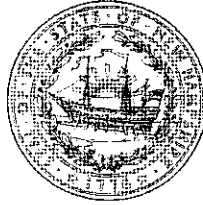


**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

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

PARTIAL MOTION TO DISMISS

NOW COMES the State of New Hampshire, Department of Transportation, by and through its attorneys, the Office of the Attorney General and moves this Honorable Court to partially dismiss the above-captioned action. In support thereof, the Department of Transportation says as follows:

Alleged Violation No. 1 – Untimely Release of Documents

1. On April 17, 2007, ATV Watch, through Andrew Walters, contacted the Department of Transportation (“DOT”) via e-mail regarding ATV use on rail trails that were purchased with Federal Transportation Enhancement Funds. In the April 17, 2007 e-mail, Mr. Walters requested that “all governmental records related to the process [of obtaining a waiver from the Federal Highway Administration] be preserved and a copy provided” to Mr. Walters. This was a request for prospective documents that the DOT might create with respect to seeking a waiver from the Federal Highway Administration (“FHWA”). As such, no response was required at that time.

2. On July 24, 2007, Mr. Walters sent an e-mail to DOT requesting “all of the documents which ATV Watch asked to be retained” in its April 17, 2007 e-mail to DOT.

3. On July 30, 2007, the DOT responded to Mr. Walters. This response was within the 5 business day response period set forth in RSA 91-A:4, IV, because it fell over a weekend. Further, the DOT's response gave a specific timeframe for when the information would be available. On July 31, 2007, Mr. Walters reviewed the information that the DOT was able to make available at that time.

4. On August 15, 2007, the DOT circulated an internal memorandum to employees directing them to save all e-mails and correspondence in relation to the discussion on ATV usage on federal funded corridors. The internal memorandum explained the process for locating and storing e-mail documents.

5. On August 22, 2007, the DOT again wrote to Mr. Walters in follow up to its July 30, 2007 correspondence. In that letter, the DOT advised Mr. Walters that an additional portion of the information that he had requested was now available for review.

6. On August 31, 2007, Mr. Walters sent an e-mail to the DOT asking the DOT to reconsider its refusal to release certain records. On September 13, 2007, the DOT again corresponded with Mr. Walters in follow up to his July 24, 2007 request. This letter advised Mr. Walters that the remainder of the information that he had requested was now available for review. In addition, the letter advised Mr. Walters that the DOT would not release copies of draft correspondence or confidential attorney/client communications.

7. On November 2, 2007 Mr. Walters e-mailed the DOT asking that the DOT immediately provide all "governmental records" which had been generated since his last right-to-know request. The DOT responded to this request on November 5, 2007 advising Mr. Walters that no new correspondence or information existed.

8. On November 21, 2007 Mr. Walters e-mailed the DOT requesting the DOT to identify any additional documents that were being withheld and to provide specific reasons for withholding documents. This letter also requested an immediate acknowledgement by DOT and the Attorney General's Office that none of the records that had been withheld had been disposed of. The DOT responded on December 28, 2007 reiterating that the DOT had complied with the right-to-know law and would retain the withheld documents in their original form.

9. As the foregoing timeline makes clear, the DOT complied with RSA 91-A:4, IV. Contrary to Mr. Walter's assertion, his April 17, 2007 correspondence to DOT did not constitute a request for documents. Rather, the DOT properly construed it as a request to retain documents that may be created in the future regarding DOT's request for a waiver from the FHWA. Mr. Walters's first right-to-know request was dated July 24, 2007. The DOT responded to that request on July 30, 2007, which was within the statutory period of 5 business days. In its response, the DOT advised Mr. Walters that it would assemble the documents and have documents available by September 17, 2007. On August 22 and again on September 13, the DOT provided the requested documents and a list of withheld or redacted documents. Additionally, the DOT responded on November 5, 2007 to Mr. Walters's November 2, 2007 request for any new information. Consequently, this claim should be dismissed.

**Alleged Violation No. 2 – Failure to Disclose
That Documents Were Being Withheld**

10. Mr. Walters alleges that the DOT did not disclose that certain documents were being withheld. This claim should be dismissed for two reasons. First, in its August 22,

2007 and September 13, 2007 letters, the DOT provided its reasons for withholding certain documents. More specifically, the 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. Second, RSA 91-A does not require that the State agency provide a written list of documents that were not disclosed. Rather, an agency withholding records must meet a minimum threshold of disclosure to justify its refusal to disclose. *Murray v. State Police*, 154 N.H. 579 (2006). The agency is not required, however, to justify its refusal to disclose on a document-by-document basis. *Id.* The DOT's responses to Mr. Walters' requests satisfied this standard. Therefore, this claim should be dismissed.

**Alleged Violation No. 3 – Failure to
Provide Reasons For Denying Disclosure**

11. Mr. Walters claims that the DOT did not provide reasons for withholding certain documents. This assertion is incorrect and should be dismissed. As set forth above, the DOT's August 22, 2007 and September 13, 2007 letters provided reasons for withholding certain documents along with the date ranges of the withheld documents. Accordingly, the DOT met the standard set forth in *Murray v. State Police*, 154 N.H. 579 (2006).

**Alleged Violation No. 5 – Limited The Content
Scope of Search for Records Requested**

12. Mr. Walters faults the DOT for the scope of its compilation of records related to his request. This claim lacks merit and should be dismissed. Apparently, Mr. Walters argues that because the DOT worded its August 15, 2007 internal memorandum differently

than Mr. Walters' July 24, 2007 request for documents, the DOT violated RSA 91-A. However, RSA 91-A sets forth the scope of public records available for review, not Mr. Walters, or any other person seeking disclosure. It is clear from the context of Mr. Walters' request to the DOT that he was interested in obtaining copies of records related to the DOT's potential request for a waiver from the FHWA. As such, the DOT properly requested that employees involved with this issue retrieve e-mails after February 13, 2007, which was the date that FHWA first requested clarification from the DOT on the use of ATVs on rail trails. In any case, this argument lacks merit because the DOT released documents dated earlier than February 13, 2007. Further, 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. As the ultimately disclosed documents show, DOT release more than e-mails.

13. 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 e-mail instruct employees to search "Deleted Items, Drafts, Inbox, Notes, Outbox, and Sent Items." Clearly, employees were instructed to search their "deleted" folders.

**Alleged Violation #7 – Failure to Search
or Provide Documents in Response to a Request**

14. 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 Watches’ 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.

Claim for Costs and Attorney Fees

15. RSA 91-A:8, I provides for the award of attorneys fees and costs in a legal action only if the court finds that “such lawsuit was necessary in order to make the information available or the proceeding open to the public. Fees shall not be awarded unless the court finds that the body, agency or person knew or should have known that the conduct engaged in was a violation of this chapter” Even where a lawsuit has been necessary in order to obtain material under RSA chapter 91-A, the court has ruled that the petitioner is not entitled to attorneys’ fees where it was unclear whether an exemption applied prior to the lawsuit. *Professional Firefighter of New Hampshire v. Health Trust, Inc.*, 151 N.H. 501, 507 (2004); *Goode v. New Hampshire Legislative Budget Assistant*, 145 N.H. 451, 455 (2000). Petitioner has made no showing that this lawsuit was necessary in order to obtain the documents requested. Moreover, Petitioner does not and cannot request attorney’s fees, as he is not licensed to practice law in New Hampshire. A *pro se* litigant who is not an attorney cannot take advantage of a statutory provision that allows for attorney’s fees to collect payment for their time. *Emerson v. Town of Stratford*, 139 N.H. 629, 632 (1995); *see also ATV Watch v. New Hampshire Dep’t. of Resources*, 923 A.2d at 1067.

Therefore, Petitioner's requests for attorney's fees and cost should be denied.

WHEREFORE, the State respectfully requests this Honorable Court to:

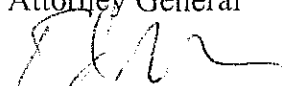
- A. Dismiss alleged violations 1, 2, 3, 5, and 7;
- B. If the Court desires, review the withheld and redacted documents *in camera* to make a determination on their disclosure; and
- C. Grant such further relief as may be just and equitable.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Kelly A. Ayotte
Attorney General

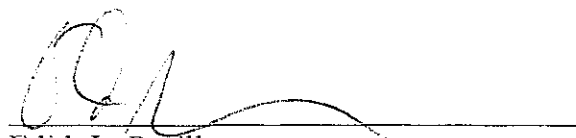


Date: 2/6/08

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

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