

ATV Watch

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Sent: Wednesday, November 21, 2007 11:20 AM
Subject: NHDOT - Right to Know Request



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November 21, 2007

Mr. David Brillhart
 State of New Hampshire
 Department of Transportation
 7 Hazen Drive
 Concord, NH 03302

Dear Mr. Brillhart:

ATV Watch is in receipt of the New Hampshire Department of Transportation's (DOT's) letter dated 11/05/07 in response to ATV Watch's letter dated 11/02/07. DOT's letter was unresponsive to a number of issues we raised.

In our letter we asked DOT to quantify the documents being withheld, in their entirety or in part, and categorize the documents on the basis of their claimed exemption from disclosure. We believe that this request was reasonable and that both State Statute and case law compel DOT to provide the information requested, but DOT declined to do so.

The intent of ATV Watch's request was to nail down a clear record of exactly what documents are being withheld and exactly what the corresponding statutory basis for each withholding is. If this is not established it places ATV Watch at the disadvantage of having to chase a constantly moving target of exactly what documents are being withheld and the basis for the withholdings. We know from experience that this approach is very advantageous to a public body and makes it very difficult for a citizen to challenge the legality of the withholdings. This approach provides the flexibility for DOT to play a "shell game" where they have not identified or quantified exactly what is being withheld and can pick and choose, and shift from day to day, the various reasons for not disclosing documents. This is a violation RSA 91-A:4, IV which states that if a document is not made available the public body shall "deny the request in writing with reasons". Further, an agency not clearly defining the documents they are withholding and not providing specific reasons for nondisclosure is contrary to the holdings in the recent NH Supreme Court decision in *Murray v NH State Police* (2006).

DOT previously indicated that documents are being withheld for the following reasons:

1. DOT claims some documents are “*preliminary draft correspondence which are not in their final form and were not disclosed, circulated, or available to a quorum or a majority of those entities defined under RSA 91-A:I-a.*” (Letter from DOT to ATV Watch 08-22-07) Please identify the documents that are in this category.
2. DOT claims some documents are “*confidential attorney/client e-mail communications between attorneys within the Department of Justice and the Department of Transportation*” (Letter from DOT to ATV Watch 08-22-07) Please identify the documents that are in this category.
3. DOT claims some documents are “*privileged communications or personal notes*” (Letter from DOT to ATV Watch 08-22-07). Please identify the documents that are in each of these two categories. DOT should know that personal notes generated in and pertaining to the conduct of public business are not necessarily exempt from disclosure.
4. DOT claims some documents contain “*information that is exempt from disclosure*” (Letter from DOT to ATV Watch 09-13-07). Please identify the documents that are in this category and, as required by law, provide the “reasons” for not disclosing them.

We are asking DOT to get past the point of saying we have a bunch of documents that are not subject to disclosure for a bunch of reasons, including the circular argument that they are not subject to disclosure because they are “exempt from disclosure.”

Because DOT has not responded to our request to establish a clear record of the scope and basis for DOT’s withholding of governmental records ATV Watch has had to do this. Thus far we have identified the following specific entire documents or parts of documents that have been withheld from disclosure. We have been unable to correlate these with reasons for nondisclosure because DOT has not, in a single instance, given a specific reason for withholding a specific document.

1. Handwritten notes on letter from DRED dated 02/15/07
2. Notes on draft letter from FHWA to DOT (undated)
3. Text in memo from Brillhart to Maddali dated 04/20/07
4. Text in email from Maddali to Gegas and Gamache dated 05/08/07
5. “Response to FHWA.doc” (attachment to 05/08/07 email from Maddali to Gegas and Gamache)
6. “Letter to DRED 5-8-07.doc” (attachment to 05/08/07 email from Maddali to Gegas and Gamache)
7. Email from Maddali to Federal Highway Administration dated 05/10/07.
8. Text on pages 1, 2 and 3 of email exchange between Maddali, Watson and Mayville dated 05/14/07
9. Text in memo from Maddali to Brillhart dated 05/15/07
10. Text in memo between unknown parties (undated)
11. Text in email exchange between Maddali and Levine dated 05/23/07

12. Text in email exchange between Morgan and Roth dated 06/14/07
13. Email from Morgan dated 06/14/07
14. "Request from DRED 6-20-07.doc" (attachment to 08-21-07 email from Hartford to Chamberlin)
15. Handwritten memo from Brillhart to O'Leary dated 06/20/07
16. "070116 FEDHWY Letter.PDF" (attachment to 07-09-07 email from Maddali to Fox)
17. "Request from DRED 7-9-07.doc" (attachment to 07-09-07 email from Maddali to Fox)
18. "ATV Usage Documents Retention (Word document)" (attachment to 08-15-07 email from Maddali to Roth)
19. Text in email exchange between Roth and unknown party (date and party redacted). The redactions include handwritten notes on the email.

We are asking DOT to identify any additional documents that are being withheld and to provide the specific reasons each of the above documents or additional ones are being withheld.

ATV Watch's most recent letter included a request to release documents previously withheld and DOT declined. ATV Watch expects that these documents will continue to be retained by DOT because the law requires that these documents be preserved. We further expect that these documents will be retained because ATV Watch intends to file an action in court to compel disclosure of the documents and the law requires that these documents be preserved while any lawsuit is pending. ATV Watch is requesting an immediate acknowledgement by DOT and their legal council at the Attorney General's Office that none of the records have been disposed of and that they will continue to be retained during the pending legal proceedings.

It is our understanding that there is now a bill before the legislature dealing with the issue of ATV use on the TE funded rail trails, which has been the subject of ATV Watch's right to know requests to DOT. As the legislature takes up this issue it is in the public's interest that all governmental records pertaining to the issue be preserved and disclosed. Disclosure of these governmental records will contribute to the public's understanding of the basis for DOT's position that it was a violation of federal law to allow ATVs on the rail trails prior to 1999 but not a violation of Federal Law after 1999. Disclosure will also contribute to the public's understanding of the basis for how and why DOT arrived at the decision to ask the Federal Highway Administration for a waiver to allow ATVs on the rail trails when Federal laws restrict motorized use on the trails to snowmobiles only.

Time is of the essence in your response to this request.

Sincerely,



Andrew Walters, Concerned Citizen and Director of ATV Watch