how taxpayers' money is being spent"). Finally, the State violated RSA 91-A when it failed to

comply with the statutory time frames for production of documents and for providing written reasons for the non-disclosure as required by RSA 91-A:4(IV). The Superior Court should have found the State's 12 week and 9 month delays to be violations under RSA 91-A, awarded NHRTL its costs and fees and enjoined the State from violating the time periods for compliance with RSA 91-A in the future.

ARGUMENT

I. The Work Product Privilege Does Not Exempt Documents or Communications the State Shared With Third Parties

The State withheld several documents on the basis of the work product privilege. Appx. 471. This 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).

The State 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 State failed to show witness statements from third party abortion clinics, its communications with abortion clinics and its communications with other states were entirely privileged work product and the Superior Court erred in upholding these withholdings. Even if a portion of these documents did constitute work product, the State violated RSA 91-A by not producing those portions that did not constitute work product.

A. The Affidavit of Meagan Gallagher Is Not Work Product

One of the documents withheld by the State was a July 8, 2014 affidavit from Planned Parenthood C.E.O Meagan Gallagher. The affidavit was a summary of Ms. Gallagher's expected testimony for a federal court case challenging the abortion clinic buffer zone law, RSA 132:38, as unconstitutional. The affidavit was not drafted by the State but was drafted by Planned Parenthood. See Appx. 84. The Superior Court described the affidavit as containing "some purely factual information, but it also contains policy statements and opinions of the affiant" C.E.O. Meagan Gallagher. Add. 9.

The Gallagher affidavit is not protected work product. "At its core, the work-product doctrine shelters the mental processes of the attorney." *State v. Chagnon*, 139 N.H. 671, 673 (1995). The Gallagher affidavit does not show the mental processes of the State's attorneys. As the Superior Court recognized, it shows "purely factual information" as well as the "policy statements and opinions of the affiant." Add. 9. The work product privilege does not exempt disclosure under RSA 91-A the "purely factual information" contained in the affidavit. The work product privilege also does not exempt from disclosure C.E.O. Gallagher's "policy statements and opinions" contained in the affidavit. Finally, even if Planned Parenthood could assert the work product privilege on behalf of documents it created, Planned Parenthood waived any work product privilege when it shared its CEO's affidavit with attorneys for the State of New Hampshire. Appx. 84. The New Hampshire Attorney General's Office was not representing Planned Parenthood in the federal litigation and Planned Parenthood was not even a party in the federal litigation. Pursuant to RSA 91-A, the Superior Court should have ordered disclosure of the July 8, 2015 Gallagher Affidavit at (w) 305-306. See Appx. 472.

B. The State's Communications With Third Party Abortion Clinics Are Not Work Product

The State has withheld emails its attorneys had with Jennifer Frizzell, the Vice President of Planned Parenthood as well as with Dalia Vidunas, the Executive Director of the Concord Feminist Health Clinic. See Appx. at 475 (Documents W 1475-1476). Communications with third parties, including attachments to such communications, are not work product. Even if such attachments were work product, any privilege is waived when shared with a third party. See, e.g., *S.E.C. v. Gupta*, 281 F.R.D. 169 (S.D.N.Y. 2012)(government attorney waives work product privilege when she shares documents with third party witness); *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126-27 (9th Cir. 2012)("voluntarily disclosing privileged documents to third parties will generally destroy the privilege"). Communications with third parties are not exempt from disclosure under RSA 91-A.

C. The State's Communications with Other States is Not Work Product

Finally, the State also withheld over 250 pages of documents described as emails "with other states Attorney General's Offices with attachments containing draft amicus briefs." Appx. 471 (Documents (w)36-294). Just as communications with the abortion clinics are not work product, neither are the communications with other States. *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126-27 (9th Cir. 2012)("voluntarily disclosing privileged documents to third parties will generally destroy the privilege"). The State has not alleged and it is unable to show that it was involved in an ongoing common enterprise with other States. In fact, the state of New Hampshire did not ultimately join other States in filing an amicus brief at the United States Supreme Court. Therefore, neither the communications with other states nor the documents received or sent to other states are exempt from disclosure pursuant to the work product privilege. Communications

with New York, Michigan, Massachusetts or any other state must be disclosed pursuant to RSA 91-A.

II. Alleged Personal Privacy is Insufficient to Deny Disclosure Under RSA 91-A of DVDS of Public Sidewalks and Communications With Third Parties Regarding the DVDs

In June 2014, the legislature adopted SB 319 to create an anti-speech buffer zone around certain abortion clinics. The stated purpose of this bill was to remedy alleged problems at "recent demonstrations outside of reproductive health clinics." 2014 N.H. Laws 81:1(I)(e-g). NHRTL denies that there have been problems necessitating such an unconstitutional restriction of First Amendment rights and testified at legislative hearings against SB 319 in 2014 and testified in favor of the buffer zone repeal bill, HB 403, in 2015. HB 403 passed the House but deadlocked in the Senate after a 12-12 vote.

One of the sets of documents requested by NHRTL but withheld by the State were DVDs of prayerful protests on public sidewalk on Pennacook Street in Manchester. The DVDs only show what would be visible from the public sidewalks. These DVDs were provided to the State by Planned Parenthood of Northern New England and, according to the Superior Court, "appear to depict not only protestors praying on a public sidewalk, but also PPNE [sic] patients entering and exiting the clinic." Add. 11. The Superior Court held that the State properly withheld the DVDs in their entirety "based on concerns for the personal privacy of individuals depicted in the videos [and in particular] the confidentiality of the physician-patient relationship. See RSA 329:26." Add. 11-12.

The Superior Court erred in broadly interpreting the personal privacy exemption of RSA 91-A:5, IV to prohibit disclosure. 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." *New Hampshire Civil Liberties Union v. City of Manchester*, 149 N.H. 437, 439 (2003). Disclosure of the DVDs is controlled by this Court's previous decision in *New Hampshire Civil Liberties Union v. City of Manchester*. In that case, the City of Manchester erroneously withheld photographs taken by its police department on same allegation of invasion of privacy. *Id.* This Court held that the City had to produce the photographs under RSA 91-A. The State made no stronger showing for withholding of DVDs in this case than the City of Manchester had for the photographs in *New Hampshire Civil Liberties Union v. City of Manchester*, 149 N.H. 437, 439 (2003).

In determining whether disclosure would result in an unwarranted invasion of privacy under RSA 91-A:5, IV, a court must first determine "whether there is a privacy interest at stake that would be invaded by disclosure. . . If there is not, the Right-to-Know Law mandates disclosure" *Id.* at 440. In this case, the Superior Court erred in finding that there was any privacy interest in video footage of a public sidewalk. In particular, the Superior Court erred in holding that disclosure of the DVDs would violate the confidentiality of the physician-patient relationship under RSA 329:26. Add. 12. Regardless of whether the depictions were of people walking down the sidewalk to obtain abortions, walking down the sidewalk to protest abortion or walking down the sidewalk to get somewhere other than an abortion clinic, the DVDs are footage of a public sidewalk and therefore are not confidential communications under RSA 329:26. RSA 329:26 only protects confidential communications and not footage of public sidewalks. There was no suggestion that medical advice was being tendered on the sidewalk. Even if medical advice was being tendered on the sidewalks, the presence of third parties destroys any privilege.

See *State v. Laroche*, 122 N.H. 231, 233 (1982).[2] Therefore, where there was no privacy interest, there was no need to weigh it against the public interest in disclosure and the Superior Court should have ordered disclosure of the DVDs.

Even if there was a privacy interest, the Superior Court erred in not finding any small privacy interest outweighed by the great public interest in these videos. These videos were during legislative hearings on the repeal of the abortion clinic buffer zone and were the State's evidence in a federal case of why it felt it was necessary to restrict citizen's free speech rights on public sidewalks outside abortion clinics. Appx. 196. Public hearings were held in January and March 2015 on the proposed repeal of RSA 132:38-39 in which numerous members of the public, including NHRTL, testified. Ultimately, the Senate deadlocked with a tie vote and the repeal bill did not pass.

The Superior Court erred in suggesting that "NHRTL has not asserted a sufficient specific public interest in the disclosure of the DVD footage, and the Court cannot discern how the content of the DVDs would shed light on the activities of the AGO, or other government entity." Add. 12. First, the Superior Court erred in assigning the burden of proof on NHRTL to assert a "specific public interest in the disclosure of the DVD footage." Id. It is not the requestor's obligation to demonstrate public interest. "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 nondisclosure." *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996). There is a presumed public interest in disclosure of all public records. "The legislature has

[2] *LaRoche* also holds that the privilege only applies to communications with physicians or surgeons. In this case the State did not suggest that the footage was exclusively of people going in to the clinic to consult with a physician or a surgeon as opposed to some other clinic employee.

provided the weight to be given one side of the balance, declaring the purpose of the Right-to-Know Law in this way: "Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter 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.'" *Id.* at 476 (quoting RSA 91-A:1). Furthermore, the State concedes the public interest by stating that the AGO was considering whether these DVDs were helpful or harmful to the AGO's attempt to defend the constitutionality of RSA 132:38-39. Appx. 193.[3]

When weighing the small or non-existent privacy interest in videos of a public sidewalk against the great public interest in disclosure, it is clear that the public interest in disclosure outweighs any privacy interest. This Court's leading case on the disclosure of photographs, *New Hampshire Civil Liberties Union v. City of Manchester*, 149 N.H. 437, 442 (2003), actually concludes by citing a New York case with a similar fact pattern to the present case. "Any privacy interest in the photographs at issue does not outweigh the public's interest in disclosure. *Cf. Planned Parenthood v. Town Bd.,* 154 Misc.2d 971, 587 N.Y.S.2d 461, 463 (Sup.Ct.1992) (no unwarranted invasion of privacy in disclosing police department photos of anti-abortion protesters)." *City of Manchester*, 149 N.H. at 442. Just as the Planned Parenthood protestors did not have a privacy interest sufficient to preclude production of the photographs in the New York case, the public interest in the DVDs outweighs any privacy interest of the protestors, patients or any other person who may have been walking down the public sidewalk.

[3] In addition, the DVDs may also be helpful to ascertain why the Manchester police did not take action to disperse the alleged crowd of protestors. NHRTL believes that the DVDs will show that people were peacefully and prayerfully demonstrating on the sidewalk and that the lack of Manchester police action was justified as no laws were being broken by any of the pro-life demonstrators.

Finally, the State also violated RSA 91-A in withholding correspondence with third parties about the DVDs. The Superior Court held that this correspondence could be withheld for the same reasons as the DVDs were withheld – i.e. the potential that it might show the patients entering or exiting the clinic onto the public sidewalk where protestors were praying. Add. 11-12. Just as there is no personal privacy basis for withholding the DVDs, there is no basis for withholding the State's communications about the DVDs. If the communications actually identified patients by name, the State could redact the names of the patients and produce the rest of the communications.

III. Identities of Contractors Whose Salaries Are Paid for by Taxpayer Funds Must Be Disclosed Under RSA 91-A

NHRTL requested documents from the BOP, DHHS and AGO regarding the regulation of taxpayer funded abortion clinics and Limited Retail Drug Distributorships licensed under RSA 318:42(VII). The State redacted the names of the employees, a portion of whose salaries were being paid for by public funds. The State also redacted the names of officials with publicly financed clinics who were being granted exemptions from complying with the pharmaceutical statutes pursuant to RSA 318:42(VII).[4] The Superior Court erred in holding that the employees and officials of publicly funded clinics have a privacy interest in their identities that outweighs the public interest in disclosure. See Add. 17, 30.

In determining whether identities and salary information may be redacted under RSA 91-A:5(IV), the same three part test applied to the withholding of the DVDs must be applied to the

[4] By definition, all Limited Retail Drug Distributorships must be a contractor of the New Hampshire Department of Health and Human Services. See RSA 318:42(VII). Therefore, all licensees are also recipients of state funds. Many organizations, such as the Concord Feminist clinic, Joan Lovering Clinic and the Planned Parenthood clinics are or were also recipients of separate family planning aid. See Appx. at 123.

redaction of the contractor's identities. The State must first identify a privacy interest, identify the public interest in disclosure and determine whether the public interest in disclosure outweighs the privacy interest. See *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).

In this case, there is a minimal privacy interest in the identities of the employees and officials running publicly funded clinics. "There is only a 'modest privacy interest' assigned to an individual's "bare name and home address" *Lamy v. NH PUC*, 152 N.H. 106, 109 (2005). Any privacy interest is even lessened when the information sought is only the name and salary and not the home address. See *Union Leader v. NH Retirement System*, 162 N.H. 673 (2011). A private employee of a publicly funded entity has no greater privacy interest in their identity and salary than a public employee. See *Prof'l Firefighters of New Hampshire v. Local Gov't Ctr., Inc.*, 159 N.H. 699, 708 (2010)("LGC employees have no greater privacy interest regarding their individual salary information than traditional public employees."); See also *Kurzon v. HHS*, 659 F.2d 65, 68 (1st Cir. 1981) ("federal grant applicants cannot reasonably expect that their efforts to secure government funds, especially in a field so much in the public eye as cancer research, [or funding of abortion clinics] will remain purely private matters.")

In addition, the identities of many of the clinic officials and employees at issue in this case have been publicly disclosed by the clinics themselves. For example, Planned Parenthood publishes employee names and board member names on its website.[5] The Concord Feminist

[5] See http://www.plannedparenthood.org/planned-parenthood-northern-new-england/about-us/publications/financial-reports (last visited September 1, 2015). In addition, PPNNE lists employees in employee profiles in its quarterly newsletter. See https://www.plannedparenthood.org/planned-parenthood-northern-new-england/about-us/publications/ (last visited September 1, 2015). See also Appx. 493-494.

Health Clinic has had front page *Concord Monitor* news articles about the work being done by its named employees[6] and the Lovering Clinic, for whom 87.5% of employee salaries are funded with tax payer funds, have disclosed their employees work in newspaper articles in the *Portsmouth Herald.*[7] The State cannot assert a privacy interest on behalf of its grant recipients when the grant recipients disclose their own employee identities.

On the other hand, there is great public interest in disclosure of who is running and whose salary is being paid by taxpayer funds. See *Brock v. Pierce County*, 476 U.S. 253, 262 (1986) ("[T]he protection of the public fisc is a matter that is of interest to every citizen."); *News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173, 1192 (11th Cir. 2007) ("easily" concluding that there is a substantial public interest under FOIA Exemption 6 in "learning whether FEMA is a good steward of (sometimes several billions of) taxpayer dollars "); *United States v. Suarez*, 880 F.2d 626, 630 (2d Cir. 1989) ("[T]here is an obvious legitimate public interest in how taxpayers' money is being spent"). Other States to have considered whether the public has a right to know the identities of individuals in publicly funded family planning clinics have uniformly found a great public interest in the identities of clinic employees and officials. *Family Life v. Dep't of Public Aid*, 493 N.E.2d 1054 (Ill. 1986); *State v. Harder*, 641 P.2d 366 (Kan. 1982); *Minnesota Medical Assoc. v. State*, 274 N.W.2d 84 (Minn. 1978).

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[6] See Appx. 173 & 182. Ms. Harris has been previously featured in other *Concord Monitor* articles including doing "outreach" by holding candlelight vigils." Id. The public has a right to know whose salaries are being paid for by taxpayer funds so it may appropriately analyze whether DHHS is using public funds effectively.

[7] The State redacted the name of Brigit Ordway as having 87.5% of her salary paid for by a taxpayer funded granted. Ms. Ordway was quoted and identified by name in an article regarding the work done at the clinic. See http://www.seacoastonline.com/article/20141214/NEWS/141219629 (last visited September 1, 2015). The public cannot effectively analyze whether DHHS is properly using taxpayer funds if the public is denied access to how these funds are being spent and used.

Similarly, this Court has previously recognized a great public interest in the employee identities of publicly funded organizations as "[p]ublic scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism." *Prof'l Firefighters of New Hampshire v. Local Gov't Ctr., Inc.*, 159 N.H. 699, 709 (2010)(holding names of employees must be disclosed under RSA 91-A).

Public scrutiny is particularly important in this case where clinics were sending hundreds of thousands of dollars in campaign contributions to key state officials and there has been a revolving door between state officials and abortion clinic officials. For example, Planned Parenthood spent more than $500,000 on Governor Hassan's election campaign.[8] In addition, the former attorney for Planned Parenthood, Lucy Hodder, became Governor's Counsel. Planned Parenthood board member Matthew Houde was a State Senator from Plainfield.[9] There is a great public interest in the officials and employees of government contractors and whether a government agency, the legislature or the Governor's office, is showing undue favoritism to a large campaign contributor. The identities of whose salaries are being paid for by public funds will inform the public as to whether the Department of Health and Human Services is spending tax payer funds appropriately or awarding grants for political reasons.

Likewise, the identities of the individuals being granted an exemption by the Board of Pharmacy to dispense prescription drugs without a pharmacist will inform the public whether the

[8] See Appx. 2 & 47.

[9] Although the public knows that Attorney Hodder moved from representing Planned Parenthood to representing the Governor, see Appx. 471, and that former Senator Houde is now on the Board of Planned Parenthood, the public cannot know how many other employees of contractors are now regulating or directing taxpayer funds to the entities that they formerly worked for.

Board of Pharmacy is properly applying RSA 318:42(VII)[10] to narrowly allow a limited subset of individuals to dispense prescription without a pharmacist or whether the Board of Pharmacy is granting exemption to political contributors. Finally, the identities of the employees are necessary to know whether the State is improperly showing favoritism or incompetently and inefficiently spending taxpayer dollars.[11]

The public interest in disclosure greatly outweighs any privacy interest. "[W]hen 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 nondisclosure. . . [This Court will] 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." *Prof'l Firefighters of New Hampshire v. Local Gov't Ctr., Inc.*, 159 N.H. 699, 707 (2010). Grantees whose salaries are paid for by tax payer funds have no greater privacy interest in their identities and salaries than public employees or retirees. *Id.* In addition to being grantees, RSA 318:42(VII) allows non-pharmacists to be exempted from complying with pharmaceutical statutes and dispense prescription drugs. The public has an interest in knowing who is being granted these exemptions and whether campaign contributions are improperly affecting regulatory decision making. This is particularly important in this case where the Board

[10] By statute all Limited Retail Drug Distributorships must be acting pursuant to a contract by the New Hampshire Department of Health and Human Services. See RSA 318:42(VII). Therefore, officers and employees of LRDDs are having their salaries paid, at least in part, by tax payer funds.

[11] As previously discussed, because the public knows that Attorney Hodder was a former attorney for Planned Parenthood, the public can be rightly concerned that Attorney Hodder was representing the Governor with regard to both funding and regulation of Planned Parenthood's clinics. Appx. 471, 472, 473. The public has a right to know the identities of other former grantee employees who are now regulating or approving funding and/or current grantee employees who were previously employed by the State. This knowledge will allow public scrutiny to possibly "expose corruption, incompetence, inefficiency, prejudice and favoritism." *Prof'l Firefighters of New Hampshire v. Local Gov't Ctr., Inc.*, 159 N.H. 699, 709 (2010).

of Pharmacy acknowledged that it was not enforcing RSA 318:42(VII) until the Board's failures were exposed by NHRTL following NHRTL's prior right to know requests. See Appx. 126, 78-79, fn 17, Add. 25-26. Public disclosure of the identities the officers and employees of publicly financed corporations will allow the public scrutiny of the decisions of the Board of Pharmacy, the Department of Health and Human Services as well as the Attorney General's office.

The Superior Court's speculation that disclosure of identities will result in harassment is unfounded and not a sufficient basis for exempting documents under RSA 91-A. Add. 15-16. NHRTL has had the identities of several clinic employees both from previous right to know requests and from public sources (such as the clinic's own website) and there has been no untoward consequence of such public disclosure. Other States that have balanced the competing interests have all found that the public interest in disclosure outweighs any asserted privacy interest. For example, in *Family Life League v. Department of Public Aid*, 493 N.E.2d 1054 (Ill. 1986), the Illinois Supreme Court rejected the state's claim that the abortion doctors receiving government funds had a privacy interest in their identities because disclosure would subject them to harassment stating:

> It would be inappropriate for a court to assume that, when given access to certain information, the public will react in a tortious or criminal manner. There are certainly sufficient legal avenues available to combat criminal and tortious acts. The denial of the People's right to public information is not one of them. Id. at 1058.

See also *State v. Harder*, 641 P.2d 366 (Kan. 1982)(names of abortion doctors must be released in a right to know request); *Minnesota Medical Assoc. v. State*, 274 N.W.2d 84 (Minn. 1978)(same). While RSA 91-A may allow the redaction of home addresses and private financial information of individuals, it does not require the redaction of the identities of officials or

employees of publicly funded abortion clinics or publicly funded Limited Retail Drug Distributorships.[12]

IV. Grant Budgets and Financial Data Are Not Exempt From Disclosure Under RSA 91-A

The State has also redacted the Joan Lovering Center's (aka Feminist Health Center of Portsmouth's) budget and financial statements that were submitted as part of their requests for additional State funding. See Appx. 468, P105 to P120, and Appx. 599 to 612. As with any document the State wants to redact or withhold, the State "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 did not meet its burden. In fact, the State's sole defense of the budget and financial statement redactions at Appx. 599 to Appx. 612 is a conclusory citation to RSA 91-A:5, IV. See Appx. 468. The State did not weigh the public interest in disclosure as compared to any privacy interest in these financial documents.

In this case, redacted budget and financial statements show finances for previous years and what percentages of certain salaries will be paid by taxpayer grants in future years. For example, the redacted portion of Lovering's financial statement shows that $306,880.25 of its $496,256.26 total income, or 62%, is related to abortions.[13] See Appx. at 601. Other redacted documents show that 87.5% of Program Director Brigit Ordway's salary and 87.47% of Assistant Program Director Donna Denny's salary is being paid for by state funds. Appx. 607. Other Lovering employees, such as Victoria Nast and Ursula Coppenheaver had their salaries

[12] Pursuant to RSA 318;42(VII), all Limited Retail Drug Distributorships must be under contract with the New Hampshire Department of Health and Human Services. Therefore, the salaries at any LRDD will be, at least in part, paid for with public funds.

[13] The first line shows medical abortions (aka RU-486) account for $49,208.77 while surgical abortions account for $257,671.48. Appx. 601.

paid at 50% State funds and 40% State funds. Appx. 124. Finally, the redacted budget forms show how the $74,500 in State grant funds was to be spent for each grant year. Appx. 611-612.

This is little or no privacy interest in the budget amounts or the financial statement numbers. These were submitted to a state agency in order to obtain additional State funding. In addition these documents are publicly available from other sources. See *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540, 556 (1997)(privacy "interest in keeping this information exempt is slight" when information is available elsewhere).

On the other hand, there is great public interest in how state tax payer dollars are spent. See *Brock v. Pierce County*, 476 U.S. 253, 262 (1986) ("[T]he protection of the public fisc is a matter that is of interest to every citizen."); *News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173, 1192 (11th Cir. 2007) ("easily" concluding that there is a substantial public interest under FOIA Exemption 6 in "learning whether FEMA is a good steward of (sometimes several billions of) taxpayer dollars "); *United States v. Suarez*, 880 F.2d 626, 630 (2d Cir. 1989) ("[T]here is an obvious legitimate public interest in how taxpayers' money is being spent").

The Superior Court erroneously held that "financial budgets primarily show the conduct of the clinic, not any government conduct." Add. 28. In fact, the budget information shows how Lovering intended to spend the State grant. See Appx. 611-612. Furthermore, the State's decision to fund Lovering was based on the budget and financial statements. The public interest in disclosure also outweighs any privacy interest for both the budgets and the financial statements.

In *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540, 555-56, (1997), this Court considered whether "certain financial statements include[ing] . . . balance sheets and income statements of the intervenors and related [private] corporations" were exempt from

disclosure under RSA 91-A. *Union Leader* recognized that because the Housing Finance Authority's decision to fund the private organization was based on the financial statements that disclosure of the financial statements may give insight into how and why the Housing Finance Authority decided to fund the companies. Similarly, disclosure of the abortion clinics budgets and financial statement may give insight as to how and why DHHS decided to fund the abortion clinics or if this was an inappropriate use of taxpayer funds. This is particularly important where the redacted data tends to show that 62% of Lovering's work involves abortions and it is unlawful to use federal grant dollars[14] to fund abortion services. Appx. 601. The Superior Court erred in not ordering the disclosure under RSA 91-A of the financial date and budgets at Appx. 599-612.

V. 2012 PPNNE Pharmacy Protocols Are Not Exempt From Disclosure Under RSA 91-A

NHRTL has, in several different requests, requested that the State produce unredacted copies of all of the pharmacy protocols approved by the State. See Add. 26 ("NHRTL's request here applies to all clinics which have submitted protocols to DHHS"). NHRTL's various requests included the protocols approved by HHS on September 7, 2012 for the Lovering Health Center, September 14, 2012 for Weeks Medical Center, September 14, 2012 for PPNNE, June 2013 for the Weeks Medical Center, June 24, 2013 for PPNNE and August 2013 for the Concord Feminist Health Center. Appx. 518. At least three separate requests specifically requested the PPNNE protocols approved by HHS on September 14, 2012.

[14] Federal law has long prohibited the use of federal funds for abortion services. See *Harris v. McRae*, 448 U.S. 297 (1980). Although many of the contracts at issue in this case were awarded by the New Hampshire Department of Health and Human Services and approved by Governor and Council, many of the contracts are an award of federal or a combination of federal and state funds. For example, the contract at Appx. 568 is 100% federal funds.

In its May 15, 2015 Order, the Superior Court properly held that the "public interest in disclosure outweighs the private interest in confidentiality" and ordered the disclosure of five of the six protocols. Add. 24-26. Nevertheless, the Court erred in not ordering disclosure of PPNNE 2012 protocols. Even though the 2012 PPNNE protocols were attached as Exhibit G to NHRTL's Complaint (Appx. 31-43) as well as Exhibit I to the State's Trial Brief, (Appx. 328-341) and specifically discussed by both parties at length in their respective trial briefs, the Superior Court did not specifically address the 2012 PPNNE protocols in its May 15, 2015 Order. Following a Motion for Clarification, the Superior Court erred in finding that the 2012 PPNNE Pharmacy Protocols were not specifically requested in NHRTL's October 11, 2014 Right-to-Know request. See June 24, 2015 Supplemental Order at Add. 41. In fact, the October 11, 2014 request specifically referenced the earlier October 23, 2012 Right-to-Know Request that had previously requested the 2012 protocols. See Appx. 581-582. In addition, as indicated in the State's Trial Brief, NHRTL had specifically requested the 2012 protocols on August 9, 2012 and received HHS's response on October 22, 2012.[15] Appx. 328-341. Finally, in its July 28, 2014 request, attached as Exhibit C to the Complaint and discussed in paragraphs 32 to 39 of its Complaint, NHRTL had comprehensively requested all documents related to PPNNE. See Appx. at 6 and 19-22.[16] The Superior Court erred in holding that "the Court cannot fault the State for failing to produce something that was not requested." Add. 42. NHRTL had requested the 2012 in at least three different Right-to-Know requests and the protocols should have been ordered disclosed.

[15] NHRTL did not receive HHS's October 22, 2012 response to its August 9, 2012 request until after it had sent its supplemental request of October 23, 2012. The requests were, however, for the same PPNNE protocols approved by HHS on September 14, 2012.

[16] In addition, the State may have provided these protocols to the Court for in camera review as part of one of Attorney Dempsey's internal working files on RSA 91-A requests. See (w) 612-817 at Appx. 472.

VI. The Superior Court Erred in Failing to Find the State's Refusal to Timely Provide Reasons for its Denials a Violation of RSA 91-A

"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). Agencies must explain their alleged exemptions in a manner "clear enough to permit a court to ascertain how each category of documents" would be exempt from disclosure. *Id.* The explanation must be:

> [S]pecific enough to afford the [petitioners] a meaningful opportunity to contest, and the [superior] court an adequate foundation to review, the soundness of the withholding. For an entry in the index to be sufficient, it must provide the connective tissue between the document, the deletion, the exemption and the explanation. Specificity is the defining requirement of the *Vaughn* index, [and][u]nless the agency discloses as much information as possible without thwarting the claimed exemption's purpose, the adversarial process is unnecessarily compromised. (quotations, citations, and brackets omitted). *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540, 549 (1997)

In this case, the State's initial response to the right to know requests vaguely cites the entire statutory exemption provision and states that the withheld "information includes, ***but is not limited to***, personal contact information and attorney work product." (emphasis added) Appx. 24. The State's response neither indicated how many documents were being withheld nor the basis for the withholding. NHRTL requested what unidentified additional information was being withheld and the basis for the withholding but the State refused. Appx. 92-94. Even after the filing of this action the State continued to refuse to indicate what documents it was withholding or the basis for the withholdings. See Answer, ¶ 64, at Appx. 60. ("information includes, ***but is not limited to***, personal contact information and attorney work product.") In its Trial Brief, the State argued that a *Vaughn* Index was not necessary to identify its undisclosed withholdings and

"due to the minimal number of documents in dispute, the State contends that an *in camera* review is appropriate." Appx. 188.

On January 13, 2015, the Superior Court set a deadline of February 2, 2015 for the parties "to file any memoranda or trial briefs or supplements thereto." Appx. 136. On March 1, 2015, the Superior Court then set a March 10, 2015 deadline for submission of the documents for *in camera* review. Appx. 435. The State did not provide all of the documents it withheld for in camera review but only those redacted documents which the State had previously provided to NHRTL. Appx. 444. When NHRTL moved for the Court to review all of the withheld documents, the State objected to identifying these documents as "The withheld documents fall clearly under RSA 91-A exemption." Appx. 461. Eventually, the Superior Court ordered the State to provide it with all of the documents for *in camera* review and a table of contents to NHRTL of the documents being provided to the Superior Court. Appx. 457. On April 17, 2015, the State provided the Court with the documents and NHRTL with a table of contents. Appx. 463-475. The total number of documents, which the State had previously characterized as a "minimal number," totaled an unwieldy 1,950 pages. NHRTL was not even aware that the State was withholding 1,460 pages until receiving the State's April 17, 2015 table of contents. Appx. 471-475; See also Appx. 92-94 ("withholding 300 pages of attorney notes of 5 pages of potential exhibits . . . could potentially have different analysis under RSA 91-A.")

First, the Superior Court erred in only requiring the State to provide NHRTL with a table of contents of withheld documents two months *after* the February 2, 2015 deadline for argument. The agency seeking non-disclosure has the burden of providing explanations "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). Requiring the State to provide the petitioners with a *Vaughn* index two months after the deadline for argument is insufficient. The State cannot rely on the Court to simply review 1,950 pages in camera. "[I]*n camera* inspection of all documents in a large document case would undermine [the purpose of RSA 91-A] since it would shift the burden of proof from the party resisting disclosure to the petitioners, who with limited knowledge must argue that a document is not exempt." *Union Leader*, 142 N.H. at 549. The State violated RSA 91-A by failing identify withheld documents and failing to provide adequate explanation of the alleged exemptions at the time of the State's initial response or at least at the time of the State's Answer.

In addition, the Superior Court erred in not requiring greater specificity of the documents withheld. As in the *Union Leader* case, the Table of Contents in this case make, at best, "only broad statements essentially explaining that the documents were withheld . . . [and] fell short of providing the [petitioners] with a meaningful opportunity to challenge a substantial number of [their] unilateral decisions to withhold documents." 142 N.H. at 550. See Appx. 467-475. For nearly all of the redacted documents, the State merely cited the exemption provision from the statute without "the connective tissue between the document, the deletion, the exemption and the explanation" required by *Union Leader*. See Appx. 467-470. For the Withheld Documents, Appx. 471-475, the State grouped large groups of hundreds of documents together without any explanation of asserted exemptions to particular types of documents. For example, (w) 236-294 at Appx. 471, includes over 250 pages, some of which may be internal emails, some of which may be communications with other states and some of which may be draft documents sent to the state of New Hampshire by other States.

Furthermore, the Table of Contents does not have any dates for any of the documents. If the State provided the dates of the documents withheld, NHRTL would be able to analyze whether the asserted privilege was properly invoked. For example, the Board of Pharmacy concluded its disciplinary investigation of Planned Parenthood on October 26, 2012. Appx. 109. NHRTL requested documents from the Board of Pharmacy regarding Planned Parenthood applications from July 1, 2013 to present. Appx. 218. The BOP responded by withholding documents relating to its disciplinary investigation under RSA 318:30, I. See Appx. 218 & Appx. 471. Either the State's withholdings include documents not requested or the State is improperly withholding documents subsequent to the October 26, 2012 closure of the disciplinary investigation. If the State's Table of Contents provided the dates of the documents withheld, NHRTL could properly analyze whether the documents withheld pursuant to RSA 318:30 were in fact subsequent to the October 26, 2012 conclusion of the disciplinary investigation.

In addition, providing the dates of the communications Attorney Lucy Hodder had with State attorneys would be helpful in analyzing whether the attorney client privilege was properly invoked. Prior to being appointed counsel to Governor Hassan in 2013, Attorney Hodder had served as attorney for Planned Parenthood. Several documents between Attorney Hodder and the State have been withheld but there is no date given to indicate if Attorney Hodder was representing Planned Parenthood or the Governor at the time of the communication. Appx. 471.

The Superior Court should have held that the State violated RSA 91-A by failing to justify its alleged exemptions.

VII. Costs Should Have Been Awarded

RSA 91-A:8, I requires an award of costs any time a Superior Court finds a public body or agency violated RSA 91-A. The Superior Court found that the State violated RSA 91-A in responding to NHRTL's right to know requests in several respects. See Add. 35. Therefore, the Superior Court should have automatically awarded NHRTL its costs. *ATV Watch v. New Hampshire Dep't of Res. & Econ. Dev.*, 155 N.H. 434, 440 (2007).

The Superior Court erred when it refused to award NHRTL its costs because costs were not specifically requested in NHRTL's Trial Brief or Supplemental Trial Brief. Add. 34. There is no statutory requirement that a petitioner request costs or waive entitlement to costs if not requested in a Trial Brief. Nevertheless, NHRTL did in fact specifically request costs in ¶ 63 of its Verified Complaint. Appx. 10. Therefore, even if RSA 91-A:8 required a petitioner to specifically request costs, NHRTL specifically requested costs in its original Verified Complaint. The Superior Court should have awarded costs.

VIII. Fees Should Have Been Awarded

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. On September 11, 2014, NHRTL requested financial data from the Director of Charitable Trusts including reports regarding Concord Feminist abortion clinic. See Verified Complaint ¶¶ 19-31 at Appx. 5-6. The Concord Feminist financial records had been received by DCT on August 18, 2014.[17] Appx. 133. Nevertheless, NHRTL was denied access to these financial records when requested on September 11, 2014.

[17] The Court's Order indicates that the records were received by the DCT on August 8, 2014. See Add. 33. This appears to be a typographical error. Regardless, the financial records were received by the DCT several weeks prior to NHRTL requesting the records on September 11, 2014 and several months before DCT produced the records on December 4, 2014.

Appx. 5-6. The Complaint was filed on October 20, 2014. Appx. 1. On Friday December 4, 2014, (just a few days before the State filed its Answer on December 8, 2014), the DCT finally provided copies of the requested documents. Appx. 80.

RSA 91-A:4(IV) requires either immediate production of a requested document or an explanation, within 5 days, of when the document will be made available. DCT did not provide these records when requested on September 11, 2014. It did not provide the documents or a statement of the time necessary to produce the documents by September 16, 2014. It was only after twelve weeks, after NHRTL was forced to file an action in Superior Court and just a few days before filing an Answer to the Complaint that the financial records were finally produced. This was a clear violation of RSA 91-A.

"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 documents, marked received by the DCT on August 18, 2014, until almost four months later on December 4, 2014. See *Id.* at 443 (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). The State's argument that it took several months to "process" the documents is unavailing. Appx. 206. This is the same argument made by the State and rejected by this Court in *ATV Watch*, 155 N.H. at 434 ("although [the State] did not respond within the statutory time period, it did respond with reasonable speed.") Just as acting with reasonable speed was no excuse for the DRED in *ATV Watch* , the allegation that it took DCT 12 weeks to process the receipt of financial records is no excuse for violating RSA 91-A. The Superior Court should have found the 12 week delay to be a violation and awarded attorneys' fees for this violation.

Furthermore, the State knowingly failed to comply with the timing requirements of RSA 91-A as it pertained to NHRTL's other record requests. For example, NHRTL made a comprehensive request on July 28, 2014 for records relating to abortion clinic buffer zones. See Appx. 19. On September 4, 2014, the State produced some records but declined to produce other records indicating that withheld "information includes, ***but is not limited to***, personal contact information and attorney work product." (emphasis added) Appx. 24. Although RSA 91-A:4(IV) clearly requires a record request denial to be "in writing with reasons," the State repeatedly refused to provide reasons for its withholdings until ordered by the Superior Court in April 2015. Appx. 463. There is no statutory basis for waiting 9 months prior to complying with RSA 91-A:4(IV). The statute requires a response within 5 days and, given this Court's holding in *ATV Watch,* the failure to comply with the time period was a knowing violation.

Finally, the Superior Court erred in finding that an award of fees in this case would not be appropriate where "the Court has upheld the majority of redactions and withholdings in the 1,500 or so pages produced, demonstrating that the State had responded to the requests in good faith." Add. 34. In fact, the State did not even disclose the existence of 1,476 pages of withheld documents until April 2015, several months after this case was filed and long after all briefing had been submitted. See Appx. 471-475. NHRTL was not even given the opportunity to challenge any of these 1,476 pages and likely would not have challenged the vast majority of these documents had the State properly identified them as documents the State was withholding. Therefore, the Superior Court erred in holding that because a majority of these 1,476 records were exempt from disclosure that the State did not act in bad faith. The State's failure to provide the hundreds of pages of financial records until 12 weeks after the request and the State's failure to identify the documents it was withholding and the reasons for the withholding until 9 months

after NHRTL's request were both knowing violations of RSA 91-A. "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). The Superior Court should have found a violation and awarded attorneys fees.

CONCLUSION

"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 Superior Court erred in finding the state met its burden to exempt a third party affidavit, communications with third party abortion clinic officials and communications with other states under the work product privilege and in finding a DVD of a public sidewalk was exempt from disclosure because people walking on the sidewalk may be considering obtaining medical services. These documents should have been disclosed pursuant to RSA 91-A. The Superior Court also erred in finding personal privacy outweighed public interest in disclosure of the state funded budgets, financial statements and identities the officials and employees of abortion clinic under contract with the State of New Hampshire. The State should not have been redacted these documents under RSA 91-A. Finally, the Superior Court erred in not finding the State's failures to produce financial records and failure to provide reasons for its withholdings was a violation. The Superior Court should have awarded NHRTL its costs and fees and enjoined the State from violating the statutory time periods for disclosures under RSA 91-A in the future.

CERTIFYING STATEMENT

I hereby certify that every issue raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

REQUEST FOR ORAL ARGUMENT

Pursuant to New Hampshire Supreme Court Rule 16, the Appellee requests fifteen minutes of oral argument to be presented by Attorney Michael J. Tierney.

DECISION APPEALED

The decision appealed is in writing and is appended to the brief herewith.

Respectfully submitted,

NEW HAMPSHIRE RIGHT TO LIFE & JACKIE PELLETIER

By their attorneys,

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Dated: September 9, 2015

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of this brief have been forwarded by First Class mail to Megan A. Yaple, Esq. and Lynmarie C. Cusack, Esq., Civil Bureau, New Hampshire Office of Attorney General, 33 Capitol Street, Concord, NH 03301-6397.

Michael Tierney

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THE STATE OF NEW HAMPSHIRE
SUPERIOR °

STRAFFORD, SS. 219-2014-CV-00386

NEW HAMPSHIRE RIGHT TO LIFE
&
JACKIE PELLETIER

v.

NEW HAMPSHIRE DIRECTOR OF CHARITABLE TRUST OFFICE
&
NEW HAMPSHIRE ATTORNEY GENERAL'S OFFICE
&
NEW HAMPSHIRE STATE BOARD OF PHARMACY
&
NEW HAMPSHIRE DEPARTMENT OF HEALTH & HUMAN SERVICES

ORDER

The plaintiffs, New Hampshire Right to Life and Jackie Pelletier (collectively referred to as "NHRTL"), have brought a Right-to-Know action pursuant to RSA 91–A against the defendants, New Hampshire Director of Charitable Trusts Office ("DCT"), New Hampshire Attorney General's Office ("the AGO"), New Hampshire State Board of Pharmacy ("the BOP"), and New Hampshire Department of Health & Human Services ("the DHHS") (collectively referred to as "the State"). NHRTL is an organization, which

takes certain positions concerning abortions and related matters. It seeks access to documents and materials in the possession of the State, which NHRTL believes bear on public issues concerning those matters. Specifically, NHRTL has propounded four Right-to-Know requests upon the State: (1) documents regarding abortion clinic buffer zones from the AGO; (2) licensing documents from the BOP; (3) pharmaceutical protocols from the DHHS, the BOP and the AGO; and (4) financial data from DCT. All of the documents requested were produced to the State by, or are related to, a number of reproductive healthcare clinics in New Hampshire, including Planned Parenthood of New England ("PPNE"), Weeks Medical Center, the Feminist Health Center of Portsmouth, and the Concord Feminist Health Center.

The State has disclosed some of these documents, but has also withheld some materials and disclosed other documents with redactions, asserting that portions of the information sought are statutorily exempt from disclosure for reasons of confidentiality and privacy. Additionally, the State asserts the attorney-client privilege and attorney work product privilege as to certain materials.

The Court held a hearing concerning NHRTL's request and State's opposition. The Court has reviewed redacted and withheld materials which the Court has received for in camera review. The Court would note that a number of delays from the time of the hearing have taken place so that the Court could be furnished with materials in a fashion that would allow for an orderly review of the redacted and withheld information.[1]

[1] After several orders for In camera review (court index #13, 18), the Court received some 1,500 pages of documentation as well as three DVDs, which represent all of the documents that have been previously produced to NHRTL and documents that were withheld from disclosure. The State submitted a pleading titled "Respondents' Response to the Court's March 27, 2015 Interim Order" with its disclosure of in camera review material. That pleading included an attached "Table of Contents" listing the previously produced documents with corresponding Bates Numbers, and the withheld documents with corresponding Bates Numbers. Insofar as the court refers to pages of in camera review material in this

The Court has conducted its in camera review of the documents without the attendance of either party or any party's counsel. State v. Hilton, 144 N.H. 470, 476 (1999).

This case concerns the right of the public to access public records through the Right-to-Know law, and the scope of certain exemptions and privileges that provide exceptions to the Right-to-Know law. "The ordinary rules of statutory construction apply to" a court's review of the Right-to-Know law. CaremarkPCS Health, LLC v. N. H. Dep't Admin. Servs., ___ N.H. ___ (Apr. 30, 2015) (slip op. at 3) (quotation omitted). Issues of statutory interpretation are questions of law. See Trefethen v. Town of Derry, 164 N.H. 754, 755 (2013) (citation omitted). In interpreting statutory language, the Court considers the statute as a whole and ascribes the plain and ordinary meaning to the words used. Id. (citation omitted). The Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. (citation omitted). The Court will not interpret a statute to require an illogical or absurd result. Gen. Insulation Co. v. Eckman Constr., 159 N.H. 601, 609 (2010). Additionally, "[b]ecause exemptions under the Right–to–Know Law are similar to those under the federal Freedom of Information Act (FOIA), we often look to federal decisions construing the FOIA for guidance" in construing the Right-to-Know law. Lamy v. New Hampshire Pub. Utilities Comm'n, 152 N.H. 106, 108 (2005) (citation omitted).

"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." CaremarkPCS Health, LLC, ___ N.H. ___ (slip op. at 4)

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order, it will refer to pages among the "produced documents" with a "P" and the Bates Number, and withheld documents with a "W" and the Bates Number. For example, "see P10–15," with references documents in the Produced Documents binder with Bates Numbers 10 through 15.

(quotation omitted). "Although the statute does not provide for unrestricted access to public records, [the Court] resolves questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives." Id. (quotation omitted); see also N.H. CONST. pt. I, art. 8. ("[T]he public's right of access to governmental proceedings and records shall not be unreasonably restricted.") Accordingly, the Court should "broadly construe provisions favoring disclosure and interpret the exemptions restrictively." CaremarkPCS Health, LLC, __ N.H. __ (slip op. at 4) (quotation omitted). "The party seeking nondisclosure has the burden of proof." Id. (quotation omitted). Thus, here, the State bears the burden of proving that the information sought should not be disclosed.

While the New Hampshire Right-to-Know Law is expansive, and is generously interpreted to accomplish its intended purposes, it is not without limitations. RSA 91-A:4, I (2013) provides citizens the right to inspect and make copies of all governmental records in the possession, custody, or control of public bodies during business hours at the public body's business location "except as otherwise prohibited by statute or RSA 91-A:5." RSA 91-A:4, I. RSA 91-A:5 (Supp. 2014) identifies numerous types of materials that are exempted from disclosure under the Right-to-Know law, including:

> Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

RSA 91-A:5, IV. The Court will consider the State's asserted exemptions for its redactions and withholdings asserted in response to each of NHRTL's four Right-to-Know requests as described above.

I. Buffer Zone Documents

During the summer of 2014, the AGO was involved in litigation in the United States District Court for the District of New Hampshire concerning "buffer zones" surrounding reproductive health centers providing abortion services and the constitutionality of RSA 132:38 (2015). In preparation for a preliminary injunction hearing in that litigation, counsel for the State prepared and collected various documents, including a witness list, a DVD depicting security footage of PPNE's Manchester office, and records of communications with employees at reproductive health centers. Subsequently, a stay was entered concerning these proceedings and no preliminary injunction hearing was held.

On July 28, 2014, Attorney Michael Tierney submitted a Right-to-Know request to the AGO requesting production of certain materials prepared by the AGO during the course of that litigation, including any communications between the AGO and a number of reproductive health care facilities and their employees; security logs and security footage for certain health care centers; legislative documents; DVDs containing security footage from Manchester Planned Parenthood; an incident report prepared by a security guard; and any and all documents regarding "abortion clinic buffer zones, reproductive health care center safety zones, RSA 132:37 to 39 in New Hampshire or any other state." (Compl. Ex. C.) The AGO responded to this request on September 4, 2014.

(Compl. Ex. D.) It produced some materials requested but redacted and/or withheld other materials, based on exemptions under RSA 91–A:5, IV "includ[ing], but [] not limited to, personal contact information and attorney work product." (Compl. Ex. D at 1.) Also on September 4, 2014, NHRTL responded to the State's production with a request that it specify which documents the State was withholding on the basis of attorney work product, and which it was withholding for other reasons. (Pls.' Trial Br. Ex. 5 at 2.) On October 11, 2014, NHRTL followed up on this request with another request for a Vaughn index of the documents the State withheld. (Id. Ex. 5 at 1.) The State responded on October 13, 2014, that it had already identified the applicable categories of exemptions and was not required to produce a Vaughn index absent a court order. (Id. Ex 5 at 1.) NHRTL asserts that the State failed to meet its burden of demonstrating an explanation for each of its withholdings. (Id. at 3.) The State counters that it informed NHRTL of the reasons for withholding in accord with RSA chapter 91–A. (Defs.' Trial Mem. at 6.) NHRTL now objects to the State's withholding of particular items: Meagan Gallagher's affidavit, the DVDs containing security footage, and "unknown" withheld documents. (See Pls.' Trial Mem. at 3–4.)

A. Meagan Gallagher Affidavit

NHRTL argues that statements of third party potential witnesses are not protected attorney work product, relying on State v. Zwicker, 151 N.H. 179 (2004). (Pls.' Trial Br. at 4.) It argues that the AGO must produce documents and communications from third party abortion clinic workers to the AGO, such as the affidavit of Meagan Gallagher that was created in preparation for the federal litigation.[2] (See Pls.' Trial Br.

[2] This is the only affidavit or "witness statement" like document produced for in camera review as a previously withheld document.

at 4, Ex. 1.) The AGO, in opposition, argues that although documents like the Gallagher Affidavit contain some factual information, they are documents prepared solely in anticipation for litigation and "the attorneys' decision to create such an affidavit and their choice of facts to include or not include, clearly is attorney work product." (Defs.' Trial Br. at 7–8.) The State argues that disclosure of such documents prepared for the federal litigation would reveal the State's reasoning or strategy in litigating that case, and though these items were listed on an exhibit list for an upcoming hearing, their use in those hearings was speculative at that point. (Id. at 8.)

The Right-to-Know Law provides an exemption from disclosure for "confidential, commercial, or financial information." RSA 91-A:5, IV. Though the New Hampshire Supreme Court has not explicitly held that attorney work product qualifies as "confidential" under the Right-to-Know law, it has held that "[c]ommunications protected under the attorney-client privilege fall within the exemption for confidential information." Prof'l Fire Fighters of N. H. v. N. H. Local Gov't Ctr., 163 N.H. 613, 614–15 (2012) (citation omitted). Though distinct, these privileges are well established in New Hampshire law and are designed to protect important aspects of the adversarial process. See Riddle Spring Realty Co. v. State, 107 N.H. 271, 274–75 (1966); N.H. R. Ev. 502 (defining attorney-client privilege); Super. Ct. Civ. R. 21 (e)(1) (establishing that party must meet certain requirements to discover materials prepared in anticipation of litigation). Consequently, this Court will analyze the State's assertion that requested material is attorney work product and/or encompassed by the attorney-client privilege to be a claim that the materials are "confidential" under RSA 91-A:5, IV. Cf. F.T.C. v.

Grolier Inc., 462 U.S. 19, 23–25 (1983) (interpreting FOIA exemption language as encompassing common law attorney work-product privilege).

"At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." State v. Chagnon, 139 N.H. 671, 673 (1995) (quotation omitted). The New Hampshire Supreme Court has defined attorney work product "as the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation." Id. at 674 (quotation omitted). "The lawyer's work must have formed an essential step in the procurement of the data which the opponent seeks, and he must have performed duties normally attended to by attorneys." Id. (quotation omitted).

Work product containing an attorney's mental impressions, opinions, conclusions, or legal theories "may consist of correspondence, memoranda, reports, exhibits, trial briefs, drafts of proposed pleadings, plans for presentation of proof, statements, and other matters, obtained by him or at his direction in the preparation of a pending or reasonably anticipated case on behalf of a client." Id. (quotation and ellipsis omitted). However, "[w]hen the determination of whether information falls within the attorney work product doctrine is made, the focus ought to be on what substantive information the material contains, rather than simply the form that information takes or how the information was acquired." Id. at 676 (citation omitted). For example, in Chagnon, the Court held that a witness statement taken by an investigator was not work product because it contained purely factual information and lacked reactions or opinions generated by the investigator and/or attorney. Id. at 676–77; see also Zwicker, 151

N.H. at 191–92 (finding summary of expected witness testimony not protected work product because "the information was purely factual and did not reflect any mental impressions or defense strategies").

The State has produced the Gallagher affidavit for the Court's in camera review. Upon review, the Court finds that the document is privileged within the meaning of the work product doctrine. The affidavit includes some purely factual information, but also contains policy statements and opinions of the affiant. (W305–306.) Although these are opinions of the affiant and not the attorney preparing the affidavit, inclusion of such statements in a draft pleading may provide insight into the AGO's litigation strategy in the ongoing federal litigation. Furthermore, the document is not merely a witness statement or notes from a witness interview. It is essentially a draft pleading for submission into evidence at a hearing in a pending litigation. The plaintiff in the federal litigation would likely not have been able to discover this affidavit prior to its introduction into evidence in that litigation; the Right-to-Know law should not necessarily alter that result. See Martin v. Office of Special Counsel, Merit Sys. Prot. Bd., 819 F.2d 1181, 1186 (D.C. Cir. 1987) ("[The plaintiff] was unable to obtain these documents using ordinary civil discovery methods, and FOIA should not be read to alter that result.") Accordingly, the Court finds that the Gallagher affidavit, W305–306, constitutes confidential work product.

Even records that are considered "confidential" under the Right-to-Know law, however, are not automatically exempt from disclosure. See Hampton Police Ass'n, Inc. v. Town of Hampton, 162 N.H. 7, 14 (2011) (finding that trial court did not err in failing to apply confidentiality balancing test because it found that the town public body had failed

to prove that the materials were subject to attorney-client privilege). "[T]o determine whether records are exempt as confidential, the benefits of disclosure to the public must be weighed against the benefits of non-disclosure to the government." Id. (quotation omitted). To justify nondisclosure "the party resisting disclosure must prove that disclosure is likely to: (1) impair the information holder's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained." Id. (citation omitted). "This test emphasizes the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential." Id. (citation omitted).

Here, the State has sufficiently demonstrated that disclosure of this affidavit could cause substantial harm to the AGO's position in the ongoing federal litigation. Though that litigation is currently stayed, any disclosure of attorney work product related to that case could jeopardize the AGO's litigation strategy. In contrast, it is unclear what public benefit would be derived from disclosure of this specific affidavit. Thus, the potential harm outweighs any benefit of disclosure to the public. The Court, therefore, finds that the State properly withheld the Gallagher affidavit under RSA 91-A:5, IV.

B. DVDs

Next, NHRTL argues that the AGO has improperly failed to produce DVDs containing security footage from Manchester Planned Parenthood. (Pls.' Trial Br. at 4.) NHRTL claims that these DVDs do not contain attorney work product, but merely portray footage of people praying on a public sidewalk. (Id. at 4.) In contrast, the AGO

asserts that the DVDs contain or relate to attorney work-product, or that production would constitute an invasion of privacy. (Defs.' Trial Br. at 10.)

The Court agrees with the AGO that the DVDs should be protected from disclosure based on concerns for the personal privacy of individuals depicted in the videos. In evaluating whether disclosure of material would constitute an "invasion of privacy" under RSA 91-A:5, IV, the Court must engage in a three step analysis. N. H. Civil Liberties Union v. City of Manchester, 149 N.H. 437, 440 (2003). First, the Court must determine "whether there is a privacy interest at stake that would be invaded by disclosure." Id. (citation omitted). If there is no privacy interest at stake, the information must be disclosed. Id. Second, the court must evaluate the public's interest in disclosure. Id. "While an individual's motives in seeking disclosure are irrelevant in the privacy context, disclosure of the requested information should serve the purpose of informing the public about the conduct and activities of their government." Id. (citation omitted). Finally, the Court must "balance the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure." Id. (citation omitted). In sum, when a party claims an exemption on the basis of invasion of privacy, the Court should focus on "whether the defendant has shown that the records sought will not inform the public about the department's activities, or that a valid privacy interest, on balance, outweighs the public interest in disclosure." Id. (citation omitted).

Here, the Court finds that the AGO has carried its burden of articulating a valid privacy interest at stake—the identity of PPNE patients and clients. The DVDs appear to depict not only protestors praying on a public sidewalk, but also PPNE patients

entering and exiting the clinic. The legislature has recognized and the courts protect the confidentiality of the physician-patient relationship. See RSA 329:26 (2011) (establishing statutory physician-patient privilege); In re Grand Jury Subpoena for Med. Records of Payne, 150 N.H. 436, 440 (2004) ("Traditionally, we have carefully guarded the confidential relationship between patients and their medical providers. . ."). Though the fact that a person is visiting or receiving care at a reproductive health clinic is not equivalent to the communications between physician and patient, it similarly constitutes a private matter related to the individual's health and safety. The Court finds that individuals have a privacy interest in the health care providers from whom they choose to seek treatment.

Conversely, NHRTL has not asserted a sufficient specific public interest in the disclosure of the DVD footage, and the Court cannot discern how the contents of these DVDs would shed light on the activities and conduct of the AGO, or other government entity. The privacy interest of individuals' seeking treatment from PPNE substantially outweighs this minor or nonexistent public interest. Accordingly, the Court finds that the AGO has met its burden supporting the asserted exemption. The DVDs shall remain withheld. Additionally, the State withheld certain correspondence related to the DVDs. (See W33-35.) For the same reasons, this material was also properly withheld.

C. Unknown Documents

NHRTL also objects to the AGO's claim of work-product and attorney-client privilege for unknown withheld documents. (Pls.' Trial Br. at 4–5.) In response to this Court's order, the State has produced all previously produced and withheld documents responsive to NHRTL's Right-to-Know requests at issue in this litigation. After reviewing

this material, the Court finds that all of the withheld documents related to the buffer zone Right-to-Know request were properly withheld under the work-product and/or attorney client privilege exemptions encompassed within RSA 91-A:5, VI, with one exception. (See W21, W36–294, W299–304, W377–611, W684–744, W818–977, W978–1388, W1399–1401, W1402–1476.)

The Court orders disclosure of W295–W298, which is an incident report prepared by a security officer who patrolled a protest at Planned Parenthood in March of 2013. The incident report contains solely factual information with no notations or other indications of any attorney's mental impressions or opinions. It, accordingly, does not fall within the attorney work-product exemption. See Zwicker, 151 N.H. at 191–92 (finding summary of expected witness testimony not protected work product because "the information was purely factual and did not reflect any mental impressions or defense strategies"). NHRTL's requests for disclosure of documents responsive to the buffer zone request are otherwise DENIED.

II. BOP Licensing Documents

RSA 318:42, VII (Supp. 2014) governs "[t]he 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..." To dispense prescriptions under this provision, a clinic must, among other things, "possess[] a current limited retail drug distributor's license under RSA 318:51–b." RSA 318:42, VII (d). In order to dispense prescriptions under this scheme, PPNE

regularly applies for limited retail drug distributor's licenses ("LRDD") for its six New Hampshire locations. Since 2012, NHRTL has submitted Right-to-Know requests to BOP annually to obtain copies of PPNE's LRDD applications.

On July 14, 2014, Attorney Tierney sent a Right-to-Know request to the BOP and AGO requesting copies "of all of Planned Parenthood of New England's 2014-2015 LRDD licenses for its six New Hampshire clinics." (Compl. Ex. E at 1.) He also requested "any documents related to these clinics either sent or received by [BOP] since July 1, 2013." (Id. Ex. E at 1.) The AGO responded to this request on July 31, 2013, by producing responsive documents and stating that it had "made redactions and [had] not included documents that are exempt from disclosure under RSA 91–A:5 and RSA 318:30, I." (Id. Ex. F.) These redactions primarily protected handwritten notations on the materials and the identities of PPNE employees. However, on some redacted documents, BOP inserted "John Doe" and a corresponding number designation so that NHRTL could identify whether individuals were working at more than one PPNE facility. BOP also withheld some documents based on RSA 318:30, I.

A. Privacy

NHRTL's main objections to the State's redactions on the produced LRDD applications are: (1) that there is no basis for redaction of handwritten notes on the applications; (2) the State has not justified its personal privacy redactions, in part, based on the fact that it has produced unredacted copies of LRDD applications in the past. (Pls.' Trial Br. at 7–8.) The BOP argues, in contrast, that its redactions are consistent with the Merrimack Superior Court's decision in New Hampshire Right to Life v. New Hampshire Board of Pharmacy, Merrimack Superior Ct., No. 217-2012-CV-00774, (Apr.

4, 2013) (Order, McNamara, J.), and that such redactions are permitted to protect the privacy of PPNE employees. (Defs.' Trial Br. at 15–16.)

The Court agrees with BOP. The redactions on the produced LRDD applications obscure several hand written notations, and the identities of each clinic's site manager, medical director, and consultant pharmacist. Though the names are redacted, BOP has assigned each redacted name a "John Doe" designation so that it is apparent which employees work at multiple clinics.

To determine whether these redactions were properly made to prevent invasions of privacy, the Court applies the balancing test as described above. See N. H. Civil Liberties Union v. City of Manchester, 149 N.H. 437, 440 (2003). First, the BOP has a privacy interest in the internal, hand-written notes on the LRDD applications. Based on the Court's review, the notations appear to record financial information in relation to the referral fee required for the LRDD renewal. This is private financial information that would provide no insight into government conduct. Therefore, the Court finds these redactions proper.

Next, the Court also finds the redactions on the basis of the personal privacy of individual employees appropriate. The State has argued that, as in the Merrimack litigation, PPNE employees have an interest in privacy of their identities because disclosure could result in harassment and other safety concerns. (Defs.' Trial Br. at 15-16.) NHRTL disputes this claim, arguing that: (1) BOP has produced unredacted LRDD applications in the past with no negative consequences, and (2) clinic employees' privacy interests have lessened because of disclosure of the identity of some

employees in recent news publications. (Pls.' Trial Br. at 8 n.5; Pls.' Supp. Trial Br. at 4–5.)

The Court finds that PPNE employees have a similar privacy interest in their identities and safety as articulated in New Hampshire Right to Life v. New Hampshire Board of Pharmacy, Merrimack Superior Ct., No. 217-2012-CV-00774, (Apr. 4, 2013) (Order, McNamara, J.) at 7–8; see also Sensor Sys. Support, Inc. v. F.A.A., 851 F. Supp. 2d 321, 333 (D.N.H. 2012) (finding federal employee subject to an internal investigation for misconduct had privacy interest in name and identity because publication of information could lead to "harassment and annoyance in the conduct of their official duties and in their private lives"); Cf. Sonoma Cnty. Employees' Ret. Ass'n v. Superior Court, 130 Cal. Rptr. 3d 540, 555 (Cal. Ct. App. 2011) (finding asserted privacy interest weak and speculative because disclosure did not include home addresses, telephone numbers, or email addresses of public employer retirees).

This privacy interest is not negated by NHRTL's arguments. The fact that the BOP may or may not have produced unredacted LRDD applications in the past without negative consequence does not demonstrate that there is no present possibility of harassment to PPNE employees. Indeed, as NHRTL's exhibits show, PPNE and other clinics' activities are highly publicized and controversial, creating a potential for harassment. (See Pls.' Supp. Trial Br. Exs. 21, 23.) Furthermore, the fact that the identities of some reproductive health clinic employees have been publicized does not lessen the privacy interest of other employees. The individuals featured in news stories or on clinic websites consented to the publication of their identities and involvement with their respective clinics. The consent of a few clinic employees to disclose their

association with a clinic cannot waive the privacy interest all clinic employees would hold in their identities. Thus, the Court finds that there is a substantial privacy interest at stake.

In response, NHRTL asserts that the public has an interest in disclosure because clinic salaries are now being paid through a state grant, and because DHHS's budget has garnered recent public debate. (Pls. Trial Br. at 8 n.5; Pls.' Supp. Trial Br. at 5.) It also asserts a public interest in knowing the BOP is properly regulating clinics holding LRDDs under RSA 318:42, VII. (Id.) Even assuming that some PPNE salaries are now being paid by through state grant funds, NHRTL has not articulated how knowing the identities of particular employees who may or may not be paid with state funding would shed light on the BOP's or the DHHS's operations except with respect to how these agencies are enforcing RSA 318:42,VII.

The LRDD regulatory requirements do specify that a clinic must identify its consultant pharmacist and medical director on the application. N.H. Admin. Rules Ph. 601.03-.04. However, disclosure of such persons' professional designation (e.g., M.D. or R.N.) would suffice to demonstrate the extent to which BOP is approving LRDD applications according to law. Accordingly, there is an attenuated public interest in the specific identities of employees.

Balancing individual employees' privacy interest in absence of harassment and safety against the public's interest in ensuring that BOP is properly enforcing RSA 318:42, VII, the Court finds that the privacy interest is greater in this instance. The

Court does, however, direct the disclosure of any professional or licensing designation accompanying employee names on PPNE's approved LRDD applications. [3]

B. RSA 318:30,I

The State has also withheld certain LRDD related documents based on RSA 318:30, I (Supp. 2014), which governs BOP investigations of licensee misconduct. (See W1–2, W8–16.) NHRTL argues that the relevant inquiry for these documents under Murray v. N. H. Div. of State Police, Special Investigation Unit, 154 N.H. 579 (2006), is whether their disclosure "could reasonably be expected to interfere with enforcement proceedings." (Pls.' Trial Br. at 8.) NHRTL argues that the documents must concern an ongoing disciplinary investigation to be protected. (Id. at 8–12.) BOP, in contrast, argues that the plain language of RSA 318:30 supports its withholding of the documents. (Defs.' Trial Br. at 17.) The Court agrees with the State that RSA 318:30, I, exempts the identified materials from disclosure.

First, NHRTL's reliance on Murray and its progeny appears misplaced. Murray involved a Right-to-Know request for police investigative files. Murray, 154 N.H. at 582; see also 38 Endicott St. N., LLC v. State Fire Marshal, N. H. Div. of Fire Safety, 163 N.H. 656, 661 (2012) (applying Murray test in Right to Know case involving request for law enforcement records or information). Because RSA chapter 91–A does not expressly address requests for police investigative files, the New Hampshire Supreme Court has adopted a six-prong test applied under FOIA for evaluating requests for police investigative files. Murray, 154 N.H. at 582. Here, however, NHRTL is not

[3] For consultant pharmacists, who do not appear to have an easily discernible professional designation or degree, the State may keep the current information redacted by writing "Licensed Pharmacist #X" to denote that the person identified as the proper licensure.

requesting police investigative files or information. Rather, it is seeking information related to a BOP investigation of misconduct. Public disclosure of BOP investigation material is addressed by the Right-to-Know law and RSA 318:30, I, making the Murray test less apposite.

Application of the Right-to-Know law and RSA 318:30, I, in this instance requires the Court to engage in statutory interpretation, which is a question of law. See Trefethen, 164 N.H. at 755 (citation omitted). RSA 91–A:4, I makes government records available to the public " except as otherwise prohibited by statute or RSA 91–A:5." RSA 91–A:4. I (emphasis added). RSA 318:30, I, prohibits public disclosure of certain BOP investigatory records. RSA 318:30, I, states, in pertinent part:

> The board may investigate possible misconduct by licensees, permittees, registrants, certificate holders, applicants, and any other matters governed by the provisions of this chapter and RSA 318-B. ... Board investigations and any information obtained by the board pursuant to such investigations shall be exempt from the public disclosure provisions of RSA 91-A, unless such information subsequently becomes the subject of a public disciplinary hearing. However, the board may disclose information obtained in an investigation to law enforcement or health licensing agencies in this state or any other jurisdiction, or in accordance with specific statutory requirements or court orders.

RSA 318:30, I (emphasis added). The plain language of this statute exempts from public disclosure all BOP investigations under this provision and any information obtained during those investigations without reference to whether or not the investigation is still pending or has already been resolved. The statutory language makes clear that such materials should only be disclosed if they become the subject of

a public disciplinary hearing. Under other circumstances, materials related to a BOP investigation under this provision are statutorily exempt from disclosure.

Here, the documents asserted as exempt under RSA 318:30, I, (W1–2, W8–16), appear to contain information obtained or created by the BOP pursuant to an investigation under RSA chapter 318 or 318–B. There is no evidence that the documents were related to a subsequent disciplinary hearing. They were, consequently, properly withheld as exempt from public disclosure under RSA 318:30, I and RSA 91–A:4, I.

III. BOP Pharmaceutical Protocols

On October 11, 2014, Attorney Tierney submitted a Right-to-Know request to DHHS, AGO, and BOP requesting a copy of pharmaceutical protocols ("the protocols") required of LRDD licensees under RSA 318:42, VII(a). (Defs.' Trial Mem. Ex. G at 2.) After some correspondence with NHRTL, the AGO and BOP indicated that they had no documents responsive to the request. (Id. Ex. G. at 2.) DHHS then responded to the request on October 29, 2014. (Id. Ex. G at 1, Ex. H.) DHHS's response stated that after reviewing the requested protocols that had been approved by DHHS, the protocols contained "certain proprietary and commercial information of [the clinics'] and is exempt from disclosure under RSA 91–A:5, IV. (Id. Ex. H at 1); see Perras v. Clements, 127 N.H. 603 (1987); Hampton Police Assoc. v. Town of Hampton, 162 N.H. 7 (2011)." (Id. Ex. H at 1.) DHHS included a copy of the pharmaceutical protocols in heavily redacted form with its response. (See Defs' Trial Br. Ex. H.)

NHRTL argues that DHHS has failed to establish that the protocols constitute commercial information under the RSA 91-A:5,VII. (Pls.' Trial Br. at 13-14.) It further argues that even if commercial information, DHHS has failed to show that the benefits of nondisclosure to the government outweigh the benefits of public disclosure. (Id. at 14-15.) In contrast, DHHS argues that its position that the protocols are confidential commercial material is supported by New Hampshire Right to Life v. Dep't of Health and Human Services, 976 F. Supp. 2d 43 (D. N.H. 2013) as affirmed in N.H. Right to Life v. U.S. Dep't Health and Human Services, 778 F.3d 43 (1st Cir. 2015). The Court agrees with NHRTL that this case is distinguishable from the federal litigation.

In N.H. Right to Life v. Dep't Health and Human Services, NHRTL filed an action under the Freedom of Information Action ("FOIA"), 5 U.S.C. § 552, (West 2014), seeking production of certain documents from the United States Department of Health and Human Services ("USDHHS") that USDHHS had received from PPNE. 778 F.3d at 46. In 2011, USDHHS awarded PPNE with a grant of funds and required PPNE to submit institutional files on a variety of internal policies and procedures, including its Manual of Medical Standards and Guidelines ("the manual"), in order to receive the funding. Id. at 49-50. NHRTL thereafter submitted a FOIA request to USDHHS for the materials PPNE had provided pursuant to the grant award. Id. at 50. USDHHS produced some pages of the manual, but redacted or withheld large portions of it, claiming, at PPNE's request, that it was exempt from disclosure as confidential commercial information. Id. at 51. The District Court agreed with USDHHS, finding that all of the material sought by NHRTL was "commercial" because it served the commercial function of providing a model for running PPNE. Id. at 52-53.

The District Court further found that the manual was confidential and therefore exempt from disclosure. Id. at 55–56. The manual at issue had been developed over many years by PPNE's national affiliate and "provide[d] a model for operating a family planning clinic and for providing the services consistent with Planned Parenthood's unique model of care." Id. at 55–56 (quotation and brackets omitted). Furthermore, both PPNE and its national affiliate had a written policy prohibiting reproduction and distribution of the manual in most circumstances. Id. at 56. The District Court reasoned that disclosure of this manual would cause substantial harm to PPNE by eliminating its "advantage over its competitors from its efforts in compiling the manual and maintaining its confidentiality." Id.

The First Circuit then upheld the District Court's holding and reasoning. N.H. Right to Life v. U.S. Dep't Health and Human Services, 778 F.3d 43, 46, 49–52 (1st Cir. 2015). The First Circuit found that the manual was commercial, or related to a plain meaning of commerce, because it outlined PPNE's operations and fees, including "amounts Planned Parenthood charges customers for its services, and how it produces those services for sale." Id. at 50. It then considered whether the manual was confidential by evaluating whether disclosure was "likely to either (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained." Id. (quotation and internal quotation marks omitted). The Court concluded that PPNE had demonstrated the existence of actual competition because other community health clinics are actual competitors of PPNE for grants and "in a number of different arenas." Id. at 51. Furthermore, it found that disclosure of the

manual posed a substantial harm to PPNE's competitive position because PPNE and its national affiliate had created the manual, taken steps to protect its confidentiality, and a potential competitor could utilize the institutional knowledge in the manual to compete with PPNE "for patients, grants, or other funding." Id. Thus, the First Circuit held that the manual had been properly withheld by USDHHS. Id.

Although the Court finds these federal decisions informative, New Hampshire law requires application of a slightly different standard to determine whether the materials were properly withheld. The New Hampshire Supreme Court considers federal precedent defining the terms "confidential, commercial, or financial" as "instructive", but has maintained its own balancing test, weighing the privacy interest in the commercial material against the public interest in disclosure, to determine whether confidential, commercial, or financial information is exempt from disclosure. Union Leader Corp. v. N. H. Hous. Fin. Auth., 142 N.H. 540, 552 (1997); cf. N.H. Right To Life, 778 F.3d at 49–51. Thus, this Court must first determine whether the materials at issue are "commercial" in nature, and then balance that private, commercial interest against the public's interest in disclosure. Union Leader Corp., 142 N.H. at 552.

The Court finds that the protocols do contain "commercial" material. "Whether documents are commercial depends on the character of the information sought." Id. at 553. "Information is commercial if it relates to commerce." Id. (citation omitted). Information may be commercial "even if the provider's interest in gathering, processing, and reporting the information is noncommercial." Id. (quotation and ellipsis omitted). On the other hand, not all information generated by traditionally commercial enterprises is necessarily "financial or commercial." Id. (citation omitted).

Here, the materials sought are protocols developed individually by each health clinic that detail the procedures employees should follow in dispensing certain prescription drugs. These protocols are "commercial" in that they outline a procedure directing how the clinics offer a portion of their services—the enterprise of dispensing prescriptions to patients. See N. H. Right to Life, 976 F. Supp. 2d. at 53 (finding manuals "commercial" material because they "guid[ed] the operations of an entity engaged in 'commerce'"). Furthermore, each clinic's development of a protocol is essential to approval by DHHS under RSA 318:42, VII to enable the clinic to dispense prescription medications in this way and continue offering this service to patients. See Pub. Citizen Health Research Grp. v. Food & Drug Admin., 704 F.2d 1280, 1283, 1290 (D.C. Cir. 1983) (finding reports and documentation of results and success of particular eye treatment device "commercial" information under FOIA because the information would be "instrumental in gaining marketing approval for their products" from the Federal Drug Administration). Thus, the protocols contain commercial information as defined by RSA 91-A:5, VII.

Next, balancing the interests at stake, the Court finds that public interest in disclosure outweighs the private interest in confidentiality of commercial material. DHHS argues that the health clinics have "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." (Defs.' Trial Br. at 20.) Specifically regarding PPNE, DHHS submitted an affidavit from PPNE's director, attesting that its protocols are kept confidential and disclosure would harm its competitive advantage in the marketplace. (Reid Aff. ¶¶ 9, 15–19.) Conversely,

NHRTL argues that there is a strong public interest supporting disclosure because the protocols will elucidate whether DHHS is implementing RSA 318:42, VII(a) to protect public safety in light of past failures to enforce the protocol requirement of RSA 318:42, VII. (Pls.' Trial Br. at 15.)

The Court recognizes that the health clinics that have submitted protocols to DHHS could suffer potential competitive harm by their disclosure. Some clinics' protocols may be better developed than others in order to comply with DHHS standards. If the protocols were disclosed, other, competing health clinics could access these protocols, potentially making it easier for them to expand their business to offer prescriptions in the manner authorized by RSA 318:42, VII. This would increase competition for clinics currently approved by DHHS, and impose an unfair disadvantage on clinics that had pre-existing approved protocols, since those clinics expended institutional resources developing the protocols.

On the other hand, the public does have a significant interest in disclosure of these protocols. Unlike the manual at issue in the federal litigation which encompassed guidance on institution wide operations, including procedures such as the protocols at issue here, the protocols here are topically specific to prescription dispersal and required by law. See N.H. Right to Life, 778 F.3d at 51 (describing the manual as "provid[ing] a model for operating a family planning clinic and for providing services consistent with Planned Parenthood's unique model of care" (ellipsis and brackets omitted)); RSA 381:42, VII (a); (See Reid Aff. ¶ 5). The fact that these protocols are required by law illustrates the public's interest in this case. The disclosure of the manual at issue in the federal case would have primarily provided insight into the

operational model of PPNE, whereas here disclosure would provide insight into DHHS's implementation of RSA 318:42, VII by allowing the public to discern whether DHHS is approving protocols that meet applicable statutory and regulatory standards. Disclosure of information "that sheds light on an agency's performance of its statutory duties falls squarely within the statutory purpose of the Right–to–Know Law". Union Leader Corp., 142 N.H. at 554 (quotation and brackets omitted). That interest is particularly strong here, where DHHS and BOP only recently began enforcing the RSA 318:42, VII protocol requirement in 2012. (See Pls.' Trial Br. Ex. 13; P58.)

Furthermore, unlike the FOIA request at issue in the federal litigation that focused only on PPNE, NHRTL's request here applies to all clinics which have submitted protocols to DHHS. Cf. N.H. Right to Life, 778 F.3d at 47. Disclosure, then, puts all the clinics at a similar, though not identical, competitive disadvantage. On balance, the Court finds that the public interest in disclosure outweighs the commercial interests at stake. DHHS must produce unredacted versions of approved RSA 318:42,VII (a) protocols featured at P3–7, P10–11, P13–14, P19, P21–22, P24, P28–29, and P65. The redactions on page P66 are permissible as they protect the identity of clinic employees but provide the professional designation of the employee dispensing medication, enabling the public to discern whether the clinic and BOP are complying with applicable law.

IV. Financial Data

It is now undisputed that the State has produced copies of the requested financial data. (See Pls.' Trial Br. at 16; Defs.' Trial Br. at 21.) Accordingly, NHRTL's

substantive Right-to-Know claim on this issue are MOOT. The Court will further address this issue as it relates to attorney's fees below.

V. Miscellaneous Documents

There are various other documents that have been produced with redactions or withheld and noted in the Vaughn index that were not specifically addressed by the parties' arguments and/or do not fall neatly into one of the categories of Right-to-Know requests addressed above. It is unclear to which Right-to-Know request the documents were responsive. In any case, the Court has reviewed the documents and makes the following findings regarding the redactions and witholdings.

A. *Internal Handwritten Notations*

P60 and P61 include redactions prohibiting disclosure of handwritten notations. It is unclear based on the State's arguments and upon the unredacted notations themselves what exemption may be applicable to these notes. Because the Court can discern no applicable exemption or privacy interest at stake, these documents must be produced without redaction. See Lamy, 152 N.H. at 109. ("If no privacy interest is at stake, the Right-to-Know Law mandates disclosure.")

B. Non-public Email Addresses

P122, P124, P125, P128, P353, P409, P419 include redactions protecting certain individuals' non-public email addresses from disclosure. The Court finds that private individuals have a privacy interest in their identity as associated with their email address. See Lamy, 152 N.H. at 109–10. As outlined above, this is especially true for clinic employees who may be subject to harassment via e-mail should this information

be publicized. NHRTL has not asserted any specific public interest in disclosure of private individuals' email addresses. Accordingly, the Court upholds these redactions to prevent potential invasions of privacy.

C. Financial Data and Budgets

P105–111, P119–120 include redacted copies of the Feminist Health Center of Portsmouth's budget and other financial documents for the years 2010 and 2013 through 2014. The redacted information includes numerical values contained in the budgets and financial statements. The clinic has a privacy interest in the redaction of this financial information as it relates to its commercial activities and competitive stance in the market relative to other health clinics. The public's interest in such information derives from the clinics' receipt of state grant money. (See Pls.' Trial Br. Ex. 12.) However, even assuming that the clinic received state funding during those time periods, the financial documents do not provide information about how the state grant money specifically was spent. Thus, the financial budgets primarily show the conduct of the clinic, not any government conduct. The Court finds these documents were properly redacted.

D. Privacy of Personnel Identities and Other Information

1. Linda Griebsch

A number of redactions prevented disclosure of the identity of Linda Griebsch as Executive Director of the Feminist Health Center. (See P57–59, P121.) However, Ms. Griebsch's identity as Executive Director of this clinic has already been disclosed in other documents produced by the State. (See P115, P353.) The Court sees no special or distinct privacy interest in her identity in relation to these specific documents, which

only disclose her identity as Executive Director without any accompanying information, such as her address or personal email. Therefore, the Court orders disclosure of P57–59 and P121 in unredacted form.[4] However, Ms. Griebsch's email address and physical address, if shown on these documents, should remain redacted in the interest of personal privacy.

2. Employee resume

P117 and P118 are a resume of a clinic employee. In contrast to Ms. Griebsch, the person's identity, contact information, and association with a reproductive health care clinic has not been disclosed elsewhere in the State's Right-to-Know production. That person, therefore, maintains a privacy interest in that information. See Lamy, 152 N.H. at 109–10. NHRTL has articulated insufficient specific public interest in disclosure of this information. Consequently, the Court upholds the State's redactions. See Hecht v. U.S. Agency for Int'l Dev., No. CIV.A. 95-263-SLR, 1996 WL 33502232, at *12 (D. Del. Dec. 18, 1996) (finding public interest in employee qualifications required release of resumes and employee data sheets, but finding redaction of identities appropriate to protect personal privacy).

3. Board member names and addresses

P113 is a list of the Feminist Health Center of Portsmouth's board members and their personal addresses. Similar to the analysis above, these individuals maintain a privacy interest in their identities, personal addresses, and association with the Feminist Health Center of Portsmouth. See Lamy, 152 N.H. at 109–10. NHRTL appears to

[4] The State has conceded that certain "public contact information" should have been disclosed and contends that a mistake was made in redacting that information. (Defs.' Trial Br. at 13.) It is unclear precisely what contact information this concession refers to, but it likely at least applies to Ms. Griebsch's identity.

argue that there is some public interest in knowing who is involved in the operation of reproductive health clinics because they may then be able to discover their relationship to certain political officials to demonstrate personal connections explaining funding choices or potential lobbying efforts. The Court finds this public interest to be derivative at best—NHRTL seeks the identity of board members so that they may be used by NHRTL to uncover additional information about some unknown and speculative government contact. See Lamy, 152 N.H. at 111–13 (finding the public interest in disclosure of residential customers' names and addresses was only "derivative" because the information revealed nothing about the government entity but could be used by plaintiff to discover additional information about government entity). The Court, therefore, accords it little weight. Id. at 113 ("We agree, however, with the courts that have held that when the derivative use of information is the *only* public interest in its disclosure, it has little weight." (emphasis in original)). The Court finds that the board members' privacy interest outweighs any public interest. The State's redaction is upheld as proper under RSA 91–A:5, VII.

4. Names and salaries of PPNE employees

P114 includes a list of key administrative personnel at the Feminist Health Center of Portsmouth and their salaries for the 2013 and 2014 fiscal years. There is a privacy interest at stake in the disclosure of this information as these employees work for a private entity that is not itself subject to the Right-to-Know law. Cf. Union Leader Corp. v. New Hampshire Ret. Sys., 162 N.H. 673, 680–81 (2011) (finding disclosure of public retiree names and retiree benefits compelled under Right-to-Know law); Prof'l Firefighters of New Hampshire v. Local Gov't Ctr., Inc., 159 N.H. 699, 708–09 (2010)

(finding that names and salaries of Local Government Center employees must be disclosed where the center was considered a government entity subject to Right-to-Know law); Mans v. Lebanon Sch. Bd., 112 N.H. 160, 164 (1972) (finding disclosure of public school teacher names and salaries did not constitute invasion of privacy and was permissible under Right-to-Know law).

On the other hand, the public has some interest in the finances of clinics that receive state grant funding because taxpayer dollars are flowing to the entity and funding certain services. Union Leader Corp., 162 N.H. at 684–85 (finding privacy interest in public employee retirement benefit information outweighed by public interest "in knowing where and how their tax dollars are spent" (quotation and internal quotation marks omitted)). Based on the document itself, it appears that it lists salaries for positions that are paid with the use of state funds. (See P.114 including "percentage of salary paid by contract" column)). It bears noting, also, however, that the clinics are not governmental entities nor are they effectively surrogates of them. Accordingly, the Court concludes that the public has an interest in knowing the salary of the key administrative personnel, but not their identities. The names of the personnel may remain redacted, but the salary information must be disclosed.

E. *Internal Draft Documents, Attorney Work Product, and Attorney-Client Privileged Materials*

The Court finds the following redactions and witholdings as permissible under either the work-product or attorney-client privilege exceptions to the statute, or under RSA 91–A:5, XI exemption for preliminary drafts, notes, or memoranda. Some of the documents contained in the below witholdings have already been produced to NHRTL in other forms. After review, the Court finds the listed exemptions justifying redaction or

withholding of P36, P363, W17–20, W22–24, W25–28, W29–32, W 612–620, and W621–683 permissible under the Right-to-Know law.

VI. Attorney's Fees

NHRTL submits that it is entitled to an award of attorney's fees on two grounds: (1) DCT knew or should have known that it was required to produce certain requested financial information sooner than it did; and (2) the State redacted or withheld certain buffer zone documents, LRDD applications, and pharmaceutical protocols, and "refused" to provide reasons for the redactions and withholdings absent a court order. (Pls.' Trial Br. at 16–17.) The State counters that the requested DCT financials had not been processed at the time of NHRTL's request and that the materials were timely produced. It further asserts that it took no other action that it knew or should have known violated the Right-to-Know law. (Defs.' Trial Br. at 22–23.)

RSA 91-A:8,I governs remedies for violations of the Right-to-Know. It provides, in pertinent part:

> If any public body or public agency or officer, employee, or other official thereof violates any provisions of this chapter, such public body or public agency shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter, provided that the court finds that such lawsuit was necessary in order to enforce compliance with the provisions of this chapter or to address a purposeful violation of this chapter. Fees shall not be awarded unless 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 this chapter or if the parties, by agreement, provide that no such fees shall be paid.

RSA 91–A:8, I. Thus, "[t]o award attorney's fees, the trial court must find that the petitioner's lawsuit was necessary to make the requested information available and that

the [agency from whom the records were sought] knew or should have known that its conduct violated the statute." Goode v. N.H. Office of the Legislative Budget Assistant, 148 N.H. 551, 558 (2002) (internal quotations omitted).

First, the Court finds that NHRTL is not entitled to attorney's fees for the DCT's actions releasing financial data. NHRTL submitted a request to DCT on September 11, 2014 for certain financial reports and audits of several clinics. One of the documents requested had been received on August 8, 2014, but it is unclear when the other documents responsive to the request were received by DCT. (See Pls.' Trial Br. Ex. 16.) DCT then responded to this Right-to-Know request on December 4, 2014. (See Id. Ex. 15.) It asserts that the documents requested were still being processed at the time of the request, and were produced to NHRTL upon completion of the agency's internal processing. (See Defs.' Trial Br. at 23.) Although this lawsuit was pending at the time of production, the documents were produced following processing. Thus, the Court cannot find that this lawsuit was "necessary in order to enforce compliance" with the statute. NHRTL's request for attorney's fees on this basis is DENIED.

Next, the Court likewise finds that NHRTL is not entitled to an award of attorney's fees based on its responses to NHRTL's Right-to-Know requests. NHRTL asserts that the State's declining to provide justifications for its exemptions and withholdings without a court order would call for an award of attorney's fees. In response to each Right-to-Know request, however, the State cited statutory provisions, case law, or applicable privileges indicating the exemption or other reason for non-disclosure. Production of a Vaughn index is typically required only pursuant to court order. See Union Leader Corp., 142 N.H. at 548–50; Church of Scientology Int'l v. U.S. Dep't of Justice, 30 F.3d

224, 228 (1st Cir. 1994) ("To assure the broadest possible disclosure, courts often direct a government agency seeking to withhold documents to supply the opposing party and the court with a Vaughn index..."). The Court cannot find that the State's listing of reasons for redactions and withholdings and refusal to provide a Vaughn index absent court mandate was unreasonable.

Finally, the Court finds that NHRTL is not entitled to an award of reasonable attorney's fees as a consequence of the specific disclosures mandated by this order. Although the Court has concluded that certain redactions or withholdings by the State did not meet Right-to-Know requirements, they were not so unreasonable under current New Hampshire case law that the State knew or should have known that disclosure was required. Indeed, the Court has upheld the majority of the redactions and withholdings in the 1,500 or so pages produced, demonstrating that the State's had responded to the requests in good faith. An award of attorney's fees in this case would not be appropriate.

As NHRTL has not specifically requested an award of costs, the Court will not presently consider the issue. Cf. ATV Watch v. New Hampshire Dep't of Res. & Econ. Dev., 155 N.H. 434, 439-40 (2007) (distinguishing test for costs under Right-to-Know law in comparison to awarding reasonable attorney's fees); (See Pls.' Trial Br. Prayer B; Pls.' Supp. Trial Br. Prayer B (requesting an award of reasonable attorney's fees).)

VII. Conclusion

For the foregoing reasons, the Court upholds the majority of the State's redactions and withholdings, but finds that the following documents must be disclosed in fully or partially unredacted form as noted:

- The Incident Report Summary dated March 28, 2013 must be produced in unredacted form. (W295–298.)
- The LRDD applications for the clinics must be produced with the professional designation, if any, of the employee listed on the application. For consultant pharmacists, the State may redact all information currently redacted, but should denote, if the pharmacist is licensed, by writing "Licensed Pharmacist #1" and so on in a parallel manner to the use of "John Doe" to designate other employees' identities. (P31–32, P35–36, P38–39, P41–42, P44–45, P47–48, P55–56.)
- Copies of the clinics' pharmaceutical protocols approved by BOP in accord with RSA 318:42, VII must be produced unredacted. (P3–7, P10–11, P13–14, P19, P21–22, P24, P28–29, P65.)
- Two documents with internal, handwritten notes must be produced with the handwritten notes unredacted. (P60–61.)
- Documents disclosing the identity of Linda Griebsch as the Executive Director of Feminist Health Center must be produced unredacted; however, Ms. Griebsch's contact information, such as email and home address, should remain redacted. (P57, P59, P121.)
- "Key Administrative Personnel" document listing salaries of certain clinic staff must be produced with the salary information unredacted, but the identities of employees may remain redacted. (P114.)

To the extent the disclosure of these documents fulfills NHRTL's requests for relief, they are GRANTED, otherwise, they are DENIED. NHRTL's request for attorney's fees is DENIED. The Court denies plaintiffs' request for clarification of its prior order. The Court has received some 1,500 pages of documentation as well as three DVDs. Between the parties' pleadings, the furnished documentation and the DVDs, the Court believes it has been able to consider the RSA 91-A issues.

SO ORDERED.

5-15-15
Date

Philip P. Mangones
Presiding Justice

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

STRAFFORD, SS. 219-2014-CV-00386

NEW HAMPSHIRE RIGHT TO LIFE
&
JACKIE PELLETIER

v.

NEW HAMPSHIRE DIRECTOR OF CHARITABLE TRUST OFFICE
&
NEW HAMPSHIRE ATTORNEY GENERAL'S OFFICE
&
NEW HAMPSHIRE STATE BOARD OF PHARMACY
&
NEW HAMPSHIRE DEPARTMENT OF HEALTH & HUMAN SERVICES

ORDER

The plaintiffs, New Hampshire Right to Life and Jackie Pelletier (collectively referred to as "NHRTL"), brought a Right-to-Know action pursuant to RSA Chapter 91-A (2013 & Supp. 2014) against the defendants, New Hampshire Director of Charitable Trusts Office ("DCT"), New Hampshire Attorney General's Office ("the AGO"), New Hampshire State Board of Pharmacy ("the BOP"), and New Hampshire Department of Health & Human Services ("the DHHS") (collectively referred to as "the State"). After a

hearing on the merits of NHRTL's claims and the Court's in camera review of the documents at issue, the Court issued an order on May 15, 2015. (Court index #26 hereinafter "May 2015 Order"). The May 2015 Order upheld many of the State's redactions and withholdings of documents in response to NHRTL's Right-to-Know requests, but also ordered production of certain documents to NHRTL. (See May 2015 order at 35.) Specifically, the Court ordered the State to produce, in unredacted form, "[c]opies of the clinics' pharmaceutical protocols approved by BOP in accord with RSA 318:42, VII." (Id.)

On or about June 3, 2015, the State produced to NHRTL certain documents in accordance with the May 2015 Order. (Pls.' Mot. Clarify ¶ 3; Defs.' Resp. Mot. Clarify ¶ 3, Ex. A.) This production included several reproductive health care clinics' pharmaceutical protocols: Lovering Health Center's September 2012 protocol; Weeks Medical Center's September 2012 and June 2013 protocols; Planned Parenthood of New England's ("PPNE") June 2013 protocol; and Concord Feminist Health Center's August 2013 protocol. (Defs.' Resp. Mot. Clarify Ex. A.) The State did not produce to NHRTL an unredacted copy of PPNE's September 2012 protocol.

NHRTL now moves this Court to clarify the May 2015 Order regarding production of these pharmaceutical protocols, arguing that the May 2015 Order required production of PPNE's September 2012 protocol. (Court index #28.) NHRTL asserts that its original Right-to-Know request forming the origin of this action encompassed not only the protocols the State has produced, but also PPNE's September 2012 protocol. (Pls.' Mot. Clarify ¶ 1.) NHRTL appears to further argue that, in addition to being encompassed by the original request, PPNE's September 2012 protocol was at issue in

this litigation because it was attached as Exhibit G to NHRTL's complaint and was discussed by both parties' trial briefs. (Id. ¶¶ 4–7.) NHRTL notes that because PPNE's September 2012 protocol was mentioned in the complaint, the State should have produced unredacted copies of that protocol for the Court's in camera review, and had that occurred, the Court would have ordered production of that protocol in addition to the other protocols the Court ordered produced. (Id.) Because the May 2015 Order mandates production generally of "the clinics' pharmaceutical protocols as approved by BOP in accord with RSA 318:42, VII" (May 2015 Order at 35), NHRTL seeks the Court's clarification regarding whether that order includes PPNE's September 2012 protocol.

In response, the State argues that PPNE's September 2012 protocol was never part of this litigation and that the May 2015 Order did not order the State to produce it. (Defs.' Resp. Mot. Clarify ¶ 7.) The State acknowledges that the protocols at issue were attached to the complaint, but asserts that they were attached to the complaint in error, as noted in the State's answer, and as subsequently discussed by the parties. (Id. ¶ 7.) It further avers that any references it made to the PPNE September 2012 protocol in its brief were for purposes of background information only. (Id. ¶ 8.)

As an initial matter, the Court notes that the May 2015 Order was unambiguous regarding which specific documents the State must produce. The body of the May 2015 Order states that "DHHS must produce unredacted versions of approved RSA 318:42,VII (a) protocols featured at P3–7, P10–11, P13–14, P19, P21–22, P24, P28–29, and P65." (May 2015 Order at 26.) The conclusion of the May 2015 Order also states that the Court "finds that the following documents must be disclosed in fully or partially unredacted form as noted: ... [c]opies of the clinics' pharmaceutical protocols

approved by BOP in accord with RSA 318:42, VII must be produced unredacted. (P3–7, P10–11, P13–14, P19, P21–22, P24, P28–29, and P65.)" (Id. at 35.) The May 2015 Order also included specific page number references to all of the in camera materials the Court ordered produced. (Id.) PPNE's September 2012 protocol had not been included within the in camera review materials cited by the May 2015 Order. Thus, the May 2015 Order set forth which documents the State must produce and did not direct the State to produce PPNE's 2012 protocol. Nevertheless, the Court addresses the parties' arguments to clarify any ambiguities in the May 2015 Order.

First, NHRTL's Right-to-Know request seeking production of certain pharmaceutical protocols that forms the basis of their claim regarding pharmaceutical protocols cannot fairly be read as requesting PPNE's September 2012 protocol. The Right-to-Know law requires that a Right-to-Know request "reasonably describe[]" the governmental record sought. RSA 91-A:4, IV (2013); see also 5 U.S.C. § 552 (a)(3)(A) (West 2015) (requiring requests under the Freedom of Information Act to "reasonably describe[]" records sought). Under the Freedom of Information Act ("FOIA"), "[a] FOIA request must enable a professional employee of the agency who is familiar with the subject area of the request to locate the record with a reasonable amount of effort." Sack v. Cent. Intelligence Agency, 53 F. Supp. 3d 154, 163 (D.D.C. 2014) (quotation, brackets, and internal quotation marks omitted); see also Lamy v. N.H. Pub. Utils. Comm'n, 152 N.H. 106, 108 (2005) (authorizing New Hampshire courts to look to federal law decided under FOIA for guidance in Right-to-Know cases). "The linchpin inquiry is whether the agency is able to determine precisely what records are being

requested. Sack, 53 F. Supp. 3d at 163 (quotation and internal quotation marks omitted).

Here, NHRTL's Right-to-Know request at issue did not reasonably describe PPNE's September 2012 protocol as part of its request. As the Court noted in the May 2015 Order, its discussion of the protocol production issue was based on NHRTL's October 11, 2014 Right-to-Know request submitted to the DHHS, the AGO, and the BOP. (May 2015 Order at 20.) This request, submitted by NHRTL's counsel, stated:

> Please accept this email as a Right to Know Request pursuant to RSA 91-A. Would you please provide me with a copy of Planned Parenthood's most recently approved written protocol required by RSA 318:41(VII)(a)? I attach for your reference a portion of your response of November 5, 2012 enclosing protocols approved by HHS on September 14, 2012. Please advise if there is a more recent protocol in HHS, the Board of Pharmacy, or the Attorney General Office's possession and, if there is, please provide us with a copy of the more recent protocol in accordance with RSA 91-A.

(Defs.' Resp. Mot. Clarify Ex. B at 1, Ex. C at 2; Defs.' Trial Mem. Ex. G at 2.) This email indicates that NHRTL was seeking PPNE's pharmaceutical protocols created more recently than September 2012. Indeed, the email language even states that PPNE's September 2012 protocol was attached to the email and references the 2012 protocol as responsive to a previous Right-to-Know request propounded by NHRTL. The email reasonably describes a request for the "most recently approved written protocols," but does not also request copies of the older, 2012 protocol in addition to the more recent protocols. Based on the language of the email, the Court finds that the above referenced Right-to-Know request did not reasonably describe and request PPNE's 2012 protocol.

NHRTL has not directed the Court to any other Right-to-Know request relevant to the present litigation that could be construed as requesting this particular protocol.[1] It is unclear why, or in response to which, Right-to-Know request the State provided the pharmaceutical protocols for the other reproductive health care clinics in addition to PPNE's for the Court's in camera review. Regardless, the basis of this litigation is NHRTL's challenge to the State's responses to specific Right-to-Know requests with production of redacted documents and/or withholding of documents. (See Compl. ¶ 31, 32, 40, 50.) The May 2015 Order is organized according to these specific Right-to-Know requests, which request different categories of documents. (See May 2015 Order at 5, 14, 20, 26.) Those requests form the basis upon which this Court must evaluate the lawfulness of the State's responses; the Court cannot fault the State for failing to produce something that was not requested. In turn, this Court will not order production of a document that was not within the scope of the original Right-to-Know request, and therefore, not required to be produced for the Court's in camera review.

Second, the Court does not conclude that the inclusion of PPNE's September 2012 protocol with the complaint and other pleadings brings it within the purview of this litigation. As the State pointed out in its answer and again in response to the motion to clarify, NHRTL originally attached Exhibit G to the complaint in error, and later requested assent from the State to substitute a different attachment in its place. (See Answer ¶ 51; Defs.' Resp. Mot. Clarify ¶ 7; Pls.' Mot. Clarify Ex. A ("In your Answer you correctly point out that I attached the old pharmaceutical protocols as Exhibit G. The

[1] The Court has not received any other exhibits regarding other Right-to-Know requests seeking pharmaceutical protocols. NHRTL has not cited to or provided the specific Right-to-Know request that it claims requested PPNE's 2012 protocol in its complaint, trial brief, or motion for clarification. (See Compl. ¶¶ 49–51; Pls.' Trial Mem. at 12; Pls.' Mot. Clarify ¶ 1.)

more recent pharmaceutical protocols which you sent to us in October of this year should have been attached.").) Accordingly, this error does not amend the October 11, 2014 Right-to-Know request to bring PPNE's September 2012 protocol within its scope.

Based on the fact that NHRTL indicated to the State that it had attached Exhibit G to the complaint in error, it was reasonable for the State to assume that the materials represented by Exhibit G need not be furnished to the Court for in camera review. Indeed, reading the Court's orders regarding production of documents for in camera review in conjunction and in their entirety (court index #13, 17, 18), the orders indicate that the State should produce unredacted copies or withheld documents responsive to NHRTL's Right-to-Know requests at issue in this litigation. (See e.g., court index #13 at 2 ("The Court has been provided with copies of the materials as furnished to the plaintiffs. Therefore, the materials as provided to the Court reflect the various redactions or other omissions that are contested by NHRTL.") (emphasis added).) Therefore, the State's failure to produce PPNE's September 2012 protocol for the Court's in camera review was not in error.

The State's reference to PPNE's September 2012 protocol in its trial memorandum did not bring the protocol within the scope of the current litigation or amount to an admission that it was part of the litigation. Rather, as it asserts, the State attached and cited to PPNE's September 2012 protocol in its trial memorandum to show that it has asserted the same privilege and applied the same redactions regarding pharmaceutical protocols in the past as it asserted in this case. (See Defs.' Trial Mem. at 18, Ex. I ("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.").)

For the foregoing reasons, the Court clarifies that the May 2015 Order did not order the State to produce PPNE's 2012 protocol, as that protocol was not contained in the specific in camera review pages cited by the order. (May 2015 Order at 35.) PPNE's 2012 protocol was properly not ordered produced in the prior order because that specific protocol was not encompassed by the Right-to-Know requests giving rise to this action. To the extent that NHRTL's motion for clarification requests the Court to order production of that protocol, it is denied.

SO ORDERED.

6-24-15
Date

Philip P. Mangones
Presiding Justice