

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

ATV Watch and Andrew Walters

v.

State of New Hampshire Department of Transportation

ATV WATCH MOTION FOR PARTIAL SUMMARY JUDGMENT

Now Comes Petitioner, ATV Watch, with Motion for Partial Summary Judgment. ATV Watch moves for partial summary judgment and in support of this states as follows:

VIOLATION 4 - Failure to Disclose Documents in their Entirety or in Part

ATV Watch's Petition claims that DOT, in violation of RSA 91-A, failed to disclose documents in their entirety or in part. In the State's Motion to dismiss they reference three separate documents which they fault ATV Watch for "overlook[ing]" or "fail[ing] to acknowledge." Implicit in the assumption by the State that ATV Watch overlooked or failed to acknowledge these documents is that the documents were subject to disclosure in response to ATV Watch's right to know requests and that the documents had been disclosed. Further, during the February 11, 2008 hearing before this court the State acknowledged that these three documents were subject to disclosure and indicated that they would provide them to ATV Watch.

Document A Withheld in Violation of RSA 91-A

June 8, 2007 email from Maddali to selected DOT Employees

With respect to this email, in the State's Motion to Dismiss, the State indicated the following:

"Mr. Walters' argument implies that the DOT only searched for e-mails. This assertion overlooks the June 8, 2007 e-mail in which the DOT directed employees to save 'all e-mails, notes, meeting minutes and any other information pertaining to' ATVs on federally funded rail trails." (State's Motion to Dismiss page 5)

The above clearly demonstrates that DOT acknowledges that the June 8, 2007 email should have been released to ATV Watch. In the February 11, 2008 court hearing DOT either agreed that they had not provided it or at the very least made no objection to the contention by ATV Watch that it had not been provided. In court DOT agreed to provide this document to ATV Watch and it was sent to ATV Watch by the Department of Justice on February 13, 2008.

Documents B & C Withheld in Violation of RSA 91-A

August 15, 2007 email from Brillhart to selected DOT employees and attachment titled "ATV Watch Documents Retentio.doc"

With respect to this email and the attachment, in the State's Motion to Dismiss, the State indicated the following:

Mr. Walters' claim that the DOT did not search "deleted" or "trash can" folders is simply erroneous and should be rejected. Mr. Walters bases this argument on a August 15, 2007 e-mail in which Assistant Commissioner Brillhart stated "attached are instructions to follow. This should be done for your main mailbox and any archive folders you have." Mr. Walters fails to acknowledge that the detailed instructions attached to that email instruct employees to search "Deleted Items, Drafts, Inbox, Notes, Outbox, and Sent Items." Clearly, employees were instructed to search their "deleted" folders. (State's Motion to Dismiss page 5)

The above clearly demonstrates that DOT acknowledges that the August 15, 2007 email and the attachment should have been released to ATV Watch. With respect to the August 15, 2007 email itself, in the February 11, 2008 court hearing DOT either

acknowledged that they had not provided it or at the very least made no objection to the contention by ATV Watch that it had not been provided. After the hearing, in the hallway outside the courtroom, DOT provided this document to ATV Watch. Exhibit A attached hereto is a copy of that document.

With respect to the attachment titled "ATV Usage Documents Retention.doc," in the February 11, 2008 court hearing DOT looked at the file that they had provided to ATV Watch and specifically acknowledged that the document had not been provided to ATV Watch. At that time the offer was made by the Attorney General (AG) to provide the document to ATV Watch.

In ATV Watch's November 21, 2007 letter to DOT ATV Watch specifically identified, by document title, that this document had not been released and was continuing to be withheld. In ATV Watch's Petition to this court ATV Watch again specifically identified this document as being withheld (Document Number 065, Petition page 7, Petition page 8, and Petition Exhibit page 20). Based on these two notices to DOT with four separate references indicating that this document was being withheld it is unquestionable that DOT either knew or should have known that the document had not been disclosed.

Based on the above facts it is indisputable that

1. The AG and DOT had not disclosed these three documents.
2. The AG and DOT knew the documents were subject to disclosure.
3. The AG and DOT knew the documents should have been disclosed.
4. The AG and DOT knew or should have known that the documents had not been disclosed.

5. The AG and NHDOT disclosed the documents as a result of this legal action by ATV Watch.

Subsequent to the hearing in court, on February 11, 2008, DOT having realized their admission with respect to these three documents sent a letter to ATV Watch stating the following:

“This document [the June 8, 2007 email] and the two August 15, 2007 documents that I provided to you at the hearing contain privileged attorney-client communications or work product concerning the DOT’s search for documents in response to your 91-A request. They are being released solely for the limited purpose of responding to allegations in your Petition concerning the scope of the DOT’s search for documents, as set forth in the State’s Motion to Dismiss.” (February 13, 2008 letter from NHDOT to ATV Watch) Exhibit B attached hereto is a copy of that letter and the attached document.

The AG mentioned nothing about these documents being exempt from disclosure under 91-A when referencing them in their Motion to Dismiss. The AG mentioned nothing about these documents being exempt from disclosure under 91-A in the court hearing on February 11, 2008 when they agreed to provide them to ATV Watch. In the hallway outside the courtroom when the AG provided to ATV Watch the August 15, 2007 email from Brillhart, they mentioned nothing about the document being exempt from disclosure under 91-A. With respect to the attachment titled “ATV Usage Documents Retention.doc,” in the February 11, 2008 hearing the AG specifically indicated that they thought the document had been released, but in reviewing their file during the hearing realized it had not been.

Now DOT is trying to put the genie back in the bottle, by claming after the fact, that the documents are attorney-client privileged or work product and that they are not subject to disclosure under 91-A. This is not only disingenuous, but demonstrates a bad

faith and willful attempt to continue shield documents from disclosure in violation of RSA 91-A.

VIOLATION 7 - Failure to Search or Provide Documents in Response to a Request

In ATV Watch's Petition to this court ATV Watch stated the following:

"The scope of ATV Watch's November 2, 2007 Right to Know request included 'any governmental records generated in the processing of this or my previous Right-to-Know requests.' ATV Watch presumes that there must at least be some records pertaining to the processing of ATV Watch's July 24, 2007 and November 2, 2007 right to know requests. If there are no governmental records that pertain to the processing of ATV Watch's right to know requests one has to ask the question how did NHDOT process the requests." (ATV Watch Petition page 16)

In DOT's Motion to Dismiss they state the following:

"In this claim, Mr. Walters makes the argument that 'ATV Watch presumes that there must be at least some records pertaining to the processing of ATV Watch's July 24, 2007 and November 2, 2007 right-to-know requests.' Aside from Mr. Walters' presumption, this claim is not supported by any factual allegation, and should be dismissed." (DOT Motion to Dismiss page 6)

Based on the three specific documents identified in the State's Motion to Dismiss, two of which have subsequently been released, ATV Watch no longer logically presumes that there are documents related to the processing of ATV Watch's request, we now know that there are documents related to the processing of the requests and we now have two of those documents. The State agreed to provide the third document titled "ATV Usage Documents retention.doc" during the court hearing. ATV Watch believes that they may have provided it to ATV Watch during the hearing, but subsequent to the hearing ATV Watch has found that they do not have this document. ATV Watch intends to contact the AG to obtain a copy of it.

In the State's Motion to Dismiss they are claiming that ATV Watch's presumption that documents exist, related to the processing of ATV Watch's right to

know request, is “unsupported.” At the same time, in the same Motion to Dismiss, the State is acknowledging that at least three documents exist, related to the processing of ATV Watch’s right to know requests. Not only has the State now acknowledge that the documents exist, but they also acknowledge that ATV Watch should have looked at them and inherent in this is the presumption that the documents are subject to disclosure.

As noted above, at the hearing on February 11, 2008 the State further acknowledged that ATV Watch had not been provided with the documents and that they would provide them to ATV Watch.

WHEREFORE, ATV WATCH respectfully requests that this honorable court grant ATV Watch’s Motion for Summary Judgment as follows:

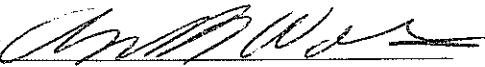
1. That NHDOT violated RSA 91-A by withholding the June 8, 2007 email circulated within DOT, by withholding the August 15, 2007 email from Brillhart, and by withholding the attachment (“ATV Usage Documents Retention.doc”) to the August 15, 2007 email from Brillhart.
2. That the continuing attempt by the AG's office to shield these documents from disclosure is a willful and bad faith violation of RSA 91-A.
3. That the presumed violation of RSA 91-A by DOT as set forth in ATV Watch’s Claim 7 proved to be true.
4. That with respect to the three documents noted above, DOT knew or should have known that they were in violation of RSA 91-A.
5. That this action resulted in the release of the documents noted above.
6. Award ATV Watch costs.

Respectfully Submitted,

ATV Watch

Andrew Walters, Director

Dated February 19, 2008

By: 

Andrew Walters

AFFIDAVIT

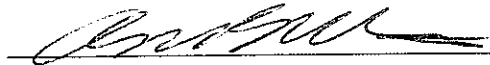
I, Andrew Walters, hereby certify under penalty of perjury that

1. Every fact alleged herein is true and accurate to the best of my knowledge and belief.
2. ATV Watch's right to know request dated November 2, 2007 requested documents from NHDOT pertaining to the processing of ATV Watch's right to know requests.
3. ATV Watch did not receive the June 8, 2007 email circulated within DOT, the August 15, 2007 email from Brillhart, or the "ATV Usage Documents Retention.doc" attachment to the email in response to their right to know request to DOT.
4. During the February 11, 2008 court hearing the AG agreed to provide the document titled "ATV Usage Documents Retention.doc" and may have provided it to ATV Watch at that time. However, subsequent to the hearing ATV Watch has found that they do not have this document.
5. Subsequent to the hearing ATV Watch received from the AG the other two documents referenced above.

02-19-08

DATE

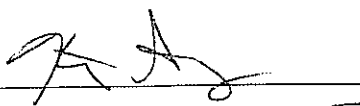
THE STATE OF NEW HAMPSHIRE



SIGNATURE

S.S. Cheshire

SUBSCRIBED AND SWORN TO THIS 19th Day of February, 2008.

Before Me, 

Justice of the Peace/Notary Public

KATY M. SELBY, Notary Public
My Commission Expires February 7, 2012

THIS DOCUMENT WAS PROVIDED
TO ATV WATCH BY THE AG AFTER
THE COURT HEARING ON
FEBRUARY 11, 2007.

Pacillo, Edith

From: Barbara Roth [BRoth@dot.state.nh.us]

Sent: Wednesday, August 15, 2007 4:52 PM

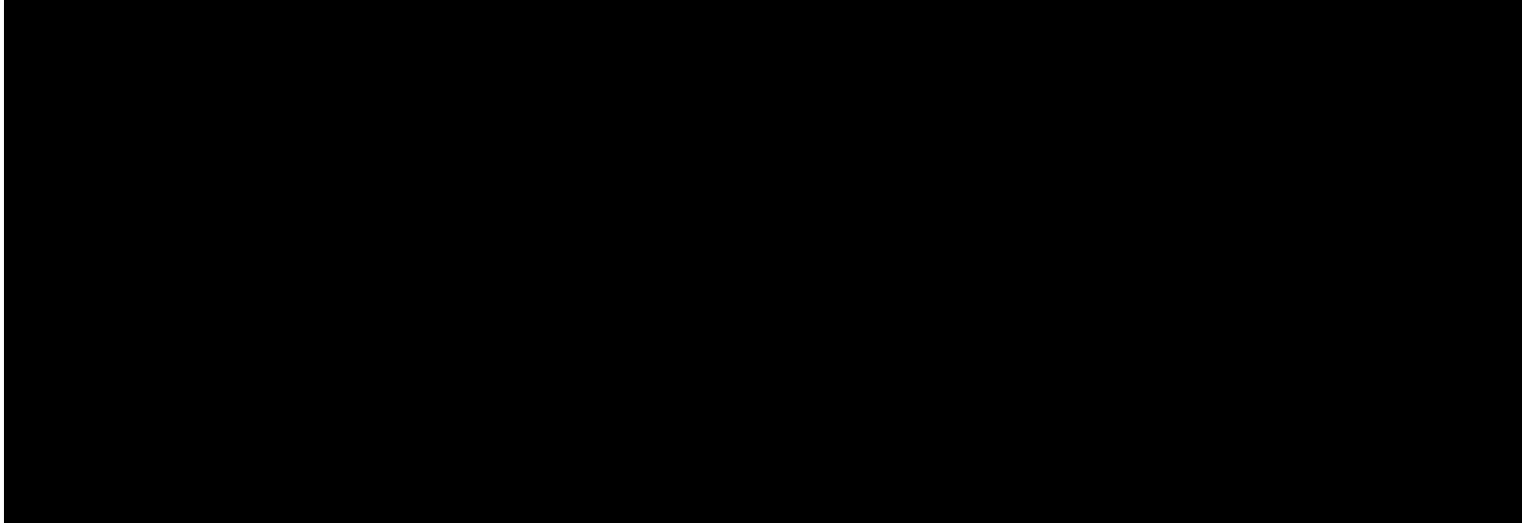
To: dbrillhart@dot.state.nh.us; Barbara Roth; Bill Cass; James Moore; Bill Watson; Ram Maddali; Nancy Mayville; Christopher Morgan; Diane Hartford; William Boynton; Tom Jameson; Jack Ferns

Cc: Charles O'Leary Jr.; Dane Prescott; Pacillo, Edith

Subject: ATV Watch Right to Know Request

NOTE: This document was redacted
by ATV Watch due to constraints
placed on its release by the NH
Attorney General

On behalf of Jeff Brillhart, Assistant Commissioner:



**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

KELLY A. AYOTTE
ATTORNEY GENERAL



ORVILLE B. "BUD" FITCH II
DEPUTY ATTORNEY GENERAL

February 13, 2008

Mr. Andrew Walters, Director
ATV Watch
PO Box 34
Fitzwilliam, New Hampshire 03447

Re: ATV Watch, et al. v. State of NH Department of Transportation

Dear Mr. Walters:

I am enclosing the June 8, 2007 e-mail referred to in the State's Partial Motion to Dismiss. This document and the two August 15, 2007 documents that I provided to you at the hearing contain privileged attorney-client communications or work product concerning the DOT's search for documents in response to your 91-A request. They are being released solely for the limited purpose of responding to allegations in your Petition concerning the scope of the DOT's search for documents, as set forth in the State's Motion to Dismiss.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Judith L. Pacillo".

Judith L. Pacillo
Assistant Attorney General
Transportation & Construction Bureau
(603) 271-3675

ELP/sed
Enclosure
247617.doc

Right to Know law request

THIS DOCUMENT WAS PROVIDED
TO ATV WATCH WITH LETTER FROM
AG DATED FEBRUARY 13, 2007

Pacillo, Edith

From: Ram Maddali [RMaddali@dot.state.nh.us]

Sent: Friday, June 08, 2007 12:52 PM

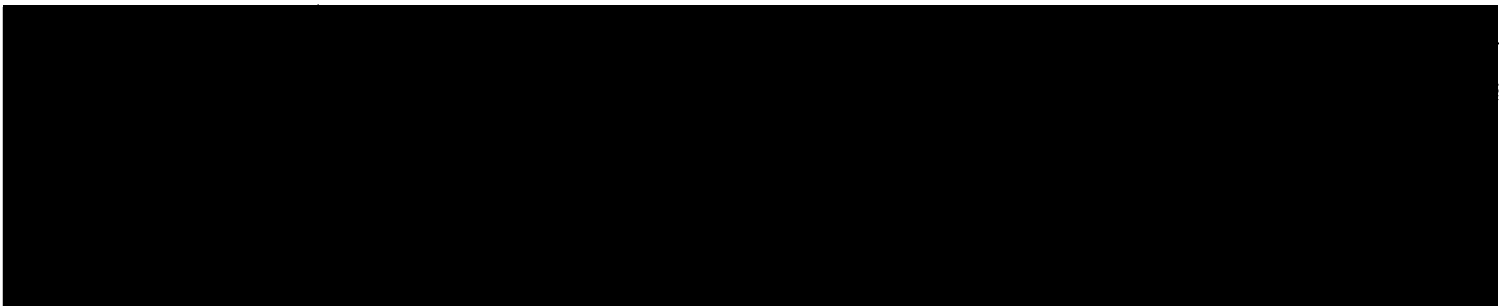
To: Barbara Roth; James Moore; Bill Cass; Christopher Morgan; Nancy Mayville; Bill Watson

Cc: Pacillo, Edith

Subject: Right to Know law request

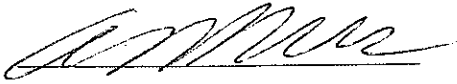
NOTE: This document was redacted
by ATV Watch due to constraints
placed on its release by the NH
Attorney General

Hi,

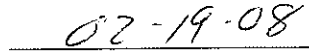


CERTIFICATE OF SERVICE

I hereby certify a copy of this Motion for Summary Judgment was mailed to Edith L. Pacillo, Assistant Attorney General on February 19, 2008.



Andrew Walters



Date