

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

ATV Watch and Andrew Walters

v.

State of New Hampshire Department of Transportation

ATV WATCH OBJECTION TO NHDOT'S MOTION TO DISMISS

Now Comes Petitioner, ATV Watch, with Objection to the State's Motion to Dismiss. ATV Watch requests that the Court deny the State's Motion to Dismiss and in support of this states as follows:

VIOLATION 1 - Untimely Release of Documents

NHDOT's Motion to Dismiss is unresponsive to this violation claimed by ATV Watch. In the State's Motion to Dismiss they argue two points.

1. That they were not required to respond to ATV Watch's April 17, 2007 request for the New Hampshire Department of Transportation (DOT) to maintain records. ATV Watch agrees with the State on this point and ATV Watch's Petition did not claim otherwise.
2. That the State did comply with the requirement to respond to a right to know request within 5 days. ATV Watch agrees with the State on this point and ATV Watch's Petition did not claim otherwise.

ATV Watch's Petition claimed that, although the State responded within 5 days, in violation of RSA 91-A, the State withheld documents for 29 days after ATV Watch's

July 24, 2007 right to know request. ATV Watch gave the State 3-1/2 months advance notice that they would be asking for these documents and there should not have been a 29 day delay in releasing them after ATV Watch's July 24, 2007 request that they be made available for review.

In the State's Motion to Dismiss they make no argument countering this claim by ATV Watch. By way of further objection, ATV Watch has submitted a Hearing Memorandum and incorporates that memorandum herein.

Accordingly, ATV Watch requests that DOT's motion to dismiss this claim be denied.

VIOLATION 2 - Failure to Disclose Documents that were being withheld.

In the State's Motion to dismiss they indicate the following:

"DOT explained that it would not release drafts of documents prepared during March, April, May, June and July, 2007 or attorney/client privileged communications spanning from March, 2007 to August 17, 2007. The documents that Mr. Walters alleges were not identified as being disclosed all fall within these two categories of records that are exempt from disclosure under RSA 91-A."

In letters to ATV Watch DOT further indicated that it was not releasing "privileged communications or personal notes" and "information that is exempt from disclosure."

Given the blanket exemptions which DOT claimed, without any explanations, ATV Watch had no means of knowing that the documents referenced in this violation were claimed to fall within either of the categories noted in the State's Motion to Dismiss. Had DOT categorized the draft and attorney-client privileged documents that they were withholding, and described these categories with a level of detail sufficient enough to ascertain whether or not the categories fell within legal exemptions, then,

disclosure of specific documents may have been less necessary. However, given DOT's refusal to make any effort to demonstrate that specific documents were in fact exempt from disclosure, they should have at least disclosed which documents they were withholding in order to allow ATV Watch some measure with which to begin to ascertain the legality of the withholding.

By way of further objection, ATV Watch has submitted a Hearing Memorandum and incorporates that Memorandum herein.

Accordingly, ATV Watch requests that DOT's motion to dismiss this claim be denied.

VIOLATION 3 - Failure to Provide Reasons for Denying Disclosure

An agency resisting disclosure of a document unquestionably bears the burden of demonstrating that the document is exempt from disclosure. A blanket claim, vague categorization, or unsupported assertion is insufficient to shield a document from disclosure. This is affirmed in the Murray opinion:

"Under the Right-to-Know Law, the respondents bear the burden of demonstrating why the requested information should not be disclosed. It is not the petitioner's responsibility to clarify the respondents' vague categorizations, nor should the petitioner be penalized for failing to do so." Murray v NH State Police

National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 680 (D.C. Cir. 1976) (*"generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA, since such allegations necessarily elude the beneficial scrutiny of adversary proceedings, prevent adequate appellate review and generally frustrate the fair assertion of rights under the Act"*).

By way of further objection, ATV Watch has submitted a Hearing Memorandum and incorporates that Memorandum herein.

Accordingly, ATV Watch requests that DOT's motion to dismiss this claim be denied.

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

Note: NHDOT's Motion to Dismiss does not request that this claim be dismissed.

VIOLATION 5 - Limiting the Content Scope of Search for Records Requested

As a basis for DOT's motion to dismiss this claim, DOT references a June 8th email and indicates that ATV Watch's "assertion overlooks the June 8 email." Not only did the State fail to disclose the very email which they claim ATV Watch should have looked at, but prior to the State's Motion to Dismiss the existence of this June 8th email was unknown to ATV Watch.

By way of further objection, ATV Watch has submitted a Hearing Memorandum and incorporates that Memorandum herein. By way of further objection, ATV Watch has also submitted a Motion for Summary Judgment and incorporates that motion herein.

Accordingly, ATV Watch requests that DOT's motion to dismiss this claim be denied.

VIOLATION 6 - Limiting the Range of Search for Records Requested

Note: NHDOT's Motion to Dismiss does not request that this claim be dismissed.

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

In the State'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.”

Based on specific documents now identified in the State’s Motion to Dismiss, 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. In the State’s Motion to Dismiss they identified the following three documents related to the process of ATV Watch’s right to know requests:

1. June 8, 2007 email circulated within DOT
2. August 15, 2007 email from Brillhart to DOT employees
3. Document attached to Brillhart’s August 15, 2007 email (ATV Usage Documents Retention.doc”).

In the State’s Motion to Dismiss, at the same time the State is acknowledging that documents exist related to the processing of ATV Watch’s right to know requests, they are claiming that ATV Watch’s presumption that the documents exist is unsupported. Not only has the State acknowledged that the documents exist, but they also acknowledge that ATV Watch should have looked at them. At the hearing on February 11, 2008 the State further acknowledged that ATV Watch had not been provided with the documents and that the State would provide them to ATV Watch.

By way of further objection, ATV Watch has submitted a Hearing Memorandum and incorporates that Memorandum herein. By way of further objection, ATV Watch has also submitted a Motion for Summary Judgment and incorporates that motion herein.

Accordingly, ATV Watch requests that DOT’s motion to dismiss this claim be denied.

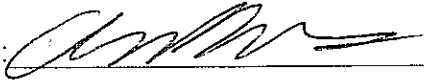
WHEREFORE, ATV WATCH respectfully requests that this honorable Court deny the State's motion to dismiss claims 1,2 ,3 5 and 7.

Respectfully Submitted,

ATV Watch

Andrew Walters, Director

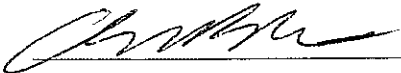
Dated February 19, 2008

By: 

Andrew Walters

CERTIFICATE OF SERVICE

I hereby certify a copy of this Objection to the State's Motion to Dismiss was mailed to Edith L. Pacillo, Assistant Attorney General on February 19, 2008.



Andrew Walters

02-19-08

Date