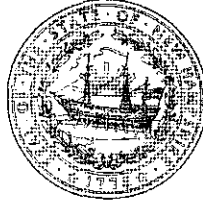


**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

KELLY A. AYOTTE
ATTORNEY GENERAL

ORVILLE B. "BUD" FITCH II
DEPUTY ATTORNEY GENERAL



Hand Delivered

February 6, 2008

William McGraw, Clerk
Merrimack County Superior Court
P. O. Box 2880
Concord, New Hampshire 03302-2880

Re: ATV Watch, et al v. State of NH Department of Transportation
Docket No. 08-E-0030

Dear Mr. McGraw:

Enclosed please find an Answer to Petition for Declaratory Judgment; a Partial Motion to Dismiss; and a Hearing Memorandum to be filed with reference to the above-captioned case.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Edith L. Pacillo".

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

ELP:mc
Enclosure
cc: ✓ ATV Watch, Andrew Walters, Director
246124.doc

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 08-E-0030

ATV Watch and Andrew Walters

v.

State of New Hampshire
Department of Transportation

HEARING MEMORANDUM

NOW COMES the State of New Hampshire Department of Transportation, by and through its attorneys, the Office of the Attorney General and submits the following Hearing Memorandum stating as follows:

I. INTRODUCTION

On January 24, 2008, ATV Watch/Mr. Walters filed a Petition containing 7 counts alleging that the New Hampshire Department of Transportation (“DOT”) violated RSA 91-A, New Hampshire’s Right-to-Know Law.

The State filed an Answer and a Partial Motion to Dismiss simultaneously with this Hearing Memorandum. In the Partial Motion to Dismiss, the State requested that the Court dismiss all but one of Mr. Walters’ claims – alleged Violation No. 4 - Failure to Disclose Documents in Their Entirety or in Part. With respect to that remaining claim, the State submits this Hearing Memorandum arguing that the State should prevail on the merits.

II. RSA 91-A: 5, IX DOES NOT VIOLATE PART I, ARTICLE 8 OF THE NEW HAMPSHIRE CONSTITUTION BECAUSE IT IS A REASONABLE RESTRICTION ON THE PUBLIC’S RIGHT OF ACCESS TO GOVERNMENTAL RECORDS.

The DOT withheld certain documents because they are exempt from disclosure under RSA 91-A:5, IX. That statute exempts “preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of those entities defined in RSA 91-A:1-a.” Mr. Walters argues that RSA 91-A:5, IX violates Part I, Article 8 of the New Hampshire Constitution. This argument lacks merit.

As the party challenging the constitutionality of a statute, Mr. Walters bears a heavy burden. “The party challenging a statute’s constitutionality bears the burden of proof.” *State v. Pierce*, 152 N.H. 790, 791 (2005); *see also Webster v. Town of Candia*, 146 N.H. 430, 434 (2001). This Court must “presume it to be constitutional and . . . not declare it invalid except upon inescapable grounds.” *Baines v. N.H. Senate President*, 152 N.H. 124, 133 (2005) (quoting *In re Judicial Conduct Comm.*, 151 N.H. 123, 125 (2004)). “In other words, [the Court] will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution.” *Id.* “[C]ourts will never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond all reasonable doubt.” *Petition of Boston & Maine Corp.*, 109 N.H. 324, 325 (1969).

It has always been the practice in this jurisdiction to follow the universally accepted doctrine that the constitutionality of an act passed by the coordinate branch of government is to be presumed. It will not be declared invalid except on unescapable grounds.

The Chronicle & Gazette Publ’g Co. v. Attorney General, 94 N.H. 148, 151 (1946); *see also Niemiec v. King*, 109 N.H. 586, 587 (1969) (a legislative act is presumed constitutional and the Court will not declare it invalid “except on inescapable grounds”).

Mr. Walters cannot meet this burden because RSA 91-A:5, IX is a reasonable restriction on the public's right of access.

Part I, Article 8 provides, in part, "The public's right of access to governmental proceedings and records shall not be unreasonably restricted." By its very words, therefore, the New Hampshire Constitution acknowledges that the public's right of access to governmental proceedings is not absolute. New Hampshire Courts have recognized the legislative ability to place reasonable restrictions on the public's right of access. *See Hughes v. Speaker, NH House of Representatives*, 152, N.H. 276, 290 (2005).

In *Associated Press v. State of New Hampshire*, 153 N.H. 120 (2005) the New Hampshire Supreme Court considered whether a provision of a statute making financial affidavits filed in divorce cases confidential violated Pt. 1, Art. 8. The Court concluded that the provision was constitutional because the financial affidavits in question retained their status as presumptively open and therefore, the public was afforded the procedural safeguards provided in the constitution. *Id.* at 136.

The Court also considered the constitutionality of a second provision of the same statute. In contrast to the first provision, the second provision required a person seeking disclosure of financial affidavits to give clear and convincing evidence that the public interest in the information outweighed the privacy interests of the affiant. The Court held that the second provision was unconstitutional because it shifted the burden of proof to the person seeking disclosure, and it completely abrogated the public's right of access to an entire class of records. Unlike the second provision of the statute considered in *Associated Press*, RSA 91-A:5, IX does not place a burden on the party seeking disclosure. Rather, it is analogous to the first provision because it leaves intact the constitutional presumption of openness and

does not contain any procedural impediments to those seeking disclosure. It is therefore, a reasonable restriction the public's right of access.

In addition, RSA 91-A:5, IX is reasonable because it was enacted for sound policy reasons. The amendment was enacted in 2004 in response to the New Hampshire Supreme Court's holding in *Goode v. N.H. Office of the Legislative Budget Assistant*, 145 N.H. 451 (2000). In *Goode* the plaintiff sought preliminary materials retained in preparation of a report. The trial court held that such a preliminary materials were not subject to RSA 91-A. The Supreme Court disagreed and held that unlike the Federal Freedom of Information Act, 5 U.S.C.A. § 552, the New Hampshire law did not exempt preliminary draft materials. Therefore, the Court held that preliminary materials were not exempt from RSA 91-A. Following that decision, the Legislature enacted RSA 91-A:5, IX.

Protecting the deliberative process of policy-makers is important to the frank, open and honest discussion necessary for decision-making. Even before the enactment of RSA 91-A:5, IX, New Hampshire courts recognized the importance of the deliberate process. *See e.g. Chambers v. Gregg*, 135 N.H. 478 (1992) (recognizing that interaction between the Governor and department heads might be exempt from disclosure as a deliberative process); *Orford Teachers' Association v. Watson*, 121 N.H. 118, 121 (1981) (acknowledging that that RSA 91-A:3 permits governmental bodies to deliberate privately about sensitive matters).

In construing the analogous provision in FOIA (the "deliberative process exemption" in 5 U.S.C.A § 552(b)(5)), the United States Supreme Court has recognized that the deliberative process exemption serves the important purpose of promoting the frank discussion of legal or policy matters. *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). Without such an exemption, the Supreme Court noted, decisions

and policies formulated would be the poorer as a result. *Id.* at 150 (discussing congressional intent behind deliberative process exemption); *see also Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2^d 1438 (1st Cir. 1992); *Mapother v. Department of Justice*, 3 F.3^d 1533 (D.C. 1993)). Like the deliberative process exemption from FOIA, RSA 91-A:5, IX serves an important governmental purpose.

RSA 91-A:5, IX, does not prevent public access to a class of documents. Rather, the public is still afforded the procedural safeguards inherent in Part I, Article 8. Additionally it is intended to meet an important policy goal. For these reasons, RSA 91-A:5, IX is a reasonable restriction on the public's right of access to government records.

III. THE DEPARTMENT OF TRANSPORTATION PROPERLY WITHHELD AND REDACTED DOCUMENTS BASED ON ATTORNEY-CLIENT PRIVILEGE

The DOT withheld various documents on the basis that they contained privileged communications with the Attorney General's Office. Legal advice from the agency's counsel is exempt from disclosure. *Society for the Protection of New Hampshire Forests v. Water Supply and Pollution Control Commission*, 115 N.H. 192 (1975). Mr. Walters argues that the DOT arbitrarily designated some documents as confidential attorney-client privileged communication. Apparently, Mr. Walters bases this argument on what he asserts to be a "stamp" that the Attorney General's office uses to shield documents from disclosure. Even assuming that the Attorney General's office routinely and consistently uses such a disclaimer on its correspondence, the DOT did not use such a disclaimer as a basis for withholding attorney-client privileged communication. This claim should be dismissed. Alternatively, the Court should review these withheld documents *in camera* to determine whether they contain privileged communications.

Mr. Walters also alleges that the attorney-client privilege has been waived because “ATV Watch presumes that the privileged communication was, in some instances distributed beyond the attorney and their client.” This argument has no basis in fact and is purely conjectural. Accordingly, it should not be considered.

IV. THE DEPARTMENT OF TRANSPORTATION PROPERLY WITHHELD AND REDACTED DOCUMENTS CONTAINING PERSONAL NOTES

In its August 22, 2007 letter to Mr. Walters, it explained that some documents were withheld or redacted because they contained personal notes. RSA 91-A:5, VIII exempts from disclosure “any notes or other materials made for personal use that do not have an official purpose, including notes and materials made prior to, during, or after a public proceeding.” Other than his distrust of the Attorney General’s office, Mr. Walters does not allege any specific reason for challenging this basis for withholding documents. Therefore, the claim should be dismissed. Alternatively, the Court should review the withheld and redacted documents *in camera* to determine whether they contain personal notes that do not have an official purpose.

WHEREFORE, DOT respectfully requests that this Honorable Court:

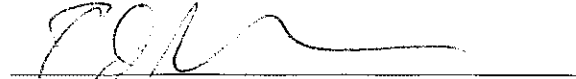
- A. Dismiss the Petition in part;
- B. If the Court desires, review the documents that DOT has withheld, *in camera* to make a determination regarding DOT’s legal position on each document; and
- C. Grant such other relief as may be just and equitable.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Kelly A. Ayotte
Attorney General




Edith L. Pacillo
Assistant Attorney General
Transportation & Construction Bureau
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3675

Date: 2/6/08

Certificate of Service

I certify that a copy of the foregoing has on this 6 day of February, 2008, been mailed, postage prepaid to ATV Watch, Andrew Walters, Director, P.O. Box 34, Fitzwilliam, NH 03447.



Edith L. Pacillo