

THE STATE OF NEW HAMPSHIRE

Merrimack County Superior Court

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Concord, NH 03301 2880

603 225-5501

NOTICE OF DECISION

ATV WATCH
ANDREW WALTERS
PO BOX 34
FITZWILLIAM NH 03447

08-E-0030 ATV Watch et al v. State of N.H. Dept. of Transportation

Enclosed please find a copy of the Court's Order dated 2/21/2008
relative to:

Court Order

***Please see attached order.**

02/22/2008

William McGraw
Clerk of Court

cc: Andrew Walters
Edith L. Pacillo

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

MERRIMACK, SS.

08-E-0030

ATV WATCH
AND
ANDREW WALTERS

v.

STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION

**ORDER ON ATV WATCH MOTION FOR
ACCESS TO DOCUMENTS PROVIDED TO THE COURT
BY THE ATTORNEY GENERAL AND MOTION THAT THESE
DOCUMENTS BE INCORPORATED AS PART OF THE COURT RECORD**

The parties are before the Court in an action for declaratory and injunctive relief brought by plaintiffs' ATV Watch and Andrew Walters against the defendant State of New Hampshire Department of Transportation ("NHDOT"). In their petition, plaintiffs' petition seeks access to NHDOT records pertaining to the permitting of use of wheeled ATVs upon certain former railway corridors that have been converted by NHDOT to rail trails. Plaintiffs bring their action under

the New Hampshire Right-to-Know Law, RSA 91-A, and under Part I, Article 8 of the New Hampshire Constitution.

At the February 11, 2008 hearing in this matter, NHDOT submitted that with the exception of some recently located materials, it has provided plaintiffs with the requested documentation with the exception of certain redacted or withheld materials which NHDOT asserts to be non-public either because they are exempt from disclosure or because they are privileged. At the hearing, plaintiffs requested that the Court perform an *in camera* review of redacted and withheld documents in order to determine whether or not a violation of public record laws had taken place.

At the February 11, 2008 hearing, NHDOT was given leave to provide the Court with sealed photocopies of the unredacted material and the withheld items for purposes of *in camera* review. The photocopied materials for review were filed by NHDOT with the Clerk of Court on February 13, 2008. The submission by NHDOT also included an index to the provided materials in which NHDOT identified redacted or withheld items and the asserted bases for the redaction or withholding.

In its cover letter to the Clerk of Court, dated February 13, 2008, a copy of which was furnished to Andrew Walters, NHDOT referenced the filing of the documents for *in camera* review, as well as the inclusion of an index of withheld and redacted documents. The Court has not yet reviewed the redacted and withheld documents which were furnished to the Court by NHDOT. The Court has reviewed the index as submitted by NHDOT.

In their recently filed motion, plaintiffs have requested access to the unredacted or withheld material as provided to the Court by NHDOT. Additionally, plaintiffs request access to the index that was submitted to the Court by NHDOT. A copy of the index, which appears to be in the nature of a *Vaughn* index, however, was not provided to the plaintiffs by NHDOT. At the February 11, 2008 hearing, NHDOT had referenced that its documentation included an index with the identification of each document and the basis for which the item was being withheld.

When a party opposing disclosure of records or documents under the raises a claim of exemption or privilege under that law, the Court reviews the requesting party's right to access to the information and the agency's assertion of exemption from disclosure or confidentiality. The Court generally does so with an *in camera* review of the records at issue. "[T]he trial court after conducting an *in camera* review of either the documents or a *Vaughn* index of them, should weigh the public's interest in disclosure against the government's interest in non-disclosure to determine whether the documents should be disclosed." Goode v. New Hampshire Office of the Legislative Budget Assistant, 145 N.H. 451, 454 (2000).

The Court would note that an *in camera* procedure for review of materials that are asserted to be exempt or privileged is a recognized means for a Court to weigh issues of confidentiality and public disclosure. Professional Firefighters of New Hampshire v. Health Trust, Inc., 151 N.H. 501, 506 (2004). As has been noted above, both parties have requested an *in camera* review of the materials.

A *Vaughn* index is often utilized in reviews where there are large numbers of documents that are at issue. However, as noted later in this order, a *Vaughn* index, or its equivalent, can also be utilized to apprise a party seeking disclosure of documents of the identity of documents and the grounds upon which an agency asserts confidentiality or an exemption from public access.

The Court shall conduct the *in camera* review of the documents without the attendance of either party or any party's counsel. As noted by the New Hampshire Supreme Court in the context of *in camera* review of pre-trial discovery requests and potentially confidential materials: "To protect the confidentiality of privileged records, and because the trial court does not require the aid of counsel to recognize discoverable evidence, the review is conducted by the trial court without the presence of counsel." State v. Hilton, 144 N.H. 470, 476 (1999). The Court will utilize the NHDOT index as a public *Vaughn* index for purposes of apprising the plaintiffs of the redacted or withheld materials and the positions asserted by NHDOT as to those items. Additionally, plaintiffs shall have leave to respond to the *Vaughn* index, as provided for below.

A disclosed *Vaughn* index is of particular utility because it will allow the Court to engage in an *in camera* review of records and materials but provide the party seeking disclosure with sufficient information to reasonably pursue the disclosure litigation.

Generally, a *Vaughn* index will include a general description of each document withheld and a justification for its nondisclosure. See Church of Scientology Intern. v. U.S. Dept. of Justice, 30 F.3d 224, 228 (1st Cir. 1994). The index safeguards the adversary process in a setting where one party, the

party resisting disclosure, has exclusive control of vital information:

It forces the government to analyze carefully any material withheld, it enables the trial court to fulfill its duty of ruling on the applicability of the exemption, and it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he can present his case to the trial court.

Id. (quotation and brackets omitted).

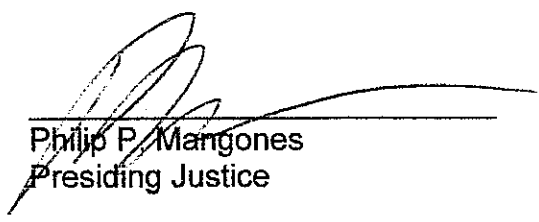
Union Leader Corp. v. New Hampshire Hous. Fin. Auth., 142 N.H. 540, 548 (1997). By proceeding in this fashion, the party seeking access may more reasonably respond to an agency's claims of confidentiality. The unredacted and withheld documents, however, shall remain confidential until and unless ordered released by the Court upon the Court's *in camera* review.

The following orders are entered:

1. The document index (*Vaughn* index) as filed with the Court by NHDOT shall be provided by NHDOT to the plaintiffs within five (5) days of the date of the Clerk of Court's notice of this order.
2. Plaintiffs, if they wish, shall have leave to respond in writing to the *Vaughn* index. Any response shall be filed by plaintiffs within fifteen (15) days of the date of the Clerk of Court's notice of this order.
3. The unredacted documents as furnished sealed to the Court by NHDOT shall remain sealed until and unless the Court enters a determination otherwise on the plaintiffs' Right-to-Know petition.
4. All pleadings, records or proceedings, sealed or otherwise, shall be preserved for appellate review.

SO ORDERED.

2-21-08
Date


Philip P. Mangones
Presiding Justice