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THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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ATV Watch

Docket No.
05-E-0085

v.

NH Department of Resources
and Economic Development,
Bureau of Trails

- - - - - x

MOTIONS HEARING

Before: Hon. Kathleen A. McGuire
Presiding Justice
Concord, New Hampshire
On Monday, March 21, 2005

* * * * *

APPEARANCES:

For the Plaintiff: Andrew Walters, pro se

For the Defendant: Ann M. Edwards
Associate Attorney General

* * * * *

Official Court Reporter: Brenda K. Hancock, CSCR

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Monday,

March 21, 2005

P R O C E E D I N G S:

1 THE COURT: Good morning -- afternoon.

2 MS. EDWARDS: Good afternoon, your Honor.

3 THE COURT: Okay. This is a Right-to-Know Petition, in which
4 ATV Watch is seeking some documents from DRED and the
5 Bureau of Trails, correct?

6 MR. WALTERS: Yes.

7 THE COURT: All right. Would you identify yourself, for the
8 record, please?

9 MR. WALTERS: Good afternoon. My name is Andrew Walters, and
10 I'm the Director of a Registered Nonprofit of New
11 Hampshire called ATV Watch.

12 THE COURT: Mr. Walters.

13 MR. WALTERS: Yes.

14 THE COURT: Not that it matters, but, just for curiosity sake,
15 is it the purpose of ATV Watch to advocate for more
16 trails, watch where they --

17 MR. WALTERS: The purpose of ATV Watch is to monitor ATV use
18 on public lands and to bring ATV use-related issues to
19 the public's attention. We track legislation and post
20 that on our website.
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22
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1 THE COURT: All right. And the State is here with an
2 Assistant Attorney General?

3 MS. EDWARDS: Actually, Associate Attorney Ann Edwards. I'm
4 also here with Chris Gamache, who is also here from the
5 Bureau of Trails.

6 THE COURT: All right. Mr. Walters, what is it that you want
7 that you don't have?

8 MR. WALTERS: I suppose, in the first instance, I would like
9 the Bureau of Trails to comply timely with requests that
10 I make concerning the Right-to-Know Law. I've devoted a
11 lot of time over the last number of months, just trying
12 to pry information out of them. It's taken letter after
13 letter, phone call after phone call, and on the other
14 end, I get nonresponses and excuses for delays. So, I
15 would like them to respond timely within the letter of
16 the law, the Right-to-Know Law, and there are also
17 certain documents that they have withheld, as noted in my
18 petition. I would like those documents released.
19 They've acknowledged they have them, but they will not
20 release them, because they don't think they come under
21 the Right-to-Know Law.

22 THE COURT: Okay. I see in the State's Motion to Dismiss
23 certain -- I'm just trying to think how to organize this.

1 Do you have his request listed?

2 MS. EDWARDS: Yes, your Honor. What we did is, starting on
3 paragraph 7, at the bottom of page 2, our different
4 subparagraphs there all correspond to ATV Watch's
5 specific requests under their prayer for relief, and what
6 we've tried to do is summarize either the Right-to-Know
7 request that is being referred to, or the specific
8 injunctive -- there are sort of some general future
9 injunctive requests that are being asked here.

10 THE COURT: All right. Just so -- did you get a copy of the
11 Motion to Dismiss?

12 MR. WALTERS: About 5 minutes ago.

13 THE COURT: About 5 minutes ago. So, do you -- I guess, why
14 don't we do it this way. Why don't I have the Attorney
15 General's Office go ahead, and we'll discuss each of her
16 subparagraphs. If you disagree that that's what it is
17 that you're seeking, then let me know.

18 MR. WALTERS: Okay, thank you.

19 THE COURT: Just so we can be on the same page, and even
20 though it's your request, I will have Attorney Edwards go
21 first.

22 MS. EDWARDS: Your Honor, the first one is the May 28, 2004
23 request, which was received by DRED on June 2 and

1 responded to on June 9, which was in the five business
2 days. Attached to our Motion to Dismiss, DRED has
3 created a spreadsheet that shows the responses and the
4 timeliness or not the timeliness of them.

5 THE COURT: Now, wait a minute. This spreadsheet; this
6 doesn't deal with just paragraph 7A?

7 MS. EDWARDS: No. It deals with all of them.

8 THE COURT: That's everything?

9 MS. EDWARDS: Yes. The first column of that spreadsheet shows
10 you the date of the document, which should correspond to
11 the date that ATV Watch is using as to the dates of their
12 letters, and in the next paragraph, it talks about what
13 it was that ATV Free New Hampshire asked for, and we have
14 put in there when it is that DRED received the specific
15 requests.

16 The next column is DRED's action, and the
17 final column is any additional information that was sent,
18 at that time it was ATV Free New Hampshire, which is why
19 it's referencing that.

20 THE COURT: Okay. Can we just concentrate on what it is that
21 you want that you don't have yet?

22 MR. WALTERS: Sure.

23 THE COURT: Mr. Walters.

1 MR. WALTERS: Yes.

2 THE COURT: And not arguing about how many -- I understand, as
3 a matter of principal and your concern for future
4 conduct, that if you ask for something, that the
5 documents are, or the response is timely. I understand
6 that. And I'm just wondering if, as far as timeliness
7 goes, if we can't reach an agreement about future
8 relations here, future requests, I should say.

9 MS. EDWARDS: We most certainly can, your Honor. As you'll
10 see, when you go through all the attachments, DRED has
11 made every effort to respond in a timely fashion and,
12 generally, it has. There is one specific request that
13 came in at the very end of November, and it was responded
14 to inappropriately by DRED. It was responded to within
15 the 5 days, but it didn't have a -- what it said was we
16 need to contact the Attorney General's Office for advice
17 on this, and then they didn't say we'll be back in touch
18 with you within 14 days, and while I'm sure Mr. Walters
19 has other issues, that was the main issue when our office
20 became involved and when there were concerns of things,
21 but when I look at the responses, while Mr. Walters may
22 challenge whether or not he received all the documents he
23 thinks he should have received, in general, the responses

1 from last year have been within the 5 business days.

2 THE COURT: Okay. Well, why don't you work that out, as far
3 as future course of conduct, okay? Maybe you can come to
4 some agreement, and now that the Attorney General's
5 Office is involved, and I'm not making any, you know,
6 judgment on that at all, but we don't want you back here,
7 right?

8 MS. EDWARDS: Right.

9 MR. WALTERS: I hope not.

10 THE COURT: You don't want to come back, no. So, now we need
11 to deal with the documents today that Mr. Walters still
12 feels that ATV Watch is entitled to.

13 MR. WALTERS: Can I back up, just a minute, and respond?

14 THE COURT: Yes.

15 MR. WALTERS: If the Attorney General doesn't recognize, even
16 at this late a date, that they didn't comply with the
17 Right-to-Know Law in a lot of different instances, I'm
18 afraid in the future they will rely on those same thought
19 patterns to continue not to comply. It took 39 days in
20 one request to get the documents and 45 in the next
21 request, and I just want to make sure that the Attorney
22 General and DRED know that, you know, in the future.

23 THE COURT: Well, let me ask you this. Would you sit down and

1 talk about those particular incidents, the 39 days and
2 the 45 days that you say, and see what each other -- make
3 sure that you, each other, understand your positions on
4 this and try to work it out, okay?

5 MR. WALTERS: Okay.

6 MS. EDWARDS: I think that we're going to work those out now,
7 your Honor, because what you're going to find is that, in
8 those time periods, when those documents weren't
9 released, it was because during a time period DRED was
10 claiming either a document was not subject to disclosure
11 or is continuing to claim that a document is subject to
12 disclosure. Those appear to be those documents. With
13 respect to the attachments I was using, I'm generally
14 using the attachments that were attached to ATV Watch's
15 petition. The January 6 letter from DRED is the one
16 where the bulk of the documents --

17 THE COURT: All right. Which paragraph is that?

18 MS. EDWARDS: It's included in paragraph -- it starts, your
19 Honor, on paragraph C, which is the Letter of Intent, D,
20 the map of the property, E --

21 THE COURT: Have you talked at all?

22 MS. EDWARDS: Yes, we have, your Honor, several times on the
23 telephone. These are documents -- I mean, really, what

1 it comes down to is these documents, and these are the
2 documents that I'm referencing, generally, these
3 documents fall under the case of Perez versus Clemmen,
4 which says that when the State is negotiating to purchase
5 property, the State is not required to give up financial
6 information about those negotiations that could put it at
7 a disadvantage when it is negotiating price for property.
8 That's what these documents fall under. They are the
9 letter of intent to purchase, to possibly purchase the
10 property. It's a map of the potential property. It's on
11 paragraph E, the notes of Bill Carpenter, who is DRED's
12 land manager, that includes comparable sale information.
13 It was at that time the Governor in Council resolution to
14 be able to hire an appraiser to go out and appraise the
15 property. G and H are two e-mails back and forth between
16 two state employees with respect to the appraisals, the
17 Governor in Council resolution, and also, I think, the
18 values of the property. So, what the State has argued
19 is, with respect to those types of documents, and there
20 are a small number of them, that those documents are not
21 subject to disclosure at this time. When the transaction
22 is complete, either the State purchases the property, or
23 the State decides not to purchase the property. Then,

1 those documents under Perez versus Clemmens, are subject
2 to being disclosed.

3 THE COURT: All right. Are we talking about one particular
4 piece of property here?

5 MS. EDWARDS: In general, there are two sets of requests here.
6 Generally, yes, we are talking about one set -- sets of
7 documents that deal with the possible purchase of what's
8 being called a Berlin ATV park. It's, approximately,
9 7,200 acres of property in Berlin, New Hampshire. That's
10 the main request. There also appears to be in the, what
11 I consider inappropriate injunctive request, there seems
12 to be general requests that DRED provide information on
13 all potential ATV trails on any property that the State
14 has any dealings with, and that's under a different
15 statute. It's not under a Right-to-Know request; it's
16 under RSA 215-A, which is the statute that deals with
17 putting DRED's --

18 THE COURT: That's what it was brought under, you mean?

19 MS. EDWARDS: Yes, and we have addressed that separately, but,
20 generally, these documents deal with the Berlin property.

21 THE COURT: All right. Mr. Walters, then, do you agree that
22 the documents that you request relate to this, the
23 possible Berlin ATV park?

1 MR. WALTERS: Yes. I made two requests to DRED, two formal
2 Right-to-Know requests, one last summer, and then one
3 late this winter. The second one relates strictly to the
4 Berlin ATV park.

5 THE COURT: Okay. The Berlin ATV park; it's not in existence
6 now, correct?

7 MS. EDWARDS: Correct, your Honor. The State doesn't own it.

8 THE COURT: Right.

9 MR. WALTERS: But they have a letter of intent, I believe,
10 though, on it, and they have funds to purchase it.

11 THE COURT: Okay. But I have not read this case yet, but
12 according to the Attorney General's Office, this is
13 exempt under the Right-to-Know Law. Have you read this
14 case, Perez versus Clemmens?

15 MR. WALTERS: Could I take, maybe, 3 minutes to read to you my
16 review of Perez versus Clemmens?

17 THE COURT: I just asked you a question. Yes or no?

18 MR. WALTERS: Yes, and I think it is completely unrelated to
19 withholding these documents.

20 THE COURT: All right, fine. So, I'll read it, too, but I
21 just want to make sure that I understand. So, the Berlin
22 property is -- there is a letter of intent, and the State
23 is debating whether to purchase this property, is that

1 it?

2 MS. EDWARDS: Yes, your Honor, and attempting to find funding
3 and attempting to have it appraised and all those things
4 you do when you're looking at whether you should buy a
5 piece of property or not.

6 THE COURT: So, the issue on that is whether Perez versus
7 Clemmens applies. Is that it?

8 MS. EDWARDS: That appears to be.

9 MR. WALTERS: I think that's the basis on which they are
10 withholding documents.

11 THE COURT: All right. And, then, what about -- so, that's
12 one issue, and then the other -- what about all potential
13 ATV trails? What is that about?

14 MR. WALTERS: I don't know what that means.

15 MS. EDWARDS: Well, if you look, your Honor, starting on
16 paragraph I of our Motion to Dismiss --

17 THE COURT: Well, let me find -- where is it in his petition?

18 MS. EDWARDS: It's paragraph I in his petition; it's his
19 Prayers For Relief. The petition doesn't appear to be
20 numbered, so it's paragraph I in the Prayers For Relief.

21 THE COURT: "Order DRED to release all documents provided by
22 DRED to the appraiser."

23 MS. EDWARDS: Yes. Actually, your Honor, I misspoke. I is

1 also dealing with the Berlin property.

2 THE COURT: Okay.

3 MS. EDWARDS: J is also dealing with the Berlin property,
4 just, at that point, they were going under the different
5 statutes.

6 THE COURT: She's just citing a different statute.

7 MR. WALTERS: I cited to 5A, because that is a statute that
8 sets out the importance of the public knowing what the
9 Bureau of Trails is doing by statute.

10 MS. EDWARDS: It's starting at K, your Honor.

11 THE COURT: So, everything -- all the documents relate to this
12 proposed or possible Berlin ATV park?

13 MS. EDWARDS: Up to that point. In K, your Honor, you'll see
14 that it says, "Order DRED to maintain adequate
15 documentation of DRED's activities throughout all ATV
16 trail development processes and order that the intent of
17 the statute be fulfilled."

18 THE COURT: I don't know if I could do that, if I wanted to.

19 MR. WALTERS: My intent there was that, one of the reasons
20 I've heard that the Right-to-Know, the intent of the
21 Right-to-Know Law isn't honored, often is that the State
22 doesn't maintain adequate documentation, and if they
23 don't have any documents then they don't have to release

1 them, and it's a loophole that is troublesome for us
2 wanting to know what's the State's up to.

3 MS. EDWARDS: Your Honor, as the State's argued in its motion,
4 the request puts the Court in the position of having to
5 determine the day-to-day business of the agency in how it
6 is either going to maintain, gather or document actions
7 that it takes or doesn't take.

8 THE COURT: Yeah. I have to have a controversy in front of
9 me. Just to say they have to comply with a Right-to-Know
10 Law, if you have an instance where you don't think they
11 did, and you do in this case, then I can decide that.

12 MR. WALTERS: On 215-A:41, it requires that the public
13 participate, that DRED provide an opportunity for public
14 participation in all aspects of trail development. That
15 is the statute that I believe they are not complying
16 with, because if they don't tell the public anything, we
17 have a hard time weighing in on it.

18 MS. EDWARDS: The challenge with that argument, your Honor, is
19 that the first paragraph of 215-A:41 under the Intent
20 section says that, "The General Court declares it to be
21 in the public interest to balance the demand for ATV and
22 trail bike trails on state lands." It then proceeds in
23 the next section to talk about possible trails on

1 state-owned property. It then goes on throughout it to
2 talk about State property, State lands? This is not
3 State property.

4 THE COURT: So, your position is, once the State purchases the
5 property, at that point, the public then has a right to
6 know that and to be appraised of the State's plans for
7 ATV parks or any other plans they may have for the
8 property?

9 MS. EDWARDS: That's right, your Honor, and at that time, the
10 State would be required to follow 215-A with all of its
11 public information sections and its public hearings
12 sections, and if DRED violated it at that time, then an
13 equity action could be brought then, but it's
14 inappropriate to do that now in an affirmative attempt.

15 MR. WALTERS: 215-A requires the collection of registration
16 fees from ATV; a portion of those go into an account for
17 land purchase. The Bureau of Trails plans on using
18 those, that land purchase account, to buy this land, in
19 part. That, really, predetermines the fate of the land,
20 and if they have used funds from ATV registration fees
21 that are meant to buy a park for ATV's, it predetermines
22 the rate of that purchase, so it would just be a
23 formality, if the public weighs in after the fact.

1 THE COURT: So, you're saying if they use that money to
2 purchase the property, they have no choice but to create
3 ATV trails on that property?

4 MR. WALTERS: I believe they would be violating the law if
5 they did not do that.

6 MS. EDWARDS: That's not the State's interpretation of the
7 law. That would be one of the main purposes, but these
8 are in general multi-use trails, and when Mr. Walters
9 and I have had a conversation along that line as I have
10 stated, I believe that's a legislative argument to make.
11 The statute is established in the manner that it is, the
12 funding is established in the manner that it is, and DRED
13 is doing nothing to violate the statute. DRED is
14 providing all the information it's required to do, and
15 it's providing all public hearings and everything else
16 it's required to do under 215-A.

17 That's not what ATV Watch is requesting. ATV
18 Watch is requesting that DRED now create additional
19 documentation and maintain this documentation so that ATV
20 Watch and any other interested members of the public can
21 have information available to them that the legislature
22 has not required them to document, information that they
23 are not gathering at this point during their regular

1 course of business, and he's coming to this court and
2 asking the Court to order that to have to occur.

3 THE COURT: All right.

4 MR. WALTERS: The Assistant Attorney General or Associate
5 Attorney General referenced the intent under 215 A:41.
6 The intent says that "The General Court" -- she didn't
7 finish the full intent, she only referenced part of it.
8 It says, "The General Court declares it to be in the
9 public interest to balance the demand for ATV and trail
10 bike trails on state lands with other non-motorized
11 recreational trail uses, with potentially conflicting
12 management goals for the state lands and protection of
13 wildlife and ecologically important areas." So, that is
14 the whole intent, of the Right-to-Know. We can't balance
15 that if we don't know what's happening.

16 THE COURT: Okay. Anything else?

17 MS. EDWARDS: Your Honor, we would just point out that I think
18 there's at least one more request for a future action.
19 It's to -- well, there's a request that you find that
20 DRED demonstrated a pattern of noncompliance with the
21 Right-to-Know Law in paragraph M. DRED requests that you
22 don't find that, because we believe that you're not going
23 to find that when you go through all of the exhibits that

1 are attached to the petition and also to DRED's motion.
2 You'll see that DRED has provided not only all the
3 information that it believes is necessary and is
4 disclosable, it's also answered questions, which, as you
5 know, under the Right-to-Know Law, State agency isn't
6 required to answer questions and provide thought
7 processes; it's really a document production exercise,
8 but in an effort to fully disclose all the information,
9 DRED has done that, and you'll see that in its responses.
10 So, DRED requests that you uphold its withholding of
11 documents based on Perez versus Clemmens, and that you
12 find that the future, the requests for future relief are
13 inappropriate at this time.

14 THE COURT: Okay. Anything else, Mr. Walters?

15 MR. WALTERS: Well, if I could respond to some of the items in
16 the Motion to Dismiss, just a couple of notes I made in
17 the last 5 minutes.

18 THE COURT: Sure, go ahead.

19 MR. WALTERS: Item 4, it talks about where there was one delay
20 caused by asking advice from the Attorney General's
21 Office. This is not a recognized exemption under the
22 Right-to-Know Law in terms of not violating with the
23 timeliness of producing the documents.

1 THE COURT: I think they've acknowledged that.

2 MS. EDWARDS: We have, your Honor.

3 MR. WALTERS: In item 7A, it says that I'm claiming that they
4 deny releasing some documents that they have. I don't
5 think I've made that claim anywhere. I'm just claiming
6 at 7A that they didn't release the documents that they
7 have timely.

8 THE COURT: Okay.

9 MR. WALTERS: I'm not really sure about this one. The Bureau
10 of Trails refers to making documents public, and that
11 they don't have to release these until they become
12 public. My reading of 91-A, the legislature defines
13 what is a public document and what is not, not the Bureau
14 of Trails. So, I'm not sure how they say a document
15 isn't public, and then the next day it is public. I
16 don't know where that --

17 THE COURT: Which paragraph are you referring to?

18 MR. WALTERS: Well, I'm looking at --

19 MS. EDWARDS: D, I believe.

20 MR. WALTERS: I'm looking at D, where it talks about DRED did
21 release the map to ATV Watch last Friday, because they
22 decided to make that document public. I don't know how
23 they decide what is, you know, how they decide. They

1 also indicate that the information I requested prior to
2 the Governor Executive Council meeting they didn't
3 provide to me because it wasn't public, and, again, I
4 think the statutes determine whether that's public or
5 not, not the Attorney General or BOT.

6 MS. EDWARDS: Your Honor, as you understand, the Right-to-Know
7 Law is one statute, that it works in a framework of many
8 statutes. With respect to the map of the property, it is
9 possible that documents change status. That's exactly
10 what Perez versus Clemmens says. Documents that might
11 not be subject to disclosure during negotiations, once a
12 transaction is complete, their status is changed, they
13 may very well be subject to public disclosure. With
14 respect to the map of the property referenced in D, the
15 map of the property was part of the negotiation
16 documents. Last week, due to numerous requests and due
17 to a requirement that there needed to be a public hearing
18 based on Councilor Burton's demands, the map was released
19 publicly at a public hearing. It was used to show what
20 the potential land area would be. As a result, the map
21 status changed at that point, and once that happened,
22 that document was released immediately to the ATV Watch
23 group. That is how documents, possibly, change status.

1 With respect to the Governor in Council resolution, those
2 documents are all confidential until Governor and Council
3 considers them. Once they are considered by Governor and
4 Council, they are then subject to public disclosure, they
5 are discussed publicly at the Council meeting, and then
6 they are released. This is one of the instances where
7 DRED did delay accidentally in releasing them. We had
8 told Mr. Walters beforehand that, once Governor and
9 Council considered this resolution, that we would then
10 release to him, and it then didn't happen for a good 7
11 days. It has been released since then with an apology.

12 THE COURT: You're talking about the map?

13 MS. EDWARDS: The map was released last week, and that was
14 released because it was used in a publication.

15 THE COURT: What was it? That was 7 days?

16 MS. EDWARDS: The Governor Council Resolution -- it was
17 released 7 days after Governor and Council met, and it
18 should have been released the afternoon of that meeting.

19 THE COURT: To whom?

20 MS. EDWARDS: To Mr. Walters, because he had asked for that in
21 the Right-to-Know request.

22 THE COURT: He has that now?

23 MS. EDWARDS: Yes.

1 MR. WALTERS: Again, I'm not a lawyer, but I don't know if
2 information that's given or produced for the Governor and
3 Executive Council prior to their meetings can't be
4 released. I don't know if there's --

5 THE COURT: Well, it's not just in this case. That's about
6 everything, correct?

7 MS. EDWARDS: That's correct, your Honor. That's Governor and
8 Council rules.

9 THE COURT: Okay. I'll take it under advisement.

10 (End of proceedings/End of transcript)

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C E R T I F I C A T E

I, Brenda K. Hancock, Certified Court Reporter of the State of New Hampshire and Official Court Reporter for the within proceedings, do hereby certify that the foregoing transcript is a true and accurate record of my stenographic notes to the best of my ability, skill, knowledge and belief.

Dated: 7/1/06 
Brenda K. Hancock, CSCR, RPR
Official Court Reporter
New Hampshire Superior Court

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