The State of New Hampshire

Superior Court

Merrimack County Courthouse
163 North Main Street, P.O. Box 2880
Concord, NH 03302-2880
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No. 05-E-085

ATV Watch

v.

New Hampshire Department of Resources and Economic Development,
Bureau of Trails

ORDER

Before the Court in this Right-to-Know proceeding are issues on remand from the New Hampshire Supreme Court. After hearing and upon review of the parties' submissions and the applicable law, the Court finds and rules as follows.

Background

For purposes of this order, the Court finds the following relevant facts. The petitioner, ATV Watch ("ATV"), is a non-profit New Hampshire entity that monitors the use and development of all-terrain vehicle trails in the State and tracks related legislation. The respondent, the New Hampshire Department of Economic Resources and Development ("DRED"), is the agency statutorily charged with developing, managing, and creating multi-use recreational trails in New Hampshire. See RSA 215-A:2, :3.

In the fall of 2004, DRED entered into negotiations to purchase approximately 7,200 acres of land in the Berlin, New Hampshire area from the landowner, T.R. Dillon Logging. At

the time, DRED was interested in purchasing this land ("the Dillon property") for possible development of multi-use and all-terrain vehicle trails. On November 27, 2004—after learning of the potential purchase—ATV filed its first written Right-to-Know ("RTK") request with DRED, seeking "all information in DRED's possession relating to DRED's 'plan to purchase [land] in northern New Hampshire to develop an ATV park.'" Petr's Hearing Memo., p. 7. On December 1, 2004, DRED responded to this request, noting that due to "matters of confidentiality," no information about the property negotiations could be released until DRED consulted with the Attorney General's office. See Petr's Ex. 4, Doc. B 04. Thereafter, DRED released documents to ATV on four separate occasions—January 6, 2005, January 21, 2005, January 26, 2005, and February 1, 2005—prior to the instigation of this lawsuit.

The January 6, 2005 document production was made after DRED sought advice from counsel at the Attorney General's Office. The accompanying response letter from DRED stated that several documents were being withheld and provided "a list generally explaining the documents that [were] not being produced." See Petr's Ex. 4, Doc. B 06. This list included the following withheld documents: (1) a letter of intent outlining the potential negotiations; (2) a map of the property potentially subject to purchase; (3) an attorney-client privileged memorandum regarding retaining an appraiser; (4) bids from potential appraisers; and (5) notes by Mr. Bill Carpenter regarding the potential property purchase and values. DRED disclosed additional documents on January 21, 2005, and January 26, 2005. The January 26th response letter informed ATV that once an appraisal of the land was performed, the appraisal report would be exempt from disclosure until the State had purchased the property. Neither the January 21st or January 26th letter identified additional documents that DRED was withholding at that time.

The February 1, 2005 document production was accompanied by a detailed response letter. This letter informed ATV that DRED had previously provided all inter-office

communications, including emails, regarding the Berlin purchase. The letter also stated that a redacted copy of the request for proposals ("RFP") was being provided and that the redacted information included potential negotiable terms for the purchase, which were not subject to disclosure under Perras v. Clements, 127 N.H. 603 (1986). DRED further explained that it was withholding the one proposal it received from Heath Appraisal Services, and that it would not provide any redacted copies of the withheld documents identified in its January 6th letter. The conclusion of this February 1, 2005 letter stated that DRED's responses on this date, as well as the three preceding dates, had provided ATV with all publicly available information related to the potential acquisition in Berlin.

On February 14, 2005, ATV instituted this proceeding alleging multiple violations of the Right-to-Know Law. In its petition, ATV asserted that DRED disclosed certain public records in a delayed manner and withheld other documents unlawfully. ATV sought injunctive relief as well as an award of attorney's fees and costs. In April 2005, after conducting a hearing, the trial court (McGuire, J.) issued an order dismissing or denying several of ATV's prayers for relief and requesting additional information with regard to the withheld documents and DRED's claimed exemptions. By the time the trial court held a second hearing, DRED had disclosed all withheld documents. After conducting the second hearing, the trial court dismissed, as moot, the remainder of ATV's petition. In January 2006, ATV filed an appeal with the New Hampshire Supreme Court. The Court ultimately vacated the trial court's order in part and remanded with instructions. See ATV Watch v. N.H. Dep't of Res. and Econ. Dev., 155 N.H. 434 (2007).

In analyzing ATV's Right-to-Know petition, the Supreme Court divided the requested documents into two groups, identified as "category one" and "category two." Id. at 436. Category one includes all of the documents that DRED considered public, but failed to disclose in a timely manner. Id.; see RSA 91-A:4, IV. Category two encompasses the documents which

DRED initially refused to disclose, relying upon certain exemptions under the Right-to-Know Law, RSA 91-A:5, IV, VIII, IX, as well as the decision in Perras. Id. The Supreme Court determined that DRED violated the Right-to-Know Law by its delayed disclosure of category-one documents. In making this determination, the Supreme Court concluded that the trial court erred in its application of the legal standard for assessing costs when the Right-to-Know Law is violated. The Supreme Court noted that, "[e]stablishing that the agency 'knew or should have known' that its refusal constituted a Right-to-Know Law violation is required for an award of legal fees, but not for costs." ATV Watch, 155 N.H. at 439. The Supreme Court further found that the "time period for responding to a Right-to-Know request is absolute," and that the "plain language of the provision does not allow for consideration of the factors applied [originally] by the trial court, such as 'reasonable speed,' 'oversight,' 'fault,' 'harm,' or 'prejudice.'" Id. at 440-441. Thus, DRED's delayed disclosures—regardless of reasons behind the delays—violated the Right-to-Know Law and this Court must now reassess whether ATV is entitled to costs.

Regarding category-two documents, the Supreme Court found that "it was error for the trial court to dismiss as moot the remaining portions of ATV's Right-to-Know petition pertaining to the intentionally withheld documents." Id. at 441. However, the Supreme Court declined to address the lawfulness of DRED's conduct in withholding category-two documents and remanded that issue for this Court's determination.

RSA 91-A, "The Right-to-Know Law"

Part I, Article 8 of the New Hampshire Constitution states:

> All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

RSA 91-A, the Right-to-Know Law, emanates from this constitutional provision. See e.g. Goode v. N.H. Office of the Legislative Budget Assistant, 145 N.H. 451, 453 (2001) and Union Leader Corp. v. N.H. Hous. Finance Auth., 142 N.H. 540, 546 (1997). RSA 91-A mandates that "[a]ll public proceedings shall be open to the public, and all persons shall be permitted to attend any meetings of [public] bodies or agencies." RSA 91-A:2, II (2001). The purpose of the Right-to-Know Law is to "ensure both the greatest possible public access to the actions, discussion, and records of all public bodies, and their accountability to the people." N.H. Civ. Liberties Union v. City of Manchester, 149 N.H. 437, 438 (2003) (quoting RSA 91-A:1 (2001)). The Right-to-Know Law "helps further our State Constitution's requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Id. (quoting Goode v. N.H. Legislative Budget Assistant, 148 N.H. 551, 553 (2002)); see also N.H. Const. pt. I, art. 8.

Pursuant to RSA 91-A:4, IV:

> If a public body or agency is unable to make a public record available for immediate inspection and copying, it shall, within 5 business days of request, make such record available, deny the request in writing with reasons, or furnish written acknowledgment of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied.

If a public entity refuses to provide a public record in violation of statutory provisions, in response to a reasonable request, such entity:

> shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter provided that the court finds that such lawsuit was necessary in order to make the information available . . . . 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 or where the parties, by agreement, provide that no such fees shall be paid.

RSA 91-A:8, I.

"The Right-to-Know Law does not, however, guarantee the public an unfettered right of access to all governmental workings, as evidenced by certain legislatively created exceptions and exemptions." Goode, 148 N.H. at 553. Under the provisions of RSA 91-A, several categories of documents are exempt from disclosure, including the following:

> IV. Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. . . .
>
> VIII. 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.
>
> IX. 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.

RSA 91-A:5 (2007). The Court "resolve[s] questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." Id. at 554 (quotation omitted). "An expansive construction of these terms must be avoided, since to do otherwise would 'allow [ ] the exemption to swallow the rule and is inconsistent with the purposes and objectives of [RSA chapter 91-A].'" Union Leader Corp. v. N.H. Hous. Fin. Auth., 142 N.H. 540, 553 (1997). Thus, the Court "construe[s] provisions favoring disclosure broadly, while construing exemptions narrowly." Id. (citation omitted).

Analysis

On remand, this Court must consider: (1) whether ATV's lawsuit was necessary to make the category-one documents available; and (2) whether DRED violated the Right-to-Know Law by its initial nondisclosure of the category-two documents and, if so, whether the lawsuit was

necessary to secure their disclosure. If the Court finds that the lawsuit was necessary with regard to either category of documents, then ATV will be entitled to an award of costs.

DRED asserts that ATV's lawsuit was unnecessary in making either category-one or category-two documents available. Regarding category-one documents, DRED maintains that despite the initial delay in releasing them, all then-existing category-one documents were released prior to the commencement of ATV's lawsuit in February 2005. DRED further asserts that it did not violate the Right-to-Know Law by withholding the category-two documents. In support of its nondisclosure of category-two documents, DRED makes several arguments. First, DRED contends that the delayed release of the Dillon property appraisal and related documents was proper based on the Supreme Court's decision in Perras as well as exemption pursuant to RSA 91-A:5, IV. Additionally, DRED asserts that it properly withheld or redacted certain category-two documents, including Bill Carpenter's notes, pursuant to other exemptions under RSA 91-A:5, VIII and IX.

ATV asserts that DRED violated the Right-to-Know Law regarding category-two documents and notes that DRED did not provide a list of all withheld documents and corresponding explanations as to which exemption applied to which document. ATV asserts that "DRED cannot rely on a generalized exemption to protect a non-specific group of documents from public access." See Pet'r's Hearing Memo, p. 5, FN4. ATV also contends that DRED violated the Right-to-Know Law because none of the exemptions claimed by DRED are applicable. Furthermore, ATV maintains that the lawsuit and appeal were necessary to make both category-one and category-two documents available. Additionally, ATV presses the following arguments: (1) DRED's classification of all documents was arbitrary; (2) DRED has waived its claim of exemption for any documents other than the "appraisal and related

documents" and Bill Carpenter's notes; and (3) there is a still a question before this Court as to whether DRED has released all documents responsive to ATV's Right-to-Know requests.

As a preliminary matter, the Court concludes that ATV raises several arguments that are either irrelevant or have been properly disposed of in earlier proceedings. As stated during the hearing, the Court will not address arguments that are outside the purview of the issues on remand and the accompanying instructions from the Supreme Court. Accordingly, the Court will address only those arguments that the Court finds relevant to its analysis of the issues on remand.

I. Category-One Documents

Category-one documents are those documents which DRED considered public but which it failed to release in a timely manner. On appeal, the Supreme Court determined that DRED violated the Right-to-Know Law by its delayed disclosure of category-one documents, and remanded for determination of whether ATV's lawsuit was necessary to make the category-one documents available. If this Court finds that the lawsuit was necessary, ATV will be entitled to costs.

At the hearing, DRED asserted that all documents still being withheld prior to ATV's lawsuit were category-two documents, exempt from disclosure under RSA 91-A:5 or the holding in Perras v. Clements. See Petr's Ex. 6, p. 5. DRED further asserted that any category-one documents which ATV alleges were withheld improperly after the filing of the lawsuit included only those category-one documents which were generated at a later date. Although ATV's hearing memorandum and exhibits do not clearly distinguish category-one documents from category-two documents, ATV asserted at the hearing that DRED's interpretation of what constitutes a category-one document is too narrow and that the lawsuit was also necessary to the release of category-one documents generated after the lawsuit was filed.

In its decision, the Supreme Court noted that "[s]ome of the category-one documents were disclosed before ATV filed its petition, but at least one was not." ATV Watch, 155 N.H. at 436. However, the opinion did not identify the category-one document to which it was referring. In light of DRED's assertion that all then-existing category-one documents were released prior to the lawsuit, this Court must make its own assessment of the record in order to determine whether the lawsuit was necessary to the release of any documents falling within the ambit of category one.

Upon review of the record, the Court is not persuaded that ATV's lawsuit was necessary to make the category-one documents available. The only document withheld prior to the lawsuit that clearly falls within category one is a newspaper article from the Berlin Daily Sun that was attached to an email that DRED claims was exempt from disclosure. Given the public availability of newspaper articles, the Court cannot find that the lawsuit was the only manner in which ATV could access the Daily Sun article. The Court notes that a draft property map that was not released until March 17, 2005, might also qualify as a category-one document. See Petr's Ex. 2, Doc. 025. However, the evidence suggests that DRED disclosed the map to ATV because it was also disclosing it to the press. See Petr's Ex. 2, Doc. B 10. Furthermore, the Court notes that although some of the category-one documents generated after institution of the lawsuit were released in a delayed fashion and thus, violated the Right-to-Know Law, there is no clear connection between ATV's lawsuit and the release of those documents. Accordingly, the Court finds that the lawsuit was not necessary to make category-one documents available and thus, ATV is not entitled to costs as to those documents.

II. Category-Two Documents

Category-two documents are those documents that DRED initially refused to disclose, relying upon certain exemptions under the Right-to-Know Law, RSA 91-A:5, IV, VIII, IX,

and/or the Supreme Court's decision in Perras. On remand, this Court must engage in a two-pronged analysis of the category-two documents. First, the Court must ascertain whether DRED's reliance on certain exemptions under RSA 91-A and the holding in Perras was lawful. If the Court determines that DRED violated the Right-to-Know Law by its initial nondisclosure of category-two documents, the Court must then ascertain whether ATV's lawsuit was necessary to secure their disclosure.

DRED maintains that it properly withheld, or delayed disclosure of, all category-two documents in existence prior to ATV's lawsuit. In making this argument, DRED first asserts that the property appraisals and related documents were exempt from disclosure because: (1) the holding in Perras supports a sufficiently compelling interest—namely, ensuring fairness in the State's negotiating processes—to warrant nondisclosure until the completion of negotiations; and (2) even if Perras and the compelling interest analysis are inapplicable, nondisclosure is warranted by RSA 91-A:5, IV, which exempts financial information.

Upon review of the documents that DRED withheld from disclosure, the Court finds that a number of category-two documents were withheld unlawfully in violation of RSA 91-A, including documents related to the appraisal, and to the meetings that occurred in connection with the transaction.[1]

In Perras, the plaintiff sought copies of appraisal reports prepared by the State in connection with condemnation proceedings involving his own property as well as those of neighboring property owners. 127 N.H. at 603. In holding that the plaintiff could not access the appraisal reports involving other property owners, the Supreme Court applied a balancing test "to determine whether the benefits of disclosure outweigh the benefits of nondisclosure." Id. at 605

[1] Because the Court has found a number of violations, it is not necessary for the Court to make rulings on each of the disputed documents.

(citing Mans v. Lebanon School Bd., 112 N.H. 160, 162 (1972)). The Supreme Court found that "there is less potential to benefit an individual property owner whose land is subject to condemnation, by allowing public access to the State's appraisal reports, than there is a potential to benefit the general public and the plaintiff by enforcing nondisclosure." Id. "An appraisal report may contain information about incomeproducing [sic] property, security systems, or trade practice, which an individual property owner expects to be private or confidential." Id. at 606. Furthermore, the court noted that "the disclosure of information regarding the range of offers of compensation available to the State would put the property owner in an unfair bargaining position. . . . [which is not] the intent of the New Hampshire Constitution or of the right-to-know law." Id.

Soon after the Supreme Court's decision in Perras, the New Hampshire Attorney General's Office issued an opinion addressing the question of whether contract negotiation meetings between the State and the private sector are open to the public within the meaning of RSA 91-A. See 1987 N.H. AG LEXIS 9. In support of a conclusion that they are not, the opinion states that "[p]ublic exposure would likely prolong negotiations and damage the procedure of compromise as well as inhibit the free exchange of views and freeze negotiators into fixed positions from which they could not recede without lost face." Id. at *4 (citations and internal quotations omitted). The opinion further states that there is a need to avoid such potential chilling effects found in negotiations between a private contractor and the State because it "could result in 'the destruction of the very process [right-to-know] was attempting to open to the public.'" Id. at *4-5 (citation omitted). "Right-to-know does not necessarily require the State to be placed at a disadvantage when bargaining with the private sector." Id. at *5 (citing Perras, 127 N.H. at 605-06).

ATV contends that Perras does not apply to the appraisal or any other document withheld by DRED because, unlike here, Perras involved eminent domain proceedings in which only the State had an interest. Additionally, ATV asserts that the balancing of public and private interests compels a different conclusion here.

Assuming that Perras applies to property appraisals and related documents outside of the eminent domain context, the Court is not persuaded that the Perras court intended to establish the breadth of nondisclosure protection that DRED asserts here. Perras does not create a categorical exemption for all documents related to property appraisals. In arguing that Perras applies to a number of appraisal-related documents, DRED's main assertion is that the "State would be at a severe disadvantage in the bargaining process if it had to reveal everything that it knows about the value of land during negotiations." See Respt's Hearing Memo., p. 5. However, the Court finds that not all of the "related documents" would compromise or unfairly disadvantage the State if disclosed prior to or during negotiations.

For example, on February 1, 2005, DRED released a redacted copy of its letter soliciting proposals ("RFP letter") for the Berlin property appraisal. See Petr's Ex. 9, Doc. No. 024. DRED's accompanying response letter to ATV stated that, "[t]he information that was redacted includes potential negotiable terms for the purchase, which are not required to be disclosed in accordance with the Perras case." Petr's Ex. 4, Doc. No. B 09, Letter from Chris Garnache. On October 31, 2005, DRED released the unredacted copy of the RFP letter, which disclosed the previously redacted information to include the following:

> A condition of the proposed sale is that for five (5) years from the date of closing, Dillon would be allowed to remove any and all marketable timber and to utilize, on or off the Property, an unlimited amount of gravel from existing gravel pits only depicted on the attached map.
>
> Phased over several years, DRED plans to purchase the property with state money and possibly a federal "Land Water Conservation Grant".

> Enclosed is a sketch map of the target Property.
>
> . . . as depicted on the attached map, with the owner holding the right to remove all timber and gravel within a five (5) year period after closing.

Petr's Ex. 9, Doc. No. 068. ATV argues, and the Court agrees, that the information about the property map redacted by DRED was withheld improperly. The Court must "construe provisions favoring disclosure broadly, while construing exemptions narrowly." Goode, 148 N.H. at 554. (citation omitted). Nothing in Perras or RSA 91-A:5 creates an exception to the disclosure of the mere existence of a map. While a copy of the map itself might be exempt from disclosure as a draft document, see RSA 91-A:5, IX, the Court cannot find that DRED lawfully withheld information about the existence of the map.

In the alternative, DRED asserts that it properly withheld the appraisal and related documents pursuant to RSA 91-A:5, IV, which provides in relevant part that records pertaining to "confidential, commercial, or financial information" as well as "other files whose disclosure would constitute invasion of privacy" are exempt from the provisions of RSA chapter 91-A. More specifically, DRED maintains that the balancing test used in Right-to-Know cases weighs in favor of nondisclosure. ATV contends that there are no significant privacy issues at stake and that none of the exemptions under RSA 91-A:5, IV applies to the appraisal or the related documents.

"The Right-to-Know Law specifically exempts from disclosure 'files whose disclosure would constitute invasion of privacy.'" Lamy v. N.H. Public Utilities Comm'n, 152 N.H. 106, 109 (2005) (quoting RSA 91-A:5, IV). "This section of the Right-to-Know Law means that financial information and personnel files and other information necessary to an individual's privacy need not be disclosed." Id. (citation and internal quotation omitted).

When considering whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV, the Court must engage in a three-step analysis. Id. (citation omitted). First, the Court must "evaluate whether there is a privacy interest at stake that would be invaded by disclosure." Id. (citation omitted). If the Court finds that no privacy interest is at stake, then the Right-to-Know Law mandates disclosure. Id. (citation omitted). Second, the Court must assess the public's interest in disclosure. Id. (citation omitted). "Disclosure of the requested information should inform the public about the conduct and activities of their government." Id. (citation omitted). Third, the Court must "balance the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure." Id. (citation omitted).

DRED asserts that the appraisal and related documents were properly withheld because the landowner with whom DRED was negotiating had a privacy interest in "what the potential value of its land is, including its commercial value such as timber values and other development potential." DRED's Hearing Memo., p. 8. DRED also contends that prior to filing its petition, ATV had all the basic information about what DRED—the government—was doing with regard to the Berlin property. DRED asserts that the only information that ATV could have gained from the release of the appraisal and related documents was the actual value of the property, which is the landowner's private financial information. Finally, DRED contends that the final step of the balancing test "shows that the invasion of privacy of the landowner as to its private financial information as well as the compelling interest to the State to not be placed in an unfair bargaining position outweigh any interest the public has in this information during negotiations." Respt's Hearing Memo., p. 9.

Again, the Court finds that DRED seeks to apply the exemption under RSA 91-A:5, IV too broadly. This is exemplified by the redacted RPF letter discussed above. The Court further

notes that references in the RFP letter about the property map as well as certain other redacted portions convey no personal information about the landowner and convey no information which would expose the State to the risk of unfair bargaining.[2] DRED cannot claim a general exemption for documents that are associated with the appraisal which contain no private information about the financial or negotiable terms/conditions related to it, nor can it disclose public documents only after redacting information it deems "generally exempt."

The Court has identified other documents that DRED improperly withheld. For example, DRED claims that the minutes from several Park Land Management Team ("PLMT") meetings were not subject to disclosure. See Petr's Ex. 2, Doc. Nos. 090, 094, 099. Although DRED does not clearly identify which exemption warrants nondisclosure, the Court finds no applicable exemptions under RSA 91-A:5 or Perras. On February 1, 2005, DRED responded to ATV's January 25th Right-to-Know request with a letter that stated the following:

1. You have been provided with all inter-office communications, including e-mails, that DRED has on this matter. DRED confirmed in its January 21, 2005, letter to you that there are no other e-mails in existence and there are none that have been deleted.

2. There are no meeting agendas or minutes related to this matter, other than the October 21, 2004, Statewide Trails Advisory Committee meeting, at which you were present.

Petr's Ex. 4, Doc. B 09, Letter from Chris Gamache. In October 2005, DRED produced numerous documents to ATV, including the minutes of three PLMT meetings that occurred in September, October, and November of 2004. At each of these three meetings, held prior to the institution of this proceeding, there were discussions about the Dillon property acquisition. Although the minutes of these meetings were apparently not in DRED's "official" file regarding this project, see Respt's Ex. A, the Court is not persuaded that DRED was unaware of these

[2] The Court acknowledges that the RFP letter's references to conditions of the proposed sale were properly redacted. However, the Court is not persuaded that reference to the State's plan to purchase the property with State money and a possible federal grant warranted redaction.

documents. The February 1st response letter was written by Chris Gamache, the Program Specialist for the Trails Bureau at that time. The PLMT meeting minutes indicate that a representative from the Trails Bureau attended each of these three meetings, and Mr. Gamache himself was present at the November 2004 meeting. Additionally, the Court notes that at least two emails were sent between DRED employees following up on an issue raised at the September 21, 2004 PLMT meeting. See Petr's Ex. 2, Doc. 092, Email from Bob Spoerl. The Court finds that DRED's responses concerning the PLMT meeting minutes violated the Right-to-Know Law. DRED had the obligation to timely produce the minutes. (The Court notes by way of contrast that on October 18, 2005, DRED responded to an October 13, 2005 request by ATV by releasing various documents, including PLMT minutes from meetings held in May, July, and September of 2005.)

Thus, the Court finds that DRED violated the Right-to-Know Law by improperly withholding a number of category-two documents. The Court further finds that, under all the circumstances, ATV's lawsuit was necessary to the disclosure of those category-two documents that DRED improperly withheld. Accordingly, ATV is entitled to an award of costs.

ATV asserts that there is still a question before this Court as to whether DRED has released all documents responsive to ATV's Right-to-Know petition. However, the Supreme Court has found that "[t]he parties agree that all of the documents ATV identified in its petition now have been released." ATV Watch, 155 N.H. at 437 (2007). ATV contends that it is more probable than not that DRED has continued to withhold public documents which ATV has not been able to specifically identify but which are responsive to ATV's Right-to-Know requests. The Court finds that this asserted issue exceeds the scope of the remand and declines to address it.

Because ATV was represented by counsel during this remand proceeding, the parties agreed that the Court should consider the issue of attorney's fees if appropriate. Upon consideration of the entire record in this matter, the Court finds that DRED knew or should have known that many of its responses as to category-two documents were in violation of the Right-to-Know Law. Accordingly, ATV is entitled to reasonable attorney's fees, as well as costs. ATV shall, within 30 days, submit for the Court's review an itemization of its requested attorney's fees and costs. DRED shall then have 10 days to file any objection or response and the Court shall thereafter rule on the request without further hearing.

So ordered.

Date: Sept 25, 2008

Carol Ann Conboy

CAROL ANN CONBOY
Presiding Justice