

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS

SUPERIOR COURT

Docket No. 219-2014-CV-00386

New Hampshire Right to Life

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Jackie Pelletier

v.

New Hampshire Director of Charitable Trusts Office

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New Hampshire Attorney General's Office

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New Hampshire State Board of Pharmacy

&

New Hampshire Department of Health & Human Services

NHRTL & PELLETIER'S SUPPLEMENTAL TRIAL BRIEF

Pursuant to this Court's Order of January 13, 2015, the plaintiffs file this Supplemental

Trial Brief in supplement to its January 9, 2015 Trial Brief and the arguments it made at the January 12, 2015 hearing and in its Verified Petition. The Court is reminded that the State has the burden of proof to demonstrate that any documents are exempt from disclosure.

I. HHS HAS FAILED TO MEET ITS BURDEN AND IGNORES THE PUBLIC INTEREST IN DISCLOSURE OF PHARMACY PROTOCOLS

At the hearing on January 12, 2015, the State argued to the Court that the Pharmacy Protocols in this case should be withheld for the same reason as the Medical Manual was

withheld under the Federal FOIA statute in the case of NHRTL v. United States Department of Health & Human Services, 976 F.Supp. 2d 43 (Sept. 30, 2013).¹

The State's argument is erroneous for several reasons. First, the documents at issue in the Federal FOIA case are different than the documents at issue in this case. One of the issues in the Federal FOIA case was an over 200 page Manual of Medical Standards and Guidelines that "provides 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. In the present case, the pharmaceutical protocols are five pages or less in length and document which prescription drugs are being dispensed without a pharmacist pursuant to the exception provided by RSA 318:42(VII). These statutorily required protocols should not be unique to any entity, but should be particular to which drugs are being dispensed without a pharmacist and whether FDA Safety Protocols are being followed. Every entity requesting an exemption pursuant to RSA 318:42(VII) is required to submit a pharmaceutical protocol. The protocols will show how the State is applying the statute as to particular drugs.² See Exhibit 10, as well as additional requests attached as Exhibits 17 and 18³ (pharmaceutical protocols for Planned Parenthood, Weeks Medical Center, Lovering Abortion Clinic and Concord Feminist Abortion Clinic).

Second, the confidential commercial exemption is much narrower under RSA 91-A than the comparable exemption under the Federal FOIA statute. In Judge LaPlante's decision

¹ The District Court Opinion relative to the redaction of the Medical Manual under FOIA is currently under appeal at the United States Court of Appeals for the First Circuit. Oral argument was held on this case on September 4, 2014, but the First Circuit has not yet issued its Opinion.

² While an entity's reasons for requesting documents is a factor under RSA 91-A, NHRTL is particularly interested in the distribution of the drug Mifeprex, otherwise known as RU-486, or the abortion pill.

³ NHRTL had mistakenly attached as Exhibit G to its Complaint pharmaceutical protocols produced in 2012 instead of the pharmaceutical protocols requested and produced in October of 2014. See attached as Exhibit 10. The State assented to considering the 2014 pharmaceutical protocols at Exhibit 10 as part of this case. See attached e-mail from Atty. Dempsey at Exhibit 19.

regarding PPNNE's Medical Manual, the Federal Court recognized that, under the federal statute, there is no weighing of the public interest in disclosure vis-à-vis any privacy interest. See NHRTL v. U.S. Department of Health & Human Services, 976 F.Supp 2d at 55.

Nevertheless, the New Hampshire Supreme Court has recognized that "our statute, unlike its federal counterpart ... [requires] the asserted private confidential, commercial, or financial interest [] be balanced against the public's interest in disclosure, Id., since these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure." Union Leader Corp. v. New Hampshire Housing Finance Authority, 142 N.H. 540, 552-553 (1997). There is a great public interest in how HHS and the Board of Pharmacy are (or are not) applying the exemption under RSA 318:42 to exempt the general requirement in RSA 318:42 that "it shall be unlawful for any person who is not a licensed pharmacist ... to manufacture, compound, dispense, sell, offer for sale or have in possession any prescription drug." HHS's complete redaction of the pharmaceutical protocols at Exhibits 10, 17 and 18 prevent the public from knowing what drugs are being dispensed under this statutory exemption and what safety protocols are being required in order to insure the public's safety. In none of the pharmaceutical protocols which HHS has redacted does HHS even attempt to balance a public interest in disclosure versus any asserted privacy interests. Rather, in nearly identical letters at Exhibits 10, 17 and 18, HHS incorrectly holds that if the material is confidential commercial information, that it is automatically exempt from disclosure under RSA 91-A.⁴ Regardless of whether such information would be automatically exempt under FOIA, under RSA 91-A, the Supreme Court has held that the agency

⁴ For the reasons stated in its January 9, 2015 Trial Brief and at the hearing, NHRTL disagrees with HHS's characterization of the redacted and withheld material as confidential commercial information. Nevertheless, even if such characterization was accurate, such characterization would not result in automatic exemption under RSA 91-A.

seeking to withhold or redact the documents must show how the withholdings and redactions serves a privacy interest which outweighs any public interest in disclosure.⁵

The pharmaceutical protocols requested in this case are not unique to any particular entity, but are required of any entity applying for a LRDD license under RSA 318:42(VII). See Exhibits 10, 17 and 18.

**II. ANY PRIVACY INTERESTS OF RECIPIENTS OF STATE
FUNDING IS OUTWEIGHED BY THE PUBLIC INTEREST
IN DISCLOSURE OF HOW THE STATE SPENDS TAXPAYER DOLLARS**

The State must not only consider the public interest in disclosure but must weigh it against the specific privacy interest asserted. The State has failed to address the lessened privacy interests in the recipients of taxpayer dollars which has further decreased since the State's arguments at the hearing on this matter.

First, since the hearing on January 12, 2015, any asserted privacy interests has lessened. The Concord Feminist Abortion Clinic, a grant recipient from the New Hampshire Department of Health & Human Services since January of 2014, was featured in a front page article of the *Concord Monitor* on January 18, 2015, including identifying Executive Director, Dalia Vidunas, both by name and by picture, protesting Roe v. Wade outside the Clinic. See attached as Exhibit 21. The article goes on to discuss the Clinic's newest employee, Lakayla Harris, whose salary is partially funded by a \$72,000.00 grant from the State and a \$20,000.00 grant from the New Hampshire Charitable Foundation. Given the Clinic's public disclosure of its employees in front

⁵ Public interest in how the Board of Pharmacy and HHS are applying or not applying RSA 318:42(VII) is particularly great where the State had been failing to require pharmacy protocols at all until NHRTL made public record requests. See Exhibit 13 ("Therefore, up until last week, none of the LRDD's licensed by this Board had NHDHHS approved policies and procedures.") and the New Hampshire House is currently considering HB 202 which is proposing a repeal of the exemption under RSA 318:42(VII). See attached as Exhibit 20.

page articles of the *Concord Monitor*, the State cannot assert a privacy interest on behalf of its grant recipient.⁶

Second, the public interest in how the State, and HHS in particular, spends taxpayer funds, has greatly increased since the hearing on January 12, 2015. As detailed in a January 25, 2015 *Union Leader* article, HHS Commissioner Nick Toumpas, told the Legislative Fiscal Committee on Friday, January 23, 2015, that HHS is short \$58 million dollars and in order to make up this shortfall, HHS will be taking at least \$7 million dollars in payments away from the nursing homes providing critical care to New Hampshire's elderly citizens. See *Union Leader* article attached as Exhibit 22. In the coming weeks, there will be much public debate regarding whether HHS should be spending limited tax dollars subsidizing abortion clinics for campaign finance and has accepted into our administration several former abortion clinic employees for consultants. The public has a right to know how its tax dollars are being spent to subsidize the abortion clinics and whether State employees are fuddling money back to their former abortion clinic employers.


WHEREFORE, Petitioners respectfully requests that this Court:

- A. Order that Respondents produce all responsive documents without redaction;
- ~~B. Rule and find that Petitioner is entitled to its reasonable attorney's fees; and~~
- C. Grant such further relief as is reasonable and just.

⁶ Ms. Harris has been previously featured in other *Concord Monitor* articles including doing "outreach" by holding candlelight vigils." See attached as Exhibit 23.

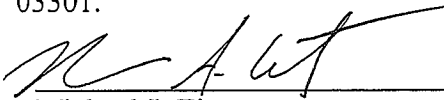
Respectfully submitted,
**New Hampshire Right to Life &
Jackie Pelletier**
By their Attorneys,
Wadleigh, Starr & Peters, P.L.L.C.

Date: February 2, 2015

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Certificate of Service

I hereby certify that a copy of the within Supplemental Trial Brief has this day been mailed, postage prepaid, to Mary Ann Dempsey and Megan Yaple, New Hampshire Attorney General's Office, 33 Capitol Street, Concord, NH 03301.

for 
Michael J. Tierney