THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

MAY 19 2015

Strafford Superior Court
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Dover NH 03820

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NOTICE OF DECISION

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Case Name: **New Hampshire Right to Life, et al v New Hampshire Director of Charitable Trusts Office, et al**
Case Number: **219-2014-CV-00386**

Enclosed please find a copy of the court's order of May 15, 2015 relative to:

Order

May 18, 2015

Karen A. Gorham
Clerk of Court

(269)

C: Lynmarie C. Cusack, ESQ; Megan A. Yaple, ESQ

MAY 19 2015

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 P114 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 witholdings 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