**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

Docket No. 2015-0366

New Hampshire Right to Life and Jackie Pelletier

v.

New Hampshire Director of Charitable Trusts Office, et al.

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APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE STRAFFORD COUNTY SUPERIOR COURT

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# BRIEF FOR NEW HAMPSHIRE DIRECTOR OF CHARITABLE TRUSTS OFFICE, et al

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October 26, 2015

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## QUESTIONS PRESENTED

1. Whether The Trial Court Correctly Determined That Certain Documents Withheld By The State Are Exempt Under The Work Product Privilege?
2. Whether The Trial Court Correctly Determined That A DVD Withheld By The State Is Exempt Under The Right-to-Know Law?
3. Whether The Trial Court Correctly Determined That Individuals' Identities, As Well As Certain Financial Data And Information Are Exempt From Disclosure Under RSA 91-A?
4. Whether The Trial Court Correctly Determined That The State Complied With The Provisions Of RSA 91-A And That There Was No Justification For An Award Of Costs Or Attorneys' Fees?
5. Whether The Trial Court Correctly Determined That Certain Pharmaceutical Protocols Were Not At Issue In This Case?

## STATEMENT OF THE FACTS AND OF THE CASE

This case arises out of the Appellants', New Hampshire Right to Life ("NHRTL") and Jackie Pelletier ("Pelletier"), dissatisfaction with the trial court's Orders, dated May 15, 2015 and June 24, 2015, relative to their requests for certain documents from the Appellees, the New Hampshire Director of Charitable Trusts Office ("DCT"); the New Hampshire Attorney General's Office ("AGO"); the New Hampshire State Board of Pharmacy ("BOP"); and the New Hampshire Department of Health and Human Services ("DHHS") (hereinafter, collectively "the State"), pursuant to RSA 91-A.

The Appellants, in one capacity or another, filed Right-to-Know requests under RSA 91-A for four different categories of documents from the State.[1] These requests were filed at various times from July of 2014 through October of 2014.[2] Specifically, the Appellants: (1) on July 14, 2014, sought information from the BOP requesting copies of drug distributor licenses and communication with PPNNE, see AA at 26-28; (2) on July 28, 2014, sought documents from the AGO regarding its communications with certain reproductive health clinics and documents and information from these reproductive health clinics related to the ongoing litigation involving "buffer zones," see AA at 19-22; (3) on September 11, 2014, sought certain reproductive health clinics' financial statements and data from DCT, see AA at 4-6; and (4) on October 11, 2014 (and later dates in December 2014), sought certain reproductive health clinics' pharmaceutical

[1] As argued in its Answer, as well as in its Trial Brief, the State contended that the Appellants failed to set forth factual allegations in their Petition to show that all four Right-to-Know requests applied to both Appellants. In fact, there was no allegation in the Appellants' Verified Petition that Jackie Pelletier was involved in any Right-to-Know request made to DCT, BOP, or DHHS. Those requests were made by Attorney Michael Tierney, which the State understood to be made on behalf of NHRTL. Additionally, the requests made to the AGO were made by Attorney Tierney in relation to a federal court case in which Jackie Pelletier is a party, but NHRTL is not a party. Although the State continues to deny that both Appellants made all four Right-to-Know requests, because that issue was never decided by the trial court, nor has the State appealed that issue, the State will refer to all requests as being made by both Appellants.

[2] In this Brief, "AA" represents "Appellants' Appendix," and "A. Add." refers to the "Appellants' Addendum."

protocols required under RSA 318:42, VII(a) from DHHS, see AA at 310-319, 143-167. The State, in response to all four requests, produced all non-exempt information and either redacted exempt information or withheld records completely exempt from disclosure.

On October 20, 2014, the Appellants filed a Verified Complaint in the Strafford County Superior Court, arguing that the various State agencies had either refused to produce the requested documents or refused to give sufficient reasons for the non-disclosure. See AA at 1-52. The Appellants claimed that the State failed to meet its burden in demonstrating that the RSA 91-A statutory exemptions applied and that this failure required the trial court to order production of the documents, as well as an award of attorneys' fees and costs. Id.

The State answered the Complaint on December 8, 2014, specifying that it had provided all required information and documentation in compliance with the Right-to-Know law, and that any information that had been withheld or redacted was privileged or exempt from disclosure. See AA at 53-63. A hearing was held on January 13, 2015. Prior to that hearing, the DCT had processed certain documents that pertained to the Appellants' Right-to-Know request and had produced those documents to the Appellants, thus making the Appellants' argument regarding DCT's alleged failures moot. See AA at 131.

Subsequent to hearing offers of proof from both sides, the trial court set February 2, 2015 as the deadline for the parties' post-hearing briefing. Both parties submitted Trial Briefs. See AA at 64-134, 184-403, 137-183. By Order dated March 1, 2015, the trial court ordered the State to produce unredacted versions of the documents that had "previously been furnished to the Court" so that it could conduct an *in camera* review of the materials to determine the merits of the parties' arguments. See AA at 435-439. On March 13, 2015, the State produced for the trial court unredacted versions of documents that had been previously been produced to the

Appellants in redacted form. The State did not produce any withheld documents, but moved for clarification from the trial court on that issue, specifically requesting if the trial court required the State to produce a DVD and a certain affidavit for *in camera* review.[3] See AA at 440-445. On March 23, 2015, the trial court ordered the State to "furnish the Court for *in camera* review an unredacted copy of the Affidavit and a copy of the DVD." See AA at 446-448. Following additional pleadings filed by the parties, on March 27, 2015, the trial court further ordered the State to produce all withheld documents for *in camera* review, as well as a "table of contents which identifie[d] the documents by a reasonable brief description and by reference to the numbering stamp numbers or equivalent numbering." See AA at 455-458. On April 17, 2015, the State produced all requested documents to the trial court, as well as a table of contents to both the trial court and the Appellants. See AA at 463-475.

In a 36-page Order dated May 15, 2015, the trial court (Mangones, J.) upheld the majority of the State's redactions and withholdings, but directed that certain documents be disclosed in fully or partially unredacted form. See AA at 1-36. The State complied with the trial court's Order and on June 3, 2015, produced all documents referenced in the Order to the Appellants. See AA at 530-573. Although subsequent pleadings were filed by the parties following this disclosure, on June 15, 2015, the Appellants filed their Rule 7 Notice of Mandatory Appeal.

[3] The affidavit sought was the "Affidavit of Meagan Gallagher," an employee of Planned Parenthood of Northern New England ("PPNNE"), which was prepared in preparation for the federal court litigation.

## SUMMARY OF THE ARGUMENT

The trial court properly conducted its *in camera* review and appropriately decided what information could be disclosed or withheld. The Appellants' Right to Know requests relate to documents and information concerning highly controversial matters related to various reproductive health clinics throughout the State. In response to the Appellants' four Right-to-Know requests, the State produced certain documents without redactions, produced certain documents with redactions, and withheld certain documents. Pursuant to RSA 91-A, with each response, the State timely provided the reasoning for the non-disclosure and cited the exemptions to RSA 91-A. As such, the State has complied with the statutory requirements. "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). Here, the State met this heavy burden for all information that was ordered to remain undisclosed or withheld. As a result, there is no justification for an award of costs or attorneys' fees. The trial court's decision should be upheld.

## ARGUMENT

### I. STANDARD OF REVIEW

RSA 91-A, the Right-to-Know law, provides that "[e]very citizen . . . has the right to inspect all public records . . . except as otherwise prohibited by statute or RSA 91-A:5." RSA 91-A:4, I. The law was enacted "to ensure . . . the greatest possible public access to the actions, discussions and records of all public bodies." RSA 91-A:1.

The interpretation of RSA 91-A is decided ultimately by this Court. See Union Leader Corp. v. City of Nashua, 141 N.H. 473, 475 (1996). Questions regarding the law are reviewed 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. See Lodge v. Knowlton, 118 N.H. 574, 575 (1978). While the statute does not provide for unrestricted access to public records, see Orford Teachers Association v. Watson, 121 N.H. 118, 120 (1981), this Court broadly construes provisions favoring disclosure and interprets the exemptions restrictively. See Society for the Protection of N.H. Forests v. Water Supply and Pollution Control Comm., 115 N.H. 192, 194 (1975). Because exemptions under the Right-to-Know law are similar to those under the federal Freedom of Information Act (FOIA), this Court often looks to federal decisions construing the FOIA for guidance. Lamy v. N.H. Public Utilities Commission, 152 N.H. 106, 108 (2005).

### II. THE TRIAL COURT CORRECTLY DETERMINED THAT THE STATE DID NOT VIOLATE RSA 91-A WHEN IT WITHHELD DOCUMENTS ON THE BASIS OF THE WORK PRODUCT PRIVILEGE.

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 clinics and the constitutionality of RSA 132:38 (2015) in an action filed by

Pelletier. See Sister Mary Rose Reddy, et al. v. Joseph Foster, et al., Case No. 14-CV-00299 (D. N.H.). In preparation for a preliminary injunction hearing in that litigation, the AGO gathered and prepared various documents, including information from other states' Attorney General's Offices and various reproductive health clinics. Subsequently, a stay was entered in the case concerning that litigation and no preliminary injunction hearing was held. See id.

On July 28, 2014, the Appellants submitted a Right-to-Know request to the AGO requesting production of certain materials. See AA at 19-22. The AGO responded to this request on September 4, 2014, producing the information, 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." See AA at 91-94. The State claimed that information gathered in the course of litigation was protected and confidential and that other information contained the private information of clinic employees. After reviewing the redacted and withheld information, the trial court agreed that documents and communications were protected by the work product privilege and did not order their disclosure. See AA at 5-13. The Appellants now contend that the State failed to show that this information was entirely privileged work product and that the trial court erred in upholding these withholdings. The Appellants further argue that the State violated RSA 91-A by not producing those portions that did not constitute work product. Specifically, the Appellants contest the trial court's findings regarding an affidavit and communications with "third parties."

Governmental records which are made privileged by statute, court rule, or common law, are appropriately treated as exempt from disclosure under the Right-to-Know law. See Prof. Fire Fighters of N.H. v. N.H. Local Gov't Ctr., 163 N.H. 613, 615 (2012) (determining that communications protected under the attorney-client privilege fall within the exemption in the

Right-to-Know law for confidential information). Although the New Hampshire Supreme Court has never determined that attorney work product also falls within the confidential information exemption in the Right-to-Know law, because these two distinct privileges are well established in New Hampshire law and are designed to protect important aspects of the adversarial process, the trial court correctly applied the same reasoning. 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. R. 21(e)(1) (establishing that party must meet certain requirements to discover materials prepared in anticipation of litigation); see also 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 work product doctrine protects any document from discovery that is "the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation." Riddle Spring, 107 N.H. at 274; see also United States v. Nobles, 422 U.S. 225, 238 n.11 (1975) (noting that the work product doctrine is "distinct from and broader than the attorney-client privilege") (citing Hickman v. Taylor, 329 U.S. 495, 508 (1947)). "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." Chagnon, 139 N.H. at 674 (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 State v. Zwicker, 151 N.H.179, 191-92 (2004) (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").

Regarding the "Gallagher Affidavit," the trial court correctly determined that although it contained "some purely factual information," the affidavit, overall, constituted confidential attorney work-product and that the State had sufficiently shown that the potential harm to the AGO outweighed any benefit of disclosure to the public. First, contrary to the Appellants' assertion that the Affidavit was "not drafted by the State but was drafted by Planned Parenthood," see Appellants' Brief at 4, and thus the State cannot assert any kind of work-product privilege, the Affidavit was, in fact, drafted by both counsel for the State and PPNNE together, in anticipation of the "buffer zone" litigation. While PPNNE was not the State's "client," nor was it a party to the federal litigation, because the State was arguing the constitutionality of a statute that affected only certain facilities, the State was obligated to collaborate with PPNNE to gather information in preparation for its case.

Second, the Affidavit shows the "mental processes" of the State's attorneys. Unlike the witness statement in Chagnon, which was not deemed attorney work-product because it

contained purely factual information, here, the Affidavit contains the thought processes of the State's counsel in that it signals information, but is also a draft document in that it was never produced in a pending litigation. The State's attorneys made the strategic decision that they needed such an Affidavit, reached out to PPNNE to gather specific information, which contained not only factual information but policy statements and opinions, and then organized the information in such a way to support their case. Although the Affidavit was listed as an exhibit, the State's attorneys involved in the litigation could have made the strategic decision to forgo using the Affidavit at the hearing. As such, it is purely conjecture as to whether the Appellants would have ever obtained the affidavit in the buffer zone litigation. 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.").

In applying the confidentiality balancing test, see Hampton Police Ass'n, Inc., v. Town of Hampton, 162 N.H. 7, 14 (2011), the trial court correctly determined that the State met its burden to show that disclosure of the entire Affidavit could cause substantial harm to the State's position in the ongoing federal litigation. See id. "[T]o determine whether records are exempt as confidential, the benefits of non-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 trial court properly found that disclosure of the entire Affidavit could cause substantial harm to the State's position in the ongoing federal litigation. See A. Add. at 10. Although the federal litigation is currently stayed, the parties are still involved in preparing and filing pleadings in the case. Thus, because of the manner in which this document was created and organized, even disclosing "purely factual information" would jeopardize the State's litigation strategy. Additionally, there is no public benefit derived from disclosing this Affidavit, as it was obtained solely for the purposes of litigation.

Regarding the State's communications with "third-party abortion clinics" and various other states' Attorney General's Offices, the Appellants argue that these communications are not work-product, and even if certain attachments to these communications are considered work product, such privilege is waived when shared with a third party. However, after conducting an *in camera* review of the withheld documents, the trial court, again, correctly determined that the documents constituted confidential attorney work product and that the State had sufficiently shown that the potential harm to the AGO's litigation strategy outweighed any benefit of disclosure to the public. See A. Add. at 12-13.

As stated above, the work product doctrine can be reflected in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways. See Hickman, 329 U.S. at 510-11. Here, the communications between the State and various employees of reproductive health clinics, as well as the communications between the State's attorneys and other states' Attorney General's offices, were made at the time of the State's involvement in the federal litigation when it was gathering

information to use in its case. All of the information was gathered "with a view to pending or anticipated litigation" and became part of the State's attorneys' working case file. Simply put, the materials gathered or correspondence generated by counsel while preparing for litigation is protected attorney work-product. The Appellants cannot use Right-to-Know requests to gather information that is part of the State's working case file and may otherwise be nondiscoverable in the course of the federal litigation. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149-55 (1975) (noting that Exemption 5 of the federal FOIA "withholds from a member of the public documents which a private party could not discover in litigation with the agency" and that attorney work product is "normally privileged in the civil discovery context") (citation omitted).

The Appellants, citing other jurisdictions, argue that even if this information is privileged, because it was "voluntarily disclosed to third parties," that privilege has been waived or destroyed. See S.E.C. v. Gupta, 281 F.R.D. 169 (S.D.NY. 2012); In re Pac. Pictures Corp., 679 F.3d 1121, 1126-27 (9th Cir. 2012). While that may be true regarding the attorney-client privilege, it is generally determined that the work-product privilege protection "is distinct from and extends more broadly than the attorney-client privilege," Gupta, 281 F.R.D. at 171 (citations omitted), and also, "is not as easily waived as the attorney-client privilege." United States v. Massachusetts Institute of Technology, 129 F.3d 681, 687 (1st Cir. 1997) (citations omitted) (noting that the attorney-client privilege is "designed to protect confidentiality, so that any disclosure outside the magic circle is inconsistent with the privilege"). The work-product protection can be waived, however, if a party "discloses the privileged material to anyone without 'common interests in developing legal theories and analyses of documents.'" In re Sealed Case, 676 F.2d 793, 817 (D.C. Cir. 1982) (quotation omitted); see also MIT, 129 F.3d at 687 (holding that the "work product protection is provided against 'adversaries,' so only

disclosing material in a way inconsistent with the keeping it from an adversary waives work product protection").

Here, the State had "common interests in developing legal theories" with the various reproductive health clinics, as well as with other state's Attorney General's Offices in anticipation of the federal litigation. Specifically, the State's attorneys gathered information from the clinics on the effect a buffer zone statute would have upon them, and also gathered information from other states who had dealt with similar situations or statutes. The State's attorneys then reviewed the information, asked pertinent follow up questions, and corresponded with various entities, all with an eye toward preparing its case for federal court. As such, information the State gathered from those third parties became part of its ongoing litigation file and was correctly determined to be confidential attorney work product exempt from disclosure.

## III. THE TRIAL COURT CORRECTLY DETERMINED THAT THE STATE DID NOT VIOLATE RSA 91-A WHEN IT WITHHELD A DVD BASED ON CONCERNS FOR THE PERSONAL PRIVACY OF INDIVIDUALS DEPICTED IN THE VIDEO.

The trial court did not err in its decision upholding the nondisclosure of the DVDs, which contained footage of PPNNE's patients and clients. The State obtained the DVDs from PPNNE as a result of its involvement in the buffer-zone litigation, and as such, they became a part of the State's ongoing litigation file. While the DVDs do not themselves constitute attorney work-product, the disclosure of information in the DVDs would constitute an invasion of privacy. Further, because the DVDs do not reveal any conduct by the State, there is little public interest in their disclosure.

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). "The party resisting disclosure bears a heavy burden to shift the balance toward nondisclosure." Id. (citation omitted).

Here, the privacy interest asserted by the State was the confidential nature of the identity of PPNNE patients and clients. While it is true that the DVDs showed footage of a public sidewalk, they also showed PPNNE patients (or potential patients) entering and exiting the building, as well as the confidential security measures taken by PPNNE to ensure safety at its facility. The disclosure of this information would breach both the confidentiality PPNNE seeks to maintain with its patients and its desire to protect its patients and employees.

The Appellants argue that the trial court erred in holding that disclosure of the DVDs would violate the confidentiality of the physician-patient privilege because footage of public sidewalks is not protected confidential communications under RSA 329:26. However, a

thorough reading of the trial court's Order does not suggest such a holding. In fact, the trial court noted that "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." See A. Add. at 12. The trial court only found that it is a "private matter related to the individual's health and safety," and that "individuals have a privacy interest in the health care providers from whom they choose to seek treatment." Id. This was the correct determination, as the State had sufficiently shown this privacy interest.

Regarding the public's interest in disclosure, the DVDs were obtained by the State as part of its ongoing federal court litigation so that the State could adequately prepare its case. Unlike the defendants in N.H. Civil Liberties Union v. City of Manchester, whose police department failed to disclose photographs taken by their own officers, here, the DVDs were not set up by the State, were not in the State's control, and only show security footage set up by PPNNE. As such, there is no public interest in disclosure because the footage does not shed light on the activities of the State. In a footnote, the Appellants contend that 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." See Appellants' Brief at 9. However, this argument is speculative, at best, and again, would not shed light on the State's activities. While it is true that "[o]fficial 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]," that purpose "is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an

agency's own conduct." U.S. Dept. of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749, 773 (1989).

Given this lack of public interest—that the DVDs would not inform the public about the department's activities—and that a valid privacy interest exists, the trial court correctly determined that the State had met its burden to show that the privacy interest outweighed the public's interest in disclosure. Contrary to the Appellants' assertion, the trial court did not shift the burden to the Appellants to assert a specific public interest in the disclosure. The trial court simply found that any public interest asserted did not outweigh the privacy interest already determined. Further, because the State sufficiently met its burden to show a privacy interest at stake and that that privacy interest outweighed any public interest in disclosure of the DVDs, any correspondence with third parties regarding these same DVDs was also legally withheld.

## IV. THE TRIAL COURT CORRECTLY DETERMINED THAT INDIVIDUALS' IDENTITIES, AS WELL AS CERTAIN FINANCIAL DATA AND INFORMATION, WERE EXEMPT FROM DISCLOSURE.

The Appellants first argue that the State should not have redacted or withheld the identities of certain reproductive health clinics' employees or officials. However, this information is exempt from disclosure under RSA 91-A:5, IV because the disclosure would constitute an invasion of privacy. The trial court did not err when it found that the State met its heavy burden to demonstrate that the information the Appellants sought is exempt from disclosure. This provision of the Right-to-Know law specifically exempts from disclosure "files whose disclosure would constitute an invasion of privacy." RSA 91-A:5, IV. "This section of the Right-to-Know law 'means that financial information and personnel files and other

information necessary to an individual's privacy need not be disclosed." Lamy, 152 N.H. at 109 (citing Mans v. Lebanon School Bd., 112 N.H. 160, 162 (1972)).

Because the disclosure of the information would constitute an "invasion of privacy," the same three-part test applies to the information, as addressed *supra*. See N.H. Civil Liberties Union, 149 N.H. at 440. First, the trial court properly found that there was a privacy interest that would be invaded by disclosure of the identities of any reproductive health clinics' employees and officials. See Lamy, 152 N.H. at 109 (determining that employees and independent contractors have a privacy interest in their identities). In weighing the next two factors, the trial court recognized that employees' and officials' privacy interest is heightened when release of their identities could result in harassment from any member of the public, or when concerns for these individuals' safety arose. In fact, buffer zone laws have been enacted to protect patients and staff of reproductive health clinics from harassment due to protestors. Indeed, in some circumstances, an individual employee has a privacy interest in his or her identity, especially where disclosure of that identity will result in harassment, annoyance, or interference with one's official duties or private life. See, e.g., Sensor Systems Support, Inc. v. F.A.A., 851 F.Supp. 2d 321, 333 (D.N.H. 2012) (a government employee that is the subject of an internal investigation has a privacy interest in his identity so as to protect him from harassment or reputational harm). The fact that the Appellants cite to and have submitted various news articles regarding this issue simply highlights the fact that much of what these reproductive health clinics do is highly controversial, which buttresses the argument that the privacy interests' of the employees must be protected.

The Appellants argue that because many of the identities of the clinic officials and employees in this case have already been publicly disclosed by the clinics themselves, that the

State cannot assert a privacy interest on behalf of these same employees or officials. However, the fact that certain information has already been disclosed does not demonstrate that there is no present possibility of harassment, nor does it mandate that the State is then required to disclose certain information that is otherwise exempt under the Right-to-Know law because it is confidential. Further, as the trial court determined, "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." See AA at 16-17.

Because there is a privacy interest at stake, the Court must next consider the public interest in the release of such information. However, here, there is no public interest in the release of certain employees' identities. The Appellants put forth various arguments to show how disclosure would serve the public interest. Specifically, the Appellants suggest that the public has an interest in knowing how reproductive health clinics spend taxpayers' money; that the public has an interest in exposing potential government corruption, which it claims could occur as a result of any reproductive health clinic donating to campaigns for certain government officials and the Governor hiring PPNNE's legal counsel as the Governor's attorney; and that the public has an interest in knowing whether the BOP is complying with RSA 318:42, VII.

Regarding the first two arguments, a public interest under the second prong of the analysis must reveal some information about the State's activities, not a reproductive health clinic's or the Office of the Governor, to whom this Right-to-Know request was not directed upon. The reasons set forth by the Appellants would not inform the public of the State's

activities. Disclosing the names of the employees and any independent contractors only provides very limited information—who those specific clinics employ. Additionally, the argument that there is some public interest in knowing who is involved in the operation of these clinics because it could potentially expose personal connections or explain funding choices and lobbying efforts is clearly derivative in that the Appellants are only seeking this information so that it can "be used to uncover additional information about some unknown or speculative government contact." See A. Ad. at 30. However, when an asserted public interest is only "derivative," the Court should accord it little weight. 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 the plaintiff to discover additional information about the government entity). Thus, balancing the employees' and officials' privacy interests in maintaining their confidentiality and being free from harassment against the speculative and derivative public interest, the redaction of these individuals' identities was proper under RSA 91-A:5, VII and should be upheld.

As to the Appellants third argument, that the identities should be disclosed to ensure that the State is complying with RSA 318:42, VII, the Appellants are correct that the LRDD regulatory requirements do, in fact, specify that a clinic must identify its consultant pharmacist and medical director on the application. N.H. Admin. Rules Ph 601.03-04. However, as was required in previous trial court Orders, and as the State provided this information to the Appellants in response to the initial Right-to-Know request (and in subsequent responses following the trial court's Order), disclosure of such persons' professional or licensing

designation is sufficient to demonstrate the extent to which the BOP is approving LRDD applications according to the law.[4]

Thus, in balancing the individual employees' privacy interests against the limited, if any, public interest, the privacy interest is far greater. The trial court found as such and that determination should be upheld.

The Appellants further argue that the reproductive health clinics' financial data should be disclosed. Specifically, the State redacted the numerical values contained in the clinics' budgets and financial statements. See AA at 468; see also AA at 599-605, 611-612. The trial court upheld these redactions. Applying the same test as above, the clinics have a strong privacy interest in their financial information because it relates to their commercial activities and competitive stance in the market relative to other health clinics.

The Appellants contend that the public has a strong interest in this information because it derives from the clinics' receipt of State grant money and that the information may give insight into how and why the State decided to fund the clinics or if this was an appropriate use of taxpayer funds. However, the financial documents provide very little, if any, information about how the state grant money was spent, and thus, show only the conduct of the clinics themselves, not any government conduct. Thus, balancing these two competing interests, the information was properly redacted and the trial court's decision regarding that determination should be upheld.

## V. THE TRIAL COURT CORRECTLY DETERMINED THAT THE STATE FOLLOWED THE RIGHT-TO-KNOW LAW AND THAT NO COSTS OR FEES WERE WARRANTED.

[4] On the redacted documents, the BOP redacted the individual employees' or consultants' names, but inserted either "John Doe" or the individuals' professional designations, along with a corresponding number designation, so that the Appellants could identify whether individuals were working at more than one facility.

The State recognizes that "[t]he purpose of the Right-to-Know Law is to ensure both the greatest public access to the actions, discussion and records of all public bodies and their accountability to the people," and contends that it complied with all requirements under the statute. Murray v. N.H. Div. of State Police, 154 N.H. 579, 581 (2006).

The Appellants first argue that the State's "initial response to the right to know requests vaguely cites the entire statutory exemption provision," and that the State's "response neither indicated how many documents were being withheld nor the basis for the withholding." See Appellants' Brief at 20. They then cite Union Leader, arguing that the State was required to more clearly explain and identify the documents and the reasons for the redactions or withholdings. See Union Leader, 142 N.H. at 549. However, it appears that the Appellants confuse the requirements for an agency's initial response to a Right-to-Know request under RSA 91-A:4 with the requirements for a Vaughn Index, when such an index is ordered by a court. See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973) *cert. denied*, 415 U.S. 977 (1974).

RSA 91-A:4, IV states:

> 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.

RSA 91-A:4, IV (emphasis added). Thus, after an initial request is made, if the governmental records are not immediately available, the State agency is only required, within five days, to: (1) make the records available; (2) deny the request in writing with reasons; or (3) provide a written acknowledgement that the request has been received along with a statement of time that is

reasonably necessary to determine whether the request will be granted or denied. Id. There is no requirement, as the Appellants suggest, that the initial response "provide the connective tissue between the document, the deletion, the exemption and the explanation." Union Leader, 142 N.H. at 549.

In this case, the State complied with the requirements of RSA 91-A:4, IV in each of its initial responses to the Appellants' four Right-to-Know requests. First, on July 14, 2014, the Appellants sought information from the BOP requesting copies of drug distributor licenses and communication with PPNNE. See AA at 26-27. The State responded to this request on July 16, 2015, see AA at 210-216, as well as on July 31, 2014, see AA at 218-240. These responses complied with RSA 91-A:4, IV, in that the State provided "reasons" for any denial. See AA at 221 (stating that the withheld documents were "exempt from disclosure under RSA 91-A:5 and RSA 318:30, I"). When the Appellants contested the State's response, the State timely responded with further explanation, contending that it had identified the categories for the exemption and absent a court order, was not required to provide a Vaughn Index. See AA at 45. This response complied with the requirements of RSA 91-A:4, IV in that it informed the Appellants that documents were being withheld and the reason for such withholding.

Second, on July 28, 2014, the Appellants sought documents from the AGO regarding its communications with certain reproductive health clinics and documents and information from these reproductive health clinic related to the ongoing litigation involving abortion clinic buffer zones. See AA at 19-22. The State formally responded on September 4, 2014 and produced certain documents, but also withheld other information specifically stating that some documents were "redacted or withheld because they contain information that is exempt from disclosure under RSA 91-A." See AA 24, 93-94. The State then further stated that the information that had

been redacted or withheld was exempt under RSA 91-A:5, IV, and included, but was not limited to, "personal contact information and attorney work product." See id. In response, the Appellants, via email, requested that the State identify what categories of documents it was withholding and the basis for its reasoning. See AA at 92-93. On October 13, 2014, the State responded, stating that the State had "identified the categories for the exemption and, absent a court order, [is] not required to provide a Vaughn Index. See Murray v. N.H. Div. of State Police, 154 N.H. 579, 583 (2006)." See id. This response complied with the requirements of RSA 91-A:4, IV in that it informed the Appellants that documents were being withheld and the reason for such withholding.

Third, on September 11, 2014, the Appellants sought certain reproductive health clinics' financial statements and data from DCT. See AA at 4-6. Some of the information requested was "immediately available" and the Appellants were able to appear in person in the DCT Office to review the documents. However, other documents had not yet been processed by the DCT Office and it was unknown that they were even in the State's possession at that time. When the DCT ultimately processed the documents, and it became apparent that additional documents existed that related to the Appellants' Right-to-Know request, on December 4, 2014, the DCT promptly notified the Appellants and provided them with the information. See AA at 131. Again, when the State redacted certain information, it provided reasons for the redactions. See id. These responses complied with the requirements under RSA 91-A:4, IV.

Fourth, on October 11, 2014 (and later dates in December 2014), the Appellants sought certain reproductive health clinics' pharmaceutical protocols required under RSA 318:42, VII(a) from DHHS. See AA at 310-319, 143-167. The State responded within five business days of the request. See AA at 311-312. On October 29, 2014, the State provided the requested documents,

in redacted format. See id. at 311-327. In its response, the State explained that redactions were made under RSA 91-A:5, IV and that the protocols contained PPNNE's proprietary and commercial information. Id.[5] This response complied with the requirements of RSA 91-A:4, IV in that it informed the Appellants that certain information in the documents was being redacted and the reason for such redactions.

A Vaughn Index, on the other hand, does require a more detailed explanation. "The Vaughn index is a procedure developed by the federal courts to effectuate the goal of broad disclosure of public documents and assist trial courts in cases involving a large number of documents." Union Leader, 142 N.H. at 548 (citing Vaughn, 484 F.2d at 820). "Generally, a Vaughn index will include a general description of each document withheld and a justification for its nondisclosure." Union Leader, 142 N.H. at 548 (citation omitted). This Court reviews de novo "whether [the State's] explanation was full and specific enough to afford the [Appellants] a meaningful opportunity to contest, and the [trial] court an adequate foundation to review, the soundness of the withholding." Id. at 549 (quoting Davin v. U.S. Dept. of Justice, 60 F.3d 1043, 1049 (3d Cir. 1995)). "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.'" Union Leader, 142 N.H. at 549 (quoting Davin, 60 F.3d at 1051)). "Specificity is the defining requirement of the Vaughn index, [and] unless the agency discloses as much information as possible without thwarting the claimed exemption's purpose, the adversarial process is unnecessarily compromised." Union Leader, 142 N.H. at 549 (quotation omitted).

[5] The State notes that the Appellants, in December of 2014, made additional Right-to-Know requests for various other reproductive health clincs' pharmaceutical protocols. See AA at 145-167. These requests, although made after the Appellants filed their initial Complaint, are deemed part of the instant litigation and were timely responded to by the State. See id. In the State's response to those requests, it set forth the same reasoning as to why certain information was redacted or withheld. Id.

The Appellants contend that there is an affirmative obligation for the State to supply a Vaughn Index. However, this argument is contrary to the New Hampshire Supreme Court decision in ATV Watch v. New Hampshire Dept. of Transportation, where the Court held state agencies are not required to provide a Vaughn Index, absent a court order. ATV Watch v. N.H. Dept. of Res. and Econ. Dev., 155 N.H. 434, 439-440 (2007) (rejecting Petitioner's argument that the state agency was required to provide a Vaughn Index for documents it contended were exempt under RSA 91-A); see also Murray, 154 N.H. at 582 (determining that a State agency is not required "to justify its refusal on a document-by-document basis" and that, although an *in camera* review or a Vaughn Index of documents may be ordered by the court to justify an agency's decision, such measures are not required). Here, the trial court determined that all the initial responses complied with the initial requirements of RSA 91-A when no Vaughn Index had been required.

Further, in this case, the trial court never ordered the State to produce a Vaughn Index. In fact, the trial court's March 27, 2015 Order stated, "the Court requests that a table of contents be prepared by defendants," and then further stated, "[t]he defendants shall prepare a table of contents which identifies the documents by a reasonable brief description and by reference to the numbering stamp numbers or equivalent numbering." AA at 457. On April 17, 2015, the State provided the trial court with the documents and a table of contents, showing the page numbers, a brief description of the documents, and the reasons for the redactions or withholdings. See AA at 463-475. The State also provided the table of contents to the Appellants. Id. This table of contents complied with the requirements under RSA 91-A and the trial court's Order.

The trial court did not err in not requiring any greater specificity in the table of contents. As an initial matter, it specifically did not require a "Vaughn Index." Further, upon receiving the

documents and the table of contents, the trial court was able to sufficiently review the information and make final determinations as to why certain information was exempt from disclosure or properly withheld. Lykins v. U.S. Dept. of Justice, 725 F.3d 1455, 1463 (D.C. Cir. 1984) ("In camera examination is not a substitute for the [State's] obligation to provide detailed public indexes and justifications whenever possible. Rather it will . . . assist the [courts] as a supplement to the detailed public record and adversary testing of [its] justifications for withholding information."). This Court should uphold that finding because each entry contains "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." Union Leader, 142 N.H. at 549 (quoting Church of Scientology Intern. v. U.S. Dept. of Justice, 30 F.3d 224, 231 (1st Cir. 1994)) (noting this is the requirement for a Vaughn Index); see also In re Keene Sentinel, 136 N.H. 121, 130 (1992) ("when appropriate, the document's subject matter . . . can be described in general terms such that persons objecting to closure can present an adequate argument to the court."). Had the trial court determined that the table of contents submitted did not comply with its Order, before imposing some kind of sanction, it likely would have, as was done by the trial court in Union Leader, given the State an opportunity to provide a more detailed index. Because it did not do so, it is clear that the table of contents provided by the State was sufficient and enabled the Appellants to contest or object to the redactions and/or withholdings.

The Appellants argue that the State failed to comply with the Right-to-Know law, and as such, costs and fees should have been awarded and that the trial court erred in failing to impose this sanction.

RSA 91-A:8, I governs remedies for violations of the Right to Know law. 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, if the State violated the Right-to-Know law, the Appellants are entitled to costs if the State "refused to provide a public record and a lawsuit was necessary in order to make the information available." ATV Watch, 155 N.H. at 439-40. The Appellants are only entitled to attorneys' fees if the court determines that the agency "knew or should have known" that its refusal constituted a Right-to-Know violation. Id.

As an initial matter, contrary to the Appellants' contention that costs should have been awarded because "[t]he Superior Court found that the State violated RSA 91-A in responding to NHRTL's right to know requests in several respects," see Appellants' Brief at 24, the trial court did not specifically determine that the State "violated RSA 91-A." Although the trial court did, in fact, order some information to be disclosed, there was no ultimate finding that a violation occurred. See ATV Watch, 155 N.H. at 440-41 (finding that time periods for responding to right to know requests are absolute, so any determination that there was a delay is considered a "violation"). Here, there was never any finding of a delay. Additionally, the trial court did not specifically determine that "a lawsuit was necessary in order to make the information available." Id. at 439. In fact, regarding the DCT documents, which were ultimately produced while the lawsuit was pending, the trial court determined, "the Court cannot find that this lawsuit was

'necessary in order to enforce compliance' with the statute." See A. Add. at 33. As such, there was no error in not awarding costs.

As stated previously, RSA 91-A:8, I "requires an award of attorney's fees if the Right-to-Know Law is violated and: (1) the lawsuit was necessary to make public information available; and (2) the body, agency, or person knew or should have known that the conduct engaged in was a violation of RSA chapter 91-A." ATV Watch, 155 N.H. at 442 (citation omitted). Here, the State timely and fully complied with the statutory requirements of RSA 91-A and took no other action that it knew or should have known violated the Right-to-Know law. Again, the State fully complied with the statute's requirements in providing justifications for its exemptions and withholdings and was not required to provide a Vaughn Index to the Appellants subsequent to their initial requests. See Union Leader Corp., 142 N.H. at 548-50. Additionally, when it was required, by court Order, to produce a table of contents, the State sufficiently complied with that Order. Finally, although certain redactions or withholdings were ultimately determined to not meet Right-to-Know requirements, there was no evidence that these redactions and withholdings were done knowing a violation could occur, nor was there any evidence that the State should have known that its actions did not meet certain requirements. In fact, the trial court stated that the State's actions "were not so unreasonable under current New Hampshire case law that the State knew or should have known that disclosure was required." AA at 34. As such, an award of attorneys' fees is not appropriate and the trial court's decision should be upheld.

## VI. THE TRIAL COURT CORRECTLY DETERMINED THAT THE 2012 PPNNE PROTOCOLS WERE NOT A PART OF THIS LITIGATION.

In their Brief, the Appellants again raise an issue concerning the 2012 PPNNE protocols.[6] By way of background, in the Order dated May 15, 2015, the trial court upheld most of the State's redactions and withholdings. However, the court did find that certain documents were to be disclosed in fully or partially unredacted form. See A. Add. at 35. As such, on June 3, 2015, the State complied with the trial court's Order and produced all documents referenced in the Order to the Appellants. See AA at 530-573. Specifically, the State produced "[c]opies of the clinics' pharmaceutical protocols approved by BOP in accord with RSA 318:42, VII" in unredacted form (P3-7, P10-11, P13-14, P19, P21-22, P24, P28-29, P65). See AA at 551-567.

After receiving the documents, the Appellants' counsel contacted the State's counsel inquiring as to the whereabouts of other pharmaceutical protocols, as they had not been included in the packet of documents. Specifically, the Appellants' counsel sought the unredacted version of PPNNE's September 14, 2012 pharmaceutical protocols ("2012 protocols"). In subsequent emails and conversations between counsel on June 3-4, 2015, the State's counsel stated that PPNNE's 2012 protocols had not been produced because they were not included in the Appellants' original October 11, 2014 RSA 91-A request and thus, were not part of this litigation. See AA at 312. Additionally, the trial court had not reviewed the 2012 protocols *in camera*, nor had it ordered that they be produced. See A. Add. at 35.

Subsequently, on June 4, 2015, the Appellants filed a Motion for Clarification requesting that the trial court clarify its May 15, 2015 Order to include the 2012 protocols. See AA at 518-

[6] The State notes that the Appellants filed their Rule 7 Notice of Mandatory Appeal from the trial court's May 15, 2015 Order on June 15, 2015. The Supplemental Order from the Strafford County Superior Court determining that the 2012 protocols were not a part of the litigation was not issued until June 24, 2015. See A.Add. at 37-44. Although the Appellants had already filed their Motion for Clarification regarding this issue and had attached it to their Notice of Appeal, there was no final appealable decision on this issue when the appeal was filed. Although the State contends this issue has not been adequately preserved, it will address the merits of the Appellants' argument. Further, the State contends that this issue is moot because the 2012 PPNNE protocols have now been provided to the Appellants, in unredacted format, in separate litigation. See New Hampshire Right to Life v. New Hampshire Department of Health and Human Services, Docket No. 219-2015-CV-00285 (Strafford Cty. Super. Ct.).

523. The Appellants argued in that Motion, as they do here, that since redacted versions of the 2012 protocols had been submitted to the trial court as attachments to pleadings, that the trial court should order that they be disclosed. The State responded and argued that the 2012 protocols were not part of the litigation, nor were they part of the trial court's Order. While the Appellants had attached the 2012 protocols, in redacted form, as Exhibit G to their Verified Petition, it was the State's understanding that the 2012 protocols were attached in error—given that the documents were not part of the State's response to the Appellants' October 11, 2014 RSA 91-A request. See AA at 579-589. In fact, the State noted this error in its Answer to the Appellants' original Verified Petition, see AA at 59-60, ¶ 51, and counsel for the Appellants noted this in a subsequent email. See AA at 523 (noting that the Appellants would be providing the court (and the State) with the State's response to the Appellants most recent request (the 2013 protocols) at the January 15, 2015 hearing and the parties agreed that there was no need to amend the Verified Petition). The State also argued that while it was true that it had referenced the 2012 protocols in its Trial Brief—and attached the 2012 protocols, in redacted form, as Exhibit I to its Trial Brief—when it did so, it was simply explaining what had been done before, for purposes of background information, when a similar Right-to-Know request had been made. The State was not referencing the 2012 protocols as something that had been properly withheld or redacted in this litigation, as they had never been requested or produced.

Following the trial court's March 1, 2015 Order requiring the State to "provide the Court with complete and unredacted versions of the materials that have been previously furnished to the Court," see AA at 435-439, the State did not include the 2012 protocols in its March 13, 2015 submission, nor did it include the 2012 protocols in its April 17, 2015 response to the trial court's March 27, 2015 Interim Order. This was because the 2012 protocols had not previously

been produced (in redacted form) to the Appellants as part of their most recent Right to Know request and were not the subject of this litigation.

On June 24, 2015, the trial court issued its Order on the Motion for Clarification. See AA at 590-598. Importantly, the trial court determined that its May 15, 2015 Order was "unambiguous regarding which specific documents the State must produce." Id. at 593. It determined that the Appellants' most recent request, that of October 11, 2014 upon DHHS, the AGO, and the BOP, did not reasonably describe PPNNE's 2012 protocols as part of its request. The trial court concluded that the 2012 protocols were not within the scope of the original Right to Know request, that the inclusion of the protocols in various pleadings did not bring it within the purview of this litigation, and that the State's failure to produce PPNNE's 2012 protocols for the court's *in camera* review was not in error. This ruling was not in error and should be upheld.

Although the Appellants have argued in their brief that this ruling was in error, on June 15, 2015 (after the trial court's final decision on the four various Right-to-Know requests, but prior to any kind of final decision on the 2012 protocol issue), NHRTL submitted a subsequent and separate Right-to-Know request to DHHS for the 2012 protocols. Specifically, NHRTL stated that because the other years and clinics' protocols had been ordered to be disclosed, that the 2012 protocols "must be produced without redaction." DHHS, through the Attorney General's Office, provided the 2012 protocols, in redacted format, to NHRTL on June 19, 2015. Although the State agreed with NHRTL that based on the trial court's May 15, 2015 Order, certain information in the 2012 protocols that had been redacted in previous years' Right-to-Know requests should now be disclosed, it believed that other information was still exempt from disclosure. Again unsatisfied with the State's response, on July 31, 2015, NHRTL filed a new Verified Petition for Injunctive Relief Pursuant to RSA 91-A in the Strafford County Superior

Court, arguing among other things, that the 2012 protocols should be disclosed in their entirety and that the State violated RSA 91-A in redacting certain information. See NH RTL v. NH DHHS, Docket No. 219-2015-CV-00285 (Strafford Cty. Super. Ct.).[7]

Subsequent to the filing of the Petition, but prior to the hearing on the merits, the State worked diligently with PPNNE to determine the extent of any confidential information and was eventually able to produce to NHRTL a complete unredacted version of the 2012 protocols. However, a hearing on the merits still occurred on September 21, 2015, at which time the trial court (Tucker, J.) took the matter under advisement. As of this date, no final order has been issued. Because the Appellants have now been provided with the 2012 protocols in unredacted format, the issue is now moot.

The State does note that in its June 24, 2015 Order, the trial court stated that "NHRTL ha[d] 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." See AA at 596. In their brief, the Appellants suggest that they requested the 2012 protocols "in at least three different Right-to-Know requests and the protocols should have been ordered disclosed." See Appellants' Brief at 19. Although the State does not contest that the Appellants have made Right-to-Know requests in previous years, two of these cited "requests" were in NHRTL's previous years' Right to Know requests and clearly not part of the instant litigation. The third cited "request," however, was made to the AGO on July 28, 2014 and requested, among other things, "[a]ny and all documents in the possession of the Attorney General's Office regarding any reproductive health facility . . ." See AA at 20-22. While it may be true that in July of 2014, the 2012 protocols were in the AGO's "possession," this was simply because they had previously been requested by NHRTL in

[7] Although the facts of this separate litigation are relevant to the issues surrounding the 2012 protocols, because this new case is, in fact, a separate matter, the pleadings and exhibits are not part of the record in this appeal.

2012 and 2013 and may have been still physically located in the building. They were not a part of, nor were they related to, however, the ongoing federal court litigation around which the Appellants' July 2014 Right-to-Know request was focused. It was only when the Appellants specifically requested certain protocols from DHHS, which did not occur until October of 2014, that the protocols were produced. Additionally, this Right-to-Know request was on the AGO, who is not the normal keeper of records such as pharmaceutical protocols. As such, it was not reasonable for the AGO to produce such documents in response to the Appellants' request.

## CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court affirm the decision of the trial court.

## ORAL ARGUMENT

The State requests 15 minutes and Attorney Megan Yaple shall present.

Respectfully Submitted,

NEW HAMPSHIRE ATTORNEY GENERAL'S OFFICE

NEW HAMPSHIRE STATE BOARD OF PHARMACY

NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES

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**CERTIFICATE OF SERVICE**

I hereby certify that two (2) copies of this Brief have been mailed this day, postage prepaid, to Michael J. Tierney, Esquire, counsel of record.

Megan A. Yaple