DEC 22 2015

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Strafford Superior Court
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NOTICE OF DECISION

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Case Name: **New Hampshire Right to Life v New Hampshire Department of Health & Human Services**
Case Number: **219-2015-CV-00285**

Enclosed please find a copy of the court's order of December 21, 2015 relative to:

Court Order

December 21, 2015

Kimberly T. Myers
Clerk of Court

(277)

C: New Hampshire Department of Health & Human Services

The State of New Hampshire

STRAFFORD, SS. SUPERIOR COURT

No. 219-2015-cv-285

NEW HAMPSHIRE RIGHT TO LIFE

v.

NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES

ORDER

New Hampshire Right to Life ("NHRTL") has sued the New Hampshire Department of Health and Human Services ("DHHS"), seeking injunctive relief and attorney's fees and costs under the Right-to-Know Law, RSA chapter 91-A (2013 & Supp. 2014). The case has a history that bears on the disposition.

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 . . . ." In order to dispense prescription drugs under this law, a health care clinic must have "a written protocol established by a licensed physician or by an advanced practice registered nurse . . . which provides for responsible supervision over the activities in question and mentions the name of each registered nurse for whom the physician or advanced practice

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registered nurse is assuming supervisory responsibility." RSA 318:42, VII (a) (2015). The written pharmaceutical protocol must be approved by DHHS. *Id.*

In September 2012, NHRTL filed a Right-to-Know request with DHHS for pharmaceutical protocols submitted by Planned Parenthood of Northern New England ("PPNE") and approved by DHHS. (See Pl.'s Ex. 7 at 2.) DHHS responded by providing the requested documents in partially redacted form. (See Pl.'s Ex. 4.) It justified the redactions by referring to the statutory exemption for internal personnel practices and confidential commercial information. See RSA 91-A:5, IV (Supp. 2014) (Pl.'s Ex's. 4, 7 at 1–2.)

In October 2014, NHRTL submitted another Right-to-Know request with DHHS for production of PPNE's most recently filed and approved pharmaceutical protocols from 2013 and 2014. (See Pl.'s Ex. 3.) DHHS again disclosed the protocols with redactions, citing the exemption in RSA 91-A:5, IV for proprietary and commercial information. (*Id.* at 1.) On October 21, 2014, NHRTL initiated litigation against DHHS and several other government agencies, alleging a number of Right-to-Know Law violations. See *New Hampshire Right to Life et al. v. New Hampshire Department of Charitable Trust Office et al*, (Strafford Sup. Ct. No. 219-2014-cv-386). One of NHRTL's claims was that DHHS failed to establish the confidential commercial nature of the information it redacted from the pharmaceutical protocols produced in response to the October 2014 Right-to-Know request. See *id.*, Order at 21, May 15, 2015 (Mangones, J.)(hereinafter "May 2015 Order"). In that case, Judge Mangones reviewed the protocols at issue *in camera* and found they contained commercial

information. But he directed NHDHS to produce unredacted protocols to NHRTL, because "the public interest in disclosure outweighs the private interest in confidentiality of the commercial material." (May 2015 Order at 24, 26, 35.)

After it received the order, DHHS sent NHRTL a number of unredacted pharmaceutical protocols. In response to NHRTL's motion to clarify the May 2015 Order, Judge Mangones explained that his order did not require DHHS to produce PPNE's 2012 protocol in unredacted form, since that protocol was not a subject of the lawsuit. (May 2015 Order at 3–4.)

NHRTL followed up with a Right-to-Know request to DHHS for PPNE's 2012 protocol. (*See* Pl.'s Ex .5.) DHHS responded by producing PPNE's 2012 protocol in partially redacted form, once again justifying the redaction by citing the confidential commercial and financial information exemption in RSA 91-A:5, IV. (*Id.* at 1–2.) Next, NHRTL submitted another Right-to-Know request to DHHS, the Attorney General's Office, and the Board of Pharmacy, for "all the protocols approved by [D]HHS pursuant to RSA 318:42(VII)" for all "clinics operated by or under contract with DHHS." (Compl. Ex. A at 1–2.) DHHS replied by indicating it had compiled the documents responsive to the request, but requested an additional week to determine whether redactions were necessary. (*Id.*, Ex. B at 2). NHRTL objected, arguing that no additional time to make redactions should be necessary in light of the ruling that "the public interest in disclosure of the protocols outweighs any commercial interest at stake." (*Id.*, Ex. B at 2.) DHHS answered that although the May 2015 Order made

determinations about protocols at issue in that litigation, the decision did not apply to other protocols. (*Id.* Ex. B at 1.) It stated "[t]he Court did not make some final determination that ALL protocols ever approved by DHHS must be disclosed without redactions—or that the disclosure of ALL protocols was even required. Although the Court's order gives us guidance on certain issues, it has no precedential value." (*Id.*, Ex. B at 1.)

DHHS produced PPNE's 2012 protocols, along with all protocols approved by DHHS between 2012 and 2015, some of which were heavily redacted. (*See* Pl.'s Ex. 2; Compl., Ex. C.) DHHS justified the redactions under the exemption for confidential commercial information under RSA 91-A:5, IV. (Pl.'s Ex. 2 at 1.) On August 3, 2015, NHRTL filed this action alleging that in light of the May 2015 Order, DHHS violated the Right-to-Know Law by redacting portions of PPNE's 2012 protocols based on the exemption for confidential commercial information. (Compl. ¶¶ 13–16.) It seeks an injunction requiring DHHS to produce PPNE's 2012 protocol in unredacted form, because the May 2015 Order "already determined that the public interest of all of the pharmaceutical protocols at issue in NHRTL v. DHHS, outweighs any asserted commercial privacy interest." (*Id.* ¶¶ 20–22.) NHRTL also requests its attorney's fees on the basis that DHHS knew or should have known from the May 2015 Order that the records requested should be produced in unredacted form. It argues "[t]here is no intelligible basis for why some but not all protocols approved by DHHS pursuant to RSA 318:42[,VII] must be produced." (*Id.* ¶¶ 23–27.)

With a hearing on the complaint looming in six days, DHHS sent NHRTL a letter on September 15, 2015 acknowledging the documents in dispute in the instant litigation, including seven pages of PPNE's 2012 protocol, one page of Goodwin Community Health's 2013 protocol, and thirteen pages of PPNE's 2015 protocol. (Pl.'s Ex. 6 at 1; Compl. Ex. C.) It reiterated that the documents were redacted or withheld based on the exemption for confidential commercial information under RSA 91-A:5, VI (Pl.'s Ex. 6 at 1), but represented that after working with PPNE and Goodwin Community Health to "substantially eliminate as many redactions as possible" it was providing NHRTL with substantially unredacted copies of the protocols at issue. (*Id.* at 1; Pl.'s Ex. 8; *see also* Bartholomew Aff. ¶¶ 5–9, September 21, 2015.)

At a hearing on the complaint, NHRTL agreed that DHHS had finally produced what it requested. (*See* Pl.'s Ex. 8.) NHRTL argues that even though the documents were produced eventually, it is entitled to its costs and attorney's fees incurred in forcing their production. It also seeks an order enjoining DHHS from redacting material from the protocols when their disclosure is sought. DHHS's eventual production of the unredacted pharmaceutical protocols does not moot NHRTL's requests because NHRTL may be entitled to costs, attorney's fees and an injunction if DHHS violated the Right-to-Know Law. *See* RSA 91-A:8 (2013); *ATV Watch v. New Hampshire Dep't of Res. & Econ. Dev.*, 155 N.H. 434, 436–37 (2007) (case not moot despite production of all requested documents in Right-to-Know action).

RSA 91-A:8, I, governs awards of attorney's fees, costs and other 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 (emphasis added). Based on this plain language, costs may be awarded in a Right-to-Know action if (1) the public agency violated any provision of the Right-to-Know Law, and (2) the lawsuit was necessary to enforce its compliance with the law. *See id.*; *ATV Watch*, 155 N.H. at 439–40. To obtain an award of attorney's fees, a party must make the third showing that the public agency "knew or should have known that the conduct engaged in was in violation of" the Right-to-Know Law. RSA 91-:A:8, I; *ATV Watch*, 155 N.H. at 442; *Goode v. N.H. Office of the Legislative Budget Assistant*, 148 N.H. 551, 558 (2002) (hereinafter *"Goode II"*).

NHRTL argues it is entitled to costs incurred in filing this action because DHHS violated the Right-to-Know Law by initially justifying the redactions under the exemption for confidential commercial information and relenting only after NHRTL filed suit. In response, DHHS has offered to pay NHRTL's court costs, so the factors bearing on the right to costs affect only the issue of attorney's fees.

The first question is whether DHHS violated the Right-to-Know Law by not providing unredacted protocols in the first instance. *See Goode (II)*, 148 N.H. at 558. DHHS argues that the May 2015 Order did not control its determination because PPNE's 2012 and 2015 protocols were substantially different from the 2013 protocols at issue in the prior litigation. It contends the 2012 and 2015 protocols included detail that the 2013 protocols did not, thereby warranting redactions. However, a review of the redacted and unredacted copies of the protocols at issue reveals the protocols should have been produced in unredacted form in response to NHRTL's request.

As discussed in detail in the May 2015 Order, RSA 91-A:5, IV includes an exemption for "[r]ecords pertaining to internal personnel practices; confidential, commercial, or financial information . . . and other files whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV. To find the redacted information covered by the exemption, it must be confidential, commercial, or financial in nature, and the private interest in withholding it must outweigh the public's interest in disclosure. *Union Leader Corp. v. N. H. Hous. Fin. Auth.*, 142 N.H. 540, 552 (1997); (*see also* May 2015 Order at 20–26).

"Whether documents are commercial depends on the character of the information sought." *Union Leader Corp*, 142 N.H. at 553. "Information is commercial if it relates to commerce," *id.* (citation omitted), and may be so "even if the provider's interest in gathering, processing, and reporting the information is noncommercial." *Id.* (quotation and

ellipsis omitted). Still, not all information generated by traditionally commercial enterprises is "financial or commercial." *Id.* (citation omitted).

For reasons similar to those given in the May 2015 Order, the documents included in Plaintiff's Exhibit 8 (which includes unredacted copies of the protocols that were initially produced with redactions), is commercial in nature. The protocols outline internal procedures and practices of PPNE and Goodwin Community Health in storing and dispensing certain prescription drugs. Consequently, they include "commercial" material in that they explain the clinics' procedure for offering one facet of the services they provide as a commercial enterprise—dispensing pharmaceuticals to patients. *See N.H. Right to Life v. U.S. Dep't Health and Human Services*, 778 F.3d 43, 46, 49–52 (1st Cir. 2015) (manuals "commercial" material because they "guid[ed] the operations of an entity engaged in 'commerce'"). Additionally, each clinic must create and maintain such a protocol in order to remain licensed by DHHS under RSA 318:42, VII and to continue offering this service to its patients. *See Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1283, 1290 (D.C. Cir. 1983) (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).

Since the protocols contain commercial information under RSA 91–A:5, IV, the next step is to balance the interests at stake. The issue here is whether the public's interest in

disclosure of the protocols outweighs the clinics' interest in confidentiality. Revealing the protocols could subject the clinics to financial losses or competitive disadvantage if other, competing health clinics could access and use them as a model without investing their own resources to create them. On the other hand, "[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." *Union Leader*, 142 N.H. at 554 (quotation and brackets omitted)). Here, the public interest is served by allowing citizens to discern whether DHHS is properly enforcing the mandates of RSA 318:42, VII. In his May 2015 Order, Judge Mangones determined that the public interest outweighs the commercial interest at stake on this precise issue, and DHHS did not challenge that ruling. Accordingly, it should have produced the protocols to NHRTL without redactions in the first instance, and two months from when this litigation was initiated. The omission violated RSA 91-A.

The second criterion is established because the lawsuit was necessary to enforce compliance with the Right-to-Know Law and to obtain access to unredacted protocols. NHRTL sent its Right-to-Know request to DHHS on approximately June 30, 2015. DHHS responded by email on July 8, 2015, that it had compiled the documents, but needed time to determine whether any of the materials should be withheld or redacted. (Compl. Ex. B.) On July 20, 2015, DHHS produced redacted versions of the subject protocols. (Pl.'s Ex. 2.) Only after NHRTL filed this suit — and approximately one week before the scheduled hearing on the complaint s— did DHHS send it unredacted copies of the protocols. (Pl.'s Ex. 6.) The

circumstances support the inference that NHRTL had to file a complaint in order to obtain unredacted protocols. *See ATV Watch*, 155 N.H. at 442.

Since DHHS violated the Right-to-Know Law and this litigation was necessary to obtain the documents in their proper form, the only issue left is whether NHRTL is entitled to its attorney's fees because DHHS "knew or should have known that the conduct engaged in was in violation of" the Right-to-Know Law. *See* RSA 91-:A:8, I; *ATV Watch*, 155 N.H. at 442. NHRTL argues that the May 2015 Order put DHHS on notice that the protocols requested should have been produced in unredacted form, since the 2012 and 2015 PPNE protocols included substantially the same information as those ordered to be produced in unredacted form in the May 2015 Order. NHRTL also contends that under *Union Leader*, the May 2015 Order should be construed as a category-based finding that applies to all protocols submitted to DHHS pursuant to RSA 318:42, VII.

DHHS disagrees, contending there should be no award of attorney's fees because the May 2015 Order did not provide guidance on whether the protocols sought in this case should have been disclosed in unredacted form. It argues further that *Union Leader* permits a document by document review of the records, and simply because certain protocols were not exempt from disclosure in the previous litigation, that does not mean necessarily that all protocols must be produced without redactions. DHHS asserts that its initial review of the records revealed that PPNE's 2012 and 2015 protocols included more and different

information than that in the protocols disclosed previously, and it believed this warranted redactions.

The ruling in the May 2015 Order was that even though the information in the protocols at issue was commercial, the public interest in monitoring DHHS's approval of pharmaceutical protocols outweighed the private interests at stake. (May 2015 Order at 20–26.) DHHS did not appeal that ruling. Comparing the protocols involved in that litigation (Pl.'s Ex. 9) to the protocols at issue here (Pl.'s Ex. 8), shows they are substantially the same. All include clinic-specific practices and procedures for dispensing and storing prescription drugs. (*See* Pl.'s Ex's. 8, 9.) The 2012 and 2015 PPNE protocols do set forth information beyond what was in the 2013 protocol, but it does not differ substantively such that it alters the balance of interests on disclosure. For example, the 2012 and 2015 PPNE protocols are longer than the 2013 protocol and include more detail on procurement, storage, packaging, and labeling of prescriptions medications. (*Compare* Pl.'s Ex 8 at 1–12, 26–41, *with* Pl.'s Ex 9 at 1–5.) (The 2013 Goodwin Community Health protocol includes the same type of information, but neither party made a specific argument on the initial redaction of a portion of this protocol. (*See* Pl.'s Ex. 8 at 13–24.)) While the information in the PPNE protocols is more comprehensive, its subject matter — procedures and best practices for dispensing prescription drugs in compliance with RSA 318:42, VII — is the same as what was ordered disclosed in the 2013 protocols.

A prior court order found that unredacted disclosure was required for substantially similar documents. Therefore, DHHS knew or should have known that its failure to disclose unredacted copies of the disputed protocols would violate the Right-to-Know Law. *Cf. Ettinger v. Town of Madison Planning Bd.*, 162 N.H. 785, 792 (2011) (award of attorney's fees not warranted where only issue was one of first impression, and the public body's argument was reasonable); *Chambers v. Gregg*, 135 N.H. 478, 481–82 (1992) (refusing to award attorney's fees for failure to disclose purportedly confidential documents where "confidential" was not defined by legislature and defendant applied reasonable meaning of confidential under the circumstances).

DHHS was entitled to conduct a document-by-document review of the material, but this does not negate the finding. The May 2015 Order was a determination that DHHS had to disclose very similar documents. For that reason, DHHS had cause to know the documents should be produced unredacted. If DHHS did not agree with the analysis in the earlier order, it at least accepted it by disclosing the documents in unredacted form after NHRTL filed suit. For these reasons, NHRTL's request for an award of reasonable attorney's fees is GRANTED.

The next issue is whether NHRTL is entitled to an injunction. The Right-to-Know Law allows an injunction where necessary to ensure there will be no future violations of its provisions. RSA 91-A:8, V. A "trial court retains the discretion to determine whether such relief should be ordered in a particular case." *ATV Watch*, 155 N.H. at 437–38. NHRTL seeks an injunction directing DHHS to provide unredacted protocols approved pursuant to RSA

318:42, VII, whenever NHRTL seeks them under RSA 91-A. DHHS argues that it has an obligation to conduct a document-by-document review and analysis in response to any Right-to-Know request, so a blanket injunction compelling the release of all protocols on demand would be unreasonable.

NHRTL's request is for a prospective determination that no part of any RSA 318:42, VII pharmaceutical protocol is exempt from disclosure. But pharmaceutical protocols generated in the future may have commercial or financial information that is different in character than that in the current protocols. For that reason, it is not appropriate to mandate that DHHS disclose all protocols without redactions. *See ATV Watch*, 155 N.H. at 437–39 (proper to deny injunction to remedy failure to keep adequate records when no cognizable standard for keeping the records at issue existed).

To recap, NHRTL's requests for costs and reasonable attorney's fees are GRANTED. Its call for an injunction is denied. The clerk of court will determine the allowable costs. The parties shall make a good faith attempt to agree on what attorney's fees are reasonable under the circumstances. If there is no agreement, NHRTL may within 30 days of the date on the clerk of court's notice of this decision submit a properly supported request for fees. DHHS may file a response within 14 days of NHRTL's filing.

SO ORDERED.

DATE: DECEMBER 21, 2015

/s/ BRIAN T. TUCKER
BRIAN T. TUCKER
PRESIDING JUSTICE