State of New Hampshire
Supreme Court

NO. 2009-0788

2010 TERM

JUNE SESSION

ATV-Watch, &a.

v.

New Hampshire Department of Transportation

RULE 7 APPEAL OF FINAL DECISION OF
MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF PLAINTIFF/APPELLANT ATV-WATCH

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

OTHER SOURCES

QUESTIONS PRESENTED

1. Was DOT's document search unlawfully narrower than ATV-Watch's Right-to-Know request?
   Preserved in Petition for Declaratory Judgment, Injunctive Relief, Fees, Costs and Sanctions

2. Did DOT unlawfully withhold documents that were immediately available?
   Preserved in Petition for Declaratory Judgment, Injunctive Relief, Fees, Costs and Sanctions

3. Were the reasons DOT provided for withholding records unlawfully unspecified?
   Preserved in Petition for Declaratory Judgment, Injunctive Relief, Fees, Costs and Sanctions

4. Should records withheld as drafts, notes, and privileged, nonetheless have been timely disclosed?
   Preserved in Petition for Declaratory Judgment, Injunctive Relief, Fees, Costs and Sanctions

5. Was the Vaughn index insufficient to provide the court information necessary to make determinations required under the Right to Know law?
   Preserved in Motion to Reconsider Vaughn Index

6. Should ATV-Watch have been allowed discovery so it could provide the court information necessary to make determinations required under the Right to Know law?
   Preserved in Motion to Extend Proceedings

7. Should the court have awarded fees and costs?
   Preserved in Petition for Declaratory Judgment, Injunctive Relief, Fees, Costs and Sanctions

STATEMENT OF FACTS

I. Reinterpretation of Federal Law: ATVs = Snowmobiles

All terrain vehicles (ATVs) are four-wheeled motorized vehicles with powerful engines and aggressive tires designed for travel over rough terrain. Although ATVs are fun, they are controversial because they are loud, cause severe erosion, and are dangerous to pedestrians, bicyclists, and equestrians. *See e.g.*, Press Release, N.H. Fish & Game Dep't, *Sandown Woman Killed in Weekend ATV Accident* (Oct. 26, 2009) (ATV rider died avoiding jogger and bicyclist).

ATV-Watch, the petitioner here, is a non-profit advocacy organization incorporated in New Hampshire, who monitors the use of ATVs on public lands and provides education relating to their use. See <www.atvwatch.com>.

In New Hampshire there are approximately 275 miles of abandoned rail corridors that were purchased by the New Hampshire Department of Transportation (DOT) using federal Transportation Enhancement (TE) grants, which are administered by the Federal Highway Administration (FHWA). The corridors have been converted into recreational trails and are managed by the New Hampshire Department of Resources and Economic Development (DRED). TE grants are intended for development of bicycle and pedestrian facilities and thus federal law stipulates that "snowmobiles" are the only motorized use allowed.

For many years after New Hampshire purchased the corridors DOT and DRED recognized that federal law prohibited using ATVs on them. LETTER FROM DRED TO TROY POLICE (Aug. 23, 1995), *Appx.* at 257. DRED even went so far as to say "anyone riding on them is operating illegally and should be prosecuted." LETTER FROM DRED TO NH FISH & GAME

(March 21, 1996), *Appx.* at 256.[1] But starting in the late 1990s DOT and DRED "reinterpreted" federal law and allowed ATVs on the trails during the winter by calling them "snow-traveling vehicles." *Snowmobilers Don't Want ATVs on Trail*, Keene Sentinel (Dec. 7, 1998), *Appx*. at 258. This was motivated, at least in part, by DRED, which has an interest in promoting ATVs because it receives dedicated funding from their registration fees. RSA 215-A:23, I.

In January 2007 ATV Watch contacted the Federal Highway Administration (FHWA) and inquired about ATVs on TE-funded projects. LETTER FROM ATV-WATCH TO FHWA (Jan. 16, 2007), *Appx.* at 42. FHWA wrote back saying ATVs were not allowed, and followed up with a letter to DOT and DRED citing the ban. LETTER FROM FHWA TO DOT (Feb. 13, 2007), *Appx.* at 59. In response DOT and DRED applied to FHWA for a waiver seeking to allow ATVs on the trails in winter. LETTER FROM DOT TO FHWA (July 30, 2007), *Appx.* at 159; LETTER FROM DRED TO FHWA (July 17, 2007), *Appx.* at 150.

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[1]In its initial petition ATV-Watch identified each document by number, and urged the State to follow its nomenclature. The State declined, and its *Vaughn* index contain page numbers, but no discernable identification system. Thus, in its order ruling on most of the disputed documents, the court hand-wrote a lettering system to identify them, from A through BB. ORDER (with attachment) (Aug. 21, 2008), *Appx*. at, 379, 386. To the extent possible this brief uses the court's lettered references.

There are four additional documents, however, that are not part of that system. As explained *infra*, three were provided to ATV-Watch after commencement of this suit and are not included on the *Vaughn* index. They were identified by the State as "A," "B," and "C." A fourth was independently procured by ATV-Watch and is called "D" in the record.

There are three appendices to this brief contained in two volumes. Appendix 1 is in the front of the first volume, and contains ATV-Watch's RTK requests and DOT's responses. Appendix 2 starts on page 21 of the first volume, and contains the records released by government entities, arranged chronologically. Each record contains notations, added by ATV-Watch for this Court's convenience. The notations identify the date the record was released, correlates each record with the superior court's A through BB lettering system, and also correlates each record with the numbering system used by ATV-Watch in its initial petition.

Appendix 2 in the first volume also contains a copy of the State's *Vaughn* index which has been extensively marked-up for the purpose of this brief. *See*, MARKED-UP *VAUGHN*, *Appx.* at 22. It attempts to accurately correlate each record with both identification systems as well as the lower court's reasons for denying disclosure.

Appendix 3 is in the second volume. It is the superior court record comprising pleadings and orders relevant to this appeal.

II. Right to Know Requests, Documents Disclosed, Documents Withheld

ATV-Watch then filed Right-to-Know requests to acquire the documents pertaining to the issue in an effort to educate the public and the New Hampshire Legislature, which had bills introduced in both houses prohibiting ATVs on rail-trails and mooting the request for a federal waiver. Although the bills did not pass, the agency waiver initiative was essentially killed.

On February 23, 2007, ATV-Watch sent a letter to DOT asking if DOT had any information tending to disabuse ATV-Watch of its belief that DOT was allowing ATVs to use TE-funded rail trails in violation of state and federal law. LETTER FROM ANDREW WALTERS, ATV-WATCH, TO MURRAY, COMM'R, DOT (Feb. 23, 2007), *Appx*. at 1. DOT replied that ATV-Watch's communications had prompted DOT to "examine the issue of ATV use in winter conditions," and promised to respond substantively by the end of March. LETTER FROM BRILLHART, ASS'T COMM'R, DOT TO WALTERS (Mar. 7, 2007), *Appx*. at 2.

On April 17, ATV-Watch emailed DOT following up on DOT's promise to forward information. The email constituted a RTK request in which ATV-Watch asked DOT to retain documents and make copies available. EMAIL FROM WALTERS TO BRILLHART (April 17, 2007), *Appx*. at 3. On July 24 ATV-Watch again wrote to DOT, renewing its request and asking to access documents it had previously requested DOT retain. ATV-Watch also specified that if any documents were partially withheld, to disclose the non-secret portions "even if those parts only identify a topic or party to whom the document was circulated." LETTER FROM WALTERS TO BRILLHART (July 24, 2007), *Appx*. at 4.

On July 30 DOT acknowledged ATV-Watch's RTK request. By letter DOT told ATV-Watch it would make the documents available by "September 17, 2007." LETTER FROM

BRILLHART TO WALTERS (July 30, 2007), *Appx*. at 5. The next day ATV-Watch wrote a letter thanking DOT for its reply, but emphasizing that DOT's anticipated 45 day delay is a violation of the RTK statute. On that same day Mr. Walters appeared at DOT and retrieved documents from the agency's files. *See* LETTER FROM WALTERS TO MADDALI, DOT (Aug. 6, 2007), *Appx*. at 7.

On August 22 DOT wrote to ATV-Watch indicating the agency would release additional documents by the September 17 date it had chosen, but indicating some would not be disclosed which contained preliminary drafts and personal notes, or were privileged. LETTER FROM BRILLHART TO WALTERS (Aug. 22, 2007), *Appx*. at 8. On August 31 ATV-Watch wrote to DOT thanking the agency for its help but also protesting the non-disclosures. LETTER FROM WALTERS TO BRILLHART (Aug. 31, 2007), *Appx*. at 10.

On September 13 DOT wrote a letter denying ATV-Watch's protest and alerting ATV-Watch that some documents were available for viewing. LETTER FROM BRILLHART TO WALTERS (Sept. 13, 2007), *Appx*. at 11. On September 21 Mr. Walters retrieved documents at DOT.

On November 2 ATV-Watch renewed and updated its requests for records, protested the lack of full disclosure stemming from earlier correspondence, and re-requested documents that had been withheld. LETTER FROM WALTERS TO BRILLHART (Nov. 2, 2007), *Appx*. at 13. ATV-Watch also asked for "any governmental records generated in the processing of this or my previous Right-to-Know requests and make those available for review." *Id.*

On November 5, DOT wrote to ATV-Watch briefly informing that all disclosable records had been released. LETTER FROM BRILLHART TO WALTERS (Nov. 5, 2007), *Appx*. at 15.

On November 21 ATV-Watch wrote a comprehensive letter to DOT identifying a variety of generalized and specific gaps in DOT's responses, and requesting that they be filled. LETTER

FROM WALTERS TO BRILLHART (Nov. 21, 2007), *Appx*. at 16.

ATV-Watch explained to DOT that "[t]ime is of the essence" in its request because there was then a "bill before the legislature dealing with the issue of ATV use on the TE funded rail trails," and that the documents it sought were necessary so the public could effectively communicate with the legislature regarding DOT's change in position on those matters, and what lead to "the decision to ask the Federal Highway Administration for a waiver to allow ATVs on the rail trails." *Id.*

On December 28, DOT declined to comply with ATV-Watch's requests. LETTER FROM BRILLHART TO WALTERS (Dec. 28, 2007), *Appx*. at 19.

STATEMENT OF THE CASE

Not satisfied with the responses it received from DOT, ATV-Watch consulted with New Hampshire attorney Arthur Cunningham. ATV-Watch drafted its RTK petition with the aid of Attorney Cunningham's review and advice. In January ATV-Watch filed a Right to Know action in the Merrimack County Superior Court. PETITION FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF, FEES, COSTS, AND SANCTIONS PURSUANT TO RSA 91-A:7 AND 8 (Jan. 24, 2008), *Appx*. at 191. ATV-Watch alleged that DOT released some documents late, and others not at all. It alleged that for the documents or portions of documents not released, no reasons were given for withholding, and when statutory exemptions were claimed they were either insufficient or inapplicable. ATV-Watch alleged that at least some of the explanation for these problems was that the information collection net cast among DOT officials in response to ATV-Watch's request was worded more narrowly than ATV-Watch's own RTK request, thus providing less

information than ATV-Watch sought.

ATV-Watch's petition sought documents, a declaration that DOT violated the RTK law in various respects, an order rescinding DOT's plea for a FHWA waiver which were the subject of the non-disclosed documents, an injunction from further violations, costs, and attorneys fees. ATV-Watch's petition detailed each of the documents that had been disclosed, listed those that had been withheld in part or entirely, and referred to documents it knew about (because they had been alluded to and named in documents that had been released) but which remained secret. *See* PETITION (Exh. M), *Appx.* at 212.

DOT denied any RTK violations, and denied liability for fees and costs. ANSWER TO PETITION FOR DECLARATORY JUDGMENT (Feb. 6, 2008), *Appx*. at 217; PARTIAL MOTION TO DISMISS (Feb. 6, 2008), *Appx*. at 229; HEARING MEMORANDUM (Feb. 6, 2008), *Appx*. at 222. It claimed that all requested documents were either timely disclosed or properly withheld.

The Merrimack County Superior Court (*Philip P. Mangones*, J.) held a hearing on February 11, 2008. ATV-Watch was represented by its non-lawyer principle, Andrew Walters. Mr. Walters explained each of the violations based on the documentary evidence he possessed at the time. He noted the State had not provided a sufficient list of documents withheld or reasons for the withholdings. FEB. 11 TRN. at 13-17; ATV WATCH HEARING MEMORANDUM (Feb. 19, 2008), *Appx*. at 237. Mr. Walters suggested the court order such a list and conduct an *in camera* review using the list and the withheld documents. FEB. 11 TRN. at 16-17. Mr. Walters gave the court copies of all documents and expurgated documents he had received from DOT, including stand-in pages to indicate known but undisclosed documents. FEB. 11 TRN. at 16.

The State provided mostly legal and policy arguments. It also gave to the court under seal

the withheld and unexpurgated documents. FEB 11 TRN. at 46-47; LETTER FROM PACILLO TO COURT (Feb. 13, 2007), *Appx*. at 236. At no time did the State indicate it had witnesses available or that it was making offers of proof based on what alleged witnesses might say if they testified. The State did not offer ATV-Watch an index of withheld material, the reasons for withholding, or the role any potential witnesses had concerning these matters.

In response to Mr. Walters arguments during the hearing DOT acknowledged it possessed three documents within the scope of ATV-Watch's RTK requests which it had not previously released, and agreed to provide them to ATV-Watch.

Because ATV-Watch viewed DOT's failures as relatively apparent, it requested summary judgment with regard to some of the documents, ATV-WATCH MOTION FOR PARTIAL SUMMARY JUDGMENT (Feb. 19, 2008), *Appx*. at 266, and objected to the State's motion to dismiss. ATV WATCH OBJECTION TO DOT'S MOTION TO DISMISS (Feb. 19, 2008), *Appx*. at 282. ATV-Watch also requested access to the under-seal documents the State had provided the court, as well as an index to them which had been prepared by the office of the Attorney General. ATV WATCH MOTION FOR ACCESS TO THE DOCUMENTS PROVIDED TO THE COURT BY THE ATTORNEY GENERAL AND MOTION THAT THESE DOCUMENTS BE INCORPORATED AS PART OF THE COURT RECORD (Feb. 29, 2008).

Shortly after the hearing and these filings, the court issued an order. It held that "with the exception of some recently located materials, [DOT] has provided [ATV-Watch] with the requested documentation with the exception of certain redacted or withheld materials which DOT asserts to be non-public either because they are exempt from disclosure or because they are privileged." ORDER ON ATV WATCH MOTION FOR ACCESS TO DOCUMENTS PROVIDED TO THE

COURT BY THE ATTORNEY GENERAL AND MOTION THAT THESE DOCUMENTS BE INCORPORATED AS PART OF THE COURT RECORD (Feb. 19, 2008), *Appx*. at 290. The court noted that the State had provided documents under seal for an *in camera* review, along with an index "which appears to be in the nature of a *Vaughn* index." *Id.* The court ordered the documents to remain sealed, but allowed ATV-Watch access to the *Vaughn* index and solicited a response from ATV-Watch regarding the contents of the index. *Id.*

The State asked for reconsideration of the order giving ATV-Watch access to the index. MOTION TO RECONSIDER ORDER ON ATV WATCH MOTION FOR ACCESS (Feb. 25, 2008), *Appx*. at 296. ATV-Watch indicated it needed the index because without it there would be no basis to verify whether the State provided the court with all relevant documents. PLAINTIFF'S MEMORANDUM CONTRA DEFENDANT'S MOTION TO RECONSIDER THE COURT'S ORDER TO PROVIDE PLAINTIFFS A COPY OF THE VAUGHN INDEX (Mar. 5, 2008), *Appx*. at 307. ATV-Watch's attorney, Arthur Cunningham, filed an appearance on its behalf. ENTRY OF APPEARANCE (Mar. 1, 2008), *Appx*. at 304.

The State filed a motion requesting the court strike several of ATV-Watch's pleadings on a variety of grounds. OBJECTION AND MOTION TO STRIKE SUMMARY JUDGMENT (Feb. 25, 2008), *Appx*. at 299.

The court denied the parties various claims for summary judgment and dismissal, ordered disclosure of the *Vaughn* index, and indicated it would undertake an *in camera* review of the index and documents. ORDER (Mar. 19, 2009), *Appx*. at 317.

ATV-Watch received the State's *Vaughn* index. INDEX OF WITHHELD AND REDACTED DOCUMENTS (undated; forwarded by letter, Mar. 26, 2008), *Appx*. at 324. ATV-Watch noted,

however, that the index lacked key information necessary both to determine comprehensiveness, and to evaluate the State's claims of exemption and privilege. PLAINTIFF'S OBJECTION TO DEFENDANT'S INDEX OF WITHHELD AND REDACTED DOCUMENTS (Apr. 18, 2008), *Appx*. at 327.

To fill in what the index lacked, ATV-Watch commenced discovery – it propounded interrogatories and made requests for documents. INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS (May 12, 2008), *Appx*. at 340; MOTION TO COMPEL RESPONSE TO INTERROGATORIES (May 23, 2008), *Appx*. at 351. ATV-Watch also asked the court for an evidentiary hearing on "the adequacy of the defendant's index," the factual basis for some of the non-disclosures, whether privileges were claimed for documents which had been disclosed outside of the privileged relationship, and on attorneys fees. REQUEST FOR EVIDENTIARY HEARING (May 13, 2008). The state replied claiming that RTK cases are exempt from discovery, and sought a protective order to shield it from "annoyance, embarrassment, oppression or undue burden or expense." MOTION FOR PROTECTIVE ORDER (May 14, 2008), *Appx*. at 348; OBJECTION TO REQUEST FOR EVIDENTIARY HEARING (May 19, 2008), *Appx*. at 349;RESPONSE TO MOTION TO COMPEL (May 29, 2008), *Appx*. at 361.

In June the court heard argument on these matters. *See* JUNE 24 TRN., *passim*, and issued an order requiring the State to file a more suitable *Vaughn* index. ORDER (June 24, 2008), *Appx*. at 368. It also allowed ATV-Watch to extend the proceedings if it believed further discovery was necessary after the court initially ruled.

Also in July the State re-filed both its *Vaughn* index and the sealed documents. COURT-ORDERED INDEX OF WITHHELD AND REDACTED DOCUMENTS (undated; forwarded by letter, July 23, 2008), *Appx*. at 375. The court conducted an *in camera* review of them. It found most

documents were exempt from disclosure, but also found that two were contingent on whether they had been circulated, and a third was not exempt in part. ORDER (Aug. 21, 2008), *Appx*. at 379. As part of its August 21 Order, the court marked up a copy of the State's *Vaughn* index with letters A through BB to identify what documents its order referred to. The court identified three exemptions – documents exempted as "preliminary drafts" pursuant to RSA 91-A:5, IX; documents exempted as "notes" pursuant to RSA 91-A:5, VIII; and documents exempted as privileged.

ATV-Watch accepted the court's February 21 invitation and filed a motion to extend the proceedings to conduct discovery. ATV-Watch it also issued a second set of interrogatories and requests for production of documents. MOTION TO EXTEND PROCEEDINGS TO ENGAGE IN DISCOVERY (Sept. 17, 2008), *Appx*. at 389.

The State objected and ATV-Watch filed a reply. OBJECTION TO PLAINTIFF'S MOTION TO EXTEND PROCEEDINGS TO ENGAGE IN DISCOVERY OR CROSS-MOTION TO STRIKE (Sept. 17, 2008), *Appx*. at 414; REPLY TO OBJECTION TO PLAINTIFF'S MOTION TO EXTEND PROCEEDINGS TO ENGAGE IN DISCOVERY (Sept. 30, 2008), *Appx*. at 417.

The court held a hearing during which ATV-Watch explained its and the court's need for further information and evidence. DEC. 23 TRN., *passim.* Following that, the court issued an order denying ATV-Watch further discovery. ORDER (Feb. 23, 2009), *Appx*. at 423.

As a number of issues were still outstanding, ATV-Watch filed a pleading pointing out the various instances in which it believed DOT had violated the RTK, and asked for a final order, to which the State objected. MOTION FOR FINAL ORDER (Mar. 23, 2009), *Appx*. at 428; STATE'S OBJECTION AND MOTION TO STRIKE PLAINTIFF'S MOTION FOR FINAL ORDER (Mar. 26, 2009),

Appx. at 436.

In June 2009 the court issued an order inviting further pleadings. ORDER ON PLAINTIFF'S MOTION FOR FINAL ORDER (June 18, 2009), *Appx*. at 447. Both parties filed requests for findings and rulings. Finally, in September 2009 the court issued an order disposing of all remaining issues. ORDER (Sept. 18, 2009), *Appx*. at 472. ATV-Watch appealed.

SUMMARY OF ARGUMENT

After briefly discussing the policy background for which the Right-to-Know plaintiff here sought government records, ATV-Watch shows that the New Hampshire Department of Transportation artificially restricted the scope of its document search. It then explains that although DOT claimed some documents were exempted, it did not provide a comprehensive list of non-disclosures or correlate them with specific exemptions, in violation of the RTK act. ATV-Watch also shows that DOT provided documents past the time specified in the law.

ATV-Watch then cites the law requiring RTK exemptions be narrowly construed, but argues the lower court allowed DOT to keep documents secret behind expansive construction of exemptions for "preliminary drafts," "personal notes," and attorney privileges. It also argues that the *Vaughn* index claiming these exemptions did not contain information necessary for the court to apply the exemptions or to determine whether they were waived. ATV-Watch then explains that the court did not allow it to conduct discovery necessary to fill these gaps.

Finally, ATV-Watch details the documents that were released after ATV-Watch sued, and how the litigation forced disclosure after it had an attorney, such that the court should have awarded fees and costs.

ARGUMENT

I. Scope of Agency Search Was Too Narrow

ATV-Watch's July 24, 2007 RTK request sought "*all governmental records* in the custody or control of the Department of Transportation (DOT) related to motorized use of New Hampshire's TE funded rail trails." LETTER FROM WALTERS TO BRILLHART (July 24, 2007), *Appx*. at 4 (emphasis added).

Three weeks after ATV-Watch's RTK request, the DOT circulated an email memo inside the agency in an attempt to assemble documents to respond to the request. The memo said:

> We need to retrieve and isolate relevant related e-mail. "Relevant" in this case means anything that was considered in the discussion process in responding to the Federal Highway Administration letter of February 13, 2007. As such we are interested in e-mail correspondence after February 13, 2007 (date of FHWA letter requesting clarification on the use of ATVs).…
>
> Attached are instructions to follow. This should be done for your main mailbox and any archive folders you have.…

EMAIL FROM MADDALI TO ROTH (Aug. 15, 2007), *Appx.* at 183.

This memo did not reflect the scope of ATV-Watch's RTK request in two ways.

First, it limited the scope of the agency's internal search to "e-mail correspondence," whereas ATV-Watch sought "all governmental records."

Second, the memo limited the agency's search to documents "after February 13, 2007" which was the "date of FHWA letter requesting clarification on the use of ATVs." ATV-Watch had first raised the issue with FHWA of ATVs regarding TE-funded rail-trails in early January 2007, and knew FHWA had been in contact with DOT immediately thereafter. *See*, DOT MEMORANDUM FROM JAMESON TO CASS (Jan. 8, 2007), *Appx*. at 27; LETTER FROM ATV-WATCH

TO FHWA (Jan. 16, 2007), *Appx.* at 42.

ATV-Watch sought the documents generated in the January exchange, before February 13, when FHWA formally contacted DOT regarding ATV use on the rail-trails.

The artificial limits DOT placed on its internal document retrieval – whether inadvertently or with intent – guaranteed that ATV-Watch would not get the information in which it was interested and to which it had a constitutional and statutory right. It appears the court did not address the issue. Nonetheless, this Court should rule DOT unlawfully limited the scope of its search.

II. DOT Withheld Documents that were Immediately Available

The Right to Know law requires that the government "shall … make available . . . public record[s] within its files when such records are immediately available." If it is "unable to make a … record available for immediate inspection … 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." RSA 91-A:4, IV.

> The time period for responding to a Right-to-Know request is absolute. The statute mandates that an agency make public records available when they are immediately available for release, or otherwise, it must within five business days of the Right-to-Know request: (1) make the records available; (2) deny the request in writing with reasons; or (3) acknowledge receipt of the request in writing with a statement of the time reasonably necessary to *determine whether the request will be granted or denied*. The plain language of the provision does not allow for consideration of … factors … such as "reasonable speed," "oversight," "fault," "harm," or "prejudice."

ATV Watch v. DRED, 155 N.H. 434, 440-441 (2007) (emphasis removed, emphasis added).

On April 17, 2007 ATV-Watch requested documents from DOT related to a "work around" of the federal rules banning ATVs on federally funding rail trails. EMAIL FROM WALTERS TO BRILLHART (April 17, 2007), *Appx*. at 3. ATV-Watch received no reply. On July 24, ATV-Watch again made a request, which was more general in that it sought "all … records … related to motorized use of New Hampshire's TE funded rail trails." LETTER FROM WALTERS TO BRILLHART (July 24, 2007), *Appx*. at 4. This time ATV-Watch got a reply, stating:

> We have started assembling the information pertaining to your request. Given available resources and the scope of your request, we anticipate having the "public records" available to you, as you have requested by September 17, 2007.

LETTER FROM BRILLHART TO WALTERS (July 30, 2007), *Appx*. at 5.

Five business days after ATV-Watch's request would have been July 30. But the internal DOT email undertaking to gather the records which ATV-Watch had requested was not even distributed within the agency until August 15, three weeks after ATV-Watch's request. EMAIL FROM MADDALI TO ROTH (Aug. 15, 2007), *Appx.* at 183. This belies DOT's July 30 claim that it had already "started assembling the information pertaining to your request." LETTER FROM BRILLHART TO WALTERS (July 30, 2007), *Appx*. at 158.

In fact the records were made available to ATV-Watch on September 13, slightly ahead of DOT's schedule, but still six-and-a-half weeks after the statutory deadline. During this period, ATV-Watch continually reminded DOT of its requests, the ticking of the RTK clock, and DOT's tardiness.

When ATV-Watch received the documents on September 13, it appeared that many were probably immediately available in July, and the delay was unnecessary. Thus DOT violated the letter of the law. It also made no haste to comply with its spirit. During a hearing the State

admitted it was late, but attempted to excuse its dawdling claiming an "oversight," and "no prejudice," JUNE 24 TRN. at 20 – factors this Court has distinctly disavowed. *ATV Watch v. DRED*, 155 N.H. at 441.

Accordingly this Court should rule that DOT was in violation of the RTK law, and that it knew or should have known its delay was a violation.

III. DOT Did Not Provide Sufficient Reasons for Exemption

ATV-Watch thrice requested that if DOT intended to withhold records, it provide reasons for each document withheld. LETTER FROM WALTERS TO BRILLHART (July 24, 2007), *Appx*. at 4 ("If any documents are being withheld, please identify those documents on the basis of exclusion, by category."); LETTER FROM WALTERS TO BRILLHART (Nov. 2, 2007), *Appx*. at 13 ("I am asking that if these documents are not released that they be quantified and categorized, that the categories be sufficiently described, and the specific statutory basis for not releasing each category be cited."); LETTER FROM WALTERS TO BRILLHART (Nov. 21, 2007), *Appx*. at 16, (*passim*; "We are asking DOT to get past the point of saying we have a bunch of documents that are not subject to disclosure for a bunch of reasons, including the circular argument that they are not subject to disclosure because they are 'exempt from disclosure.'").

DOT did give ATV-Watch a list of records and a list of reasons, but made no effort to specify which document went with which reason. LETTER FROM BRILLHART TO WALTERS (Aug. 22, 2007), *Appx*. at 8. DOT then circularly claimed it was "redacting portions of [documents] because the redacted portions contain information that is exempt from disclosure." LETTER FROM BRILLHART TO WALTERS (Sept. 13, 2007), *Appx*. at 11. When ATV-Watch complained,

DOT refused to further cooperate, writing "we have provided the basis for withholding various documents in our earlier correspondence with you." LETTER FROM BRILLHART TO WALTERS (Dec. 28, 2007), *Appx*. at 19.

New Hampshire's Right to Know statute provides that agencies must make available any records immediately available, and if unable, the agency "shall … deny the request in writing with reasons." RSA 91-A:4, IV.

For police investigations, which are technically not an exemption within the statute but have been judicially grafted from federal law, *Lodge v. Knowlton*, 118 N.H. 574 (1978); *Murray v. New Hampshire Div. of State Police*, 154 N.H. 579, 582 (2006), there is a concern that disclosures of an on-going probe may "interfere with the investigation." *Murray*, 154 N.H. at 583. Thus, for police investigations, the reasons for withholding need not be provided "on a document-by-document basis," but may "be justified category-of-document by category-of-document." *Id.* "The categories must be distinct enough to allow meaningful judicial review, yet not so distinct as to reveal the nature and scope of the investigation." *Id.*

Outside of the context of an on-going police investigation, however, these concerns are not present, and the basic statutory language applies – the agency "shall … deny the request in writing with reasons." RSA 91-A:4, IV. This Court should rule that DOT insufficiently specified its reasons for withholding, and that it knew or should have known that was a violation of the law.

IV. Withheld Documents Should Have Been Disclosed

A. Right to Know Exemptions are Restrictively Construed

The New Hampshire Constitution provides:

> 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.

N.H. CONST. pt. I, art. 8. The Right to Know statute reflects this constitutional requirement:

> Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.

RSA 91-A:1.

These constitutional and statutory guidelines require that disclosure is expansive, and exemptions are narrow. *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 546 (1997).

> We have repeatedly held that . . . there is a presumption that . . . records are public and the burden of proof rests with the party seeking closure or nondisclosure … to demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access.… Furthermore, even where a sufficiently compelling interest is demonstrated, a … record may not be kept sealed unless no reasonable alternative to nondisclosure exists and the least restrictive means available is utilized to serve the interest that compels nondisclosure.

Associated Press v. State, 153 N.H. 120 (2005) (discussing court records) (citations and quotations omitted).

The narrow construction of Right to Know exemptions is by now axiomatic. *Lambert v. Belknap County Convention*, 157 N.H. 375 , 378-379 (2008).

B. "Drafts" Were Improperly Exempted

ATV-Watch twice requested "preliminary draft" documents "if that document has been circulated beyond the person who originally generated it." LETTER FROM WALTERS TO BRILLHART (July 24, 2007), *Appx*. at 4; LETTER FROM WALTERS TO BRILLHART (Nov. 2, 2007), *Appx*. at 13. The State claimed a number of documents exempted on this basis, and the court exempted them as "draft." ORDER (Aug. 21, 2008), *Appx*. at 379 (documents D, E, F, J, O, P, Q, R, S, T, U, W, Y, and BB). The court also found that two documents were exempt as drafts "if not sent to addressee," *id.* (documents H and I), but did not make a determination whether they had been so sent.

The RTK provides an exemption for:

> 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 the members of a public body.

RSA 91-A:5, IX. The exemption was added in 2004, and has not been construed by this Court. *C.f. Goode v. New Hampshire Office of Legislative Budget Assistant*, 145 N.H. 451 (2000); *Goode v. New Hampshire Office of Legislative Budget Assistant*, 148 N.H. 551 (2002).

To bear its burden of proving a document is a secret preliminary draft, the State must show both that it was not made available to the "quorum or a majority of the members of a public body," and that it was a "preliminary draft."[2]

The language of the statute demands that it exempts only documents in the very early stages of an agency's deliberative process. "Preliminary drafts" does not exempt merely "drafts,"

[2]Where there is no "public body" such as town selectmen or an agency directed by a body, see e.g., RSA 100-A:14 (New Hampshire Retirement System Board of Trustees), it is unclear how the "public body" provision applies.

nor merely "preliminary" documents. Rather it exempts "preliminary drafts." The two words together suggest a document only in its budding stage of development. Once a document has moved beyond its "preliminary draft" stage, and has become either a "preliminary" document or a "draft," it is no longer exempt. The exemption thus does not mean that only completed or finalized documents are disclosable. If "preliminary drafts" were construed that way, the exemption would be an unconstitutionally unreasonable restriction of the public's right to open government. N.H. CONST., pt. I, art. 8.

Connecticut's Freedom of Information Act exempts "preliminary notes." The Connecticut Supreme Court has construed the phrase:

> [T]he term "preliminary drafts or notes" relates to advisory opinions, recommendations and deliberations comprising part of the process by which government decisions and policies are formulated. Such notes are predecisional. They do not in and of themselves affect agency policy, structure or function. They do not require particular conduct or forbearance on the part of the public. Instead, preliminary drafts or notes reflect that aspect of the agency's function that precedes formal and informed decisionmaking.

Wilson v. Freedom of Info. Comm'n, 435 A.2d 353, 359 (Conn. 1980). To the extent the Connecticut construction is useful, it should be recalled that Connecticut's constitution does not contain a corollary to our open government mandate, and that the phrase in New Hampshire must be construed even more narrowly.

New Hampshire's Right-to-Know law gives citizens the ability to monitor their government in real time. "The purpose of RSA chapter 91-A is to provide the utmost information to the public about what its government is up to," not what the government did sometime in the past. *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476, 686 A.2d 310, 313 (1996). Disclosure of documents throughout their drafting stages provides the ability for real

time monitoring. Waiting until documents are completed closes citizens' window into government policy-making until too late to effect it.

When a document contains facts, rather than contemporaneous opinions or suggestions not based on fact, it is public, regardless of its stage in policy development. *See e.g.*, *Citizens for A Better Env't v. Dep't of Food & Agric.*, 171 Cal. App. 3d 704, 710, 217 Cal. Rptr. 504, 507 (Cal. App. 1985); Annotation, *What constitutes preliminary drafts or notes provided by or for state or local governmental agency, or intra-agency memorandums, exempt from disclosure or inspection under state freedom of information acts*, 26 A.L.R.4th 639. Whether a document remains alterable is not a relevant consideration. *See, Wilson v. Freedom of Info. Comm'n*, 435 A.2d at 359.

The State claims that "[c]irculating a document to a sister agency or a Federal counterpart is not making it public." DEC. 23 TRN. at 13. Upholding such a view would mean that agencies – state-to-state and state-to-federal – could engage in extended policy development and interpretation via "draft" documents. Policies would emerge from the process fully formed, without any opening for public input. And that is what happened here – State policy for years banned ATVs on federally funded trails until two agencies together decided ATVs were snowmobiles. When they were caught, they applied to the federal government for a waiver, but claimed many of the documents forming the basis for the waiver were secret, even though both the New Hampshire House and Senate had bills before them mooting the waiver.

The documents claimed exempt as "preliminary drafts," to the extent they can be discerned by ATV-Watch, do not meet these standards.

For instance, the State claims that a May 10, 2007 letter from DOT to FHWA, identified

as document E and Y by the court in its August 21, 2007 order, LETTER FROM DOT TO FHWA (May 10, 2007), *Appx*. at 104, is exempt as a "draft." COURT-ORDERED INDEX, *Appx*. at 375. The document, however, plainly contains facts regarding New Hampshire's definition of "snow traveling vehicles." It sets forth DOT's apparently long-standing view that ATVs "have always been considered analogous to snowmobile use in winter conditions" and "have no environmental degradation" in the White Mountains. The letter puts forth the view of DRED, DOT's sister agency in this matter, that ATV's "provide() linkage between communities and connects the statewide trail system," and that "DRED believes this should continue." The letter appears to be a late-stage explication of DOT's position, promising the federal agency that DOT "will request DRED to install signage prohibiting ATV use on trials that were acquired or constructed using Federal Highway funds." *Id.* Although the court exempted the letter as a "draft" it contains facts and is far too near completion to constitute a "preliminary draft."

Likewise the State claimed that documents H and I are exempt as preliminary drafts. These are two letters from DOT to DRED dated May 15, 2007. The State claims the letters were signed but not sent. COURT-ORDERED INDEX, *Appx*. at 375. The court exempted them from disclosure "if not sent to addressee." ORDER (Aug. 21, 2008), *Appx*. at 379. Documents that reached such stage of completion these letters appear to have reached may perhaps be "draft," but not "preliminary drafts" exempted by the statute. Moreover, regardless of whether formally signed and mailed, because they were circulated outside of DOT, they were no longer preliminary drafts.

Documents D and E are two letters from DOT to FHWA. LETTER, *Appx*. at 104. According to document G, *see* COURT-ORDERED INDEX, *Appx*. at 375, documents D and E were

"under review by DRED and FHWA," and the only difference between the "drafts" and the final version is the inclusion of a "legal citation." DOT MEMORANDUM FROM MADDALI TO BRILLHART (document G), *Appx*. at 112. It is undeniable that these drafts were circulated outside of DOT – DOT said they were "under review by DRED and FHWA," *id.*, and ATV-Watch procured a copy from FHWA.

Document S was also circulated among agencies – the entry on the *Vaughn* index indicates it is a "draft" letter from DRED to DOT. COURT-ORDERED INDEX, *Appx*. at375. Because it was "from" DRED and "to" DOT" it was obviously created within DRED and not DOT, and then circulated "to" DOT. At the least DOT appears to be claiming the exemption on behalf of DRED.

ATV-Watch requests this Court review the documents exempted as drafts, determine they are not "preliminary drafts" exempted by the statute, rule they should have been timely disclosed, and find that the State knew or should have known they were not exempt.

C. "Notes" Were Improperly Exempted

Among ATV-Watch's requests were "notes, including personal notes made in connection with the conduct of public business." LETTER FROM WALTERS TO BRILLHART (July 24, 2007), *Appx*. at 4. The State claimed exemptions on this basis, which the court granted.

The RTK provides an exemption for:

> Any notes or other materials made for personal use that do not have an official purpose, including but not limited to, notes and materials made prior to, during, or after a governmental proceeding.

RSA 91-A:5, VIII. This section was added in 2004 and has not been construed by this court.

The exception is narrow. It does not protect all notes, or even all personal notes. It

exempts only those notes "made for personal use that do not have an official purpose." "[P]ersonal use that do not have an official purpose" means that to be exempt the notes must be both personal *and* have no official purpose. Thus all "notes and materials" made on government time are disclosable unless they have no bearing on the agency's business.

Doodles and shopping lists are exempt as they have no official purpose. But notes written on agency documents during time at work that concern the agency's job should not be secret. When a "note" is circulated within or without the agency it is by definition agency business. Otherwise it would not circulate – provided it is relevant to the government's purpose and not the inter-agency softball league.

ATV-Watch obviously cannot evaluate the "handwritten personal notes in margins and on sticky note" on documents A and B, COURT-ORDERED INDEX, *Appx*. at 375, and exempted as notes by the court. ORDER (Aug. 21, 2008), *Appx*. at 379. But both were either written on or affixed to what is otherwise an agency document, and thus is presumably relevant to the document or its context. Both also were circulated to DRED (document A) or FHWA (document B). COURT-ORDERED INDEX, *Appx*. at 375.

ATV-Watch requests this Court review the "notes," determine they are not "personal notes" exempted by the statute, rule they should have been timely disclosed, and find that the State knew or should have known they were not exempt.

D. "Privileged" Records Were Improperly Exempted

The State claimed many documents were exempted as privileged, and the exempted them on that basis. ORDER (Aug. 21, 2008), *Appx*. at 379 (documents C (in part), E, G, J, K, L, M, N, V, X, Z, AA).

Although the RTK statute does not exempt documents on the basis of attorney-client communications or attorney work-product, it is understood they may be withheld for these reasons. But merely sharing a document with the attorney general does not create a privilege. *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 274 (1966) ("Nor would the mere turning over of these documents to the Attorney General or some other lawyer for the State clothe them with that privilege."). As the privilege is concerned with confidential communications, the privilege is determined with reference to the content of the communication, "rather than simply the form that information takes or how the information was acquired." *State v. Chagnon*, 139 N.H. 671, 676 (1995); *Riddle Spring*, 107 N.H. at 274-75. Factual information is not privileged. *Chagnon*, 139 N.H. at 676; *State v. Drewry*, 139 N.H. 678 (1995).

To be exempt from RTK disclosure as attorney work-product, a document must be prepared with an eye toward litigation. "To withhold a document based on this privilege, the [agency] must prove that it was prepared under the direction of an attorney in contemplation of litigation." *Church of Scientology v. U.S. Dept. of Justice*, 30 F.3d 224, 236 (1st Cir. 1994); *State of Maine v. U.S. Dept. of Interior*, 298 F.3d 60, 67 (1st Cir. 2002).

"When otherwise privileged communications are disclosed to a third party, the disclosure destroys the confidentiality upon which the privilege is premised." *In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 22 (1st. Cir. 2003); *State v.*

Gordon, 141 N.H. 703 (1997) (waiver of privilege when communication already disclosed); *see also Scott v. Grinnell*, 102 N.H. 490 (1960); Annotation, *Applicability of attorney-client privilege to communications made in presence of or solely to or by third person*, 14 A.L.R.4th 594. The rules of evidence *define* the attorney-client privilege in terms of an intent to not disclose to third persons. N.H. R. EVID. 502(a)(5).

Documents and portions of documents withheld as attorney-client privileged were not prepared under contemplation of litigation.

1. Request to Talk to Attorney is Not Privileged

Document AA, for example, is a May 8, 2007 email from DOT staff to DRED staff. The email says, in full:

> The following two documents are currently under review and are attached for your comments. I have sent copies of these documents to Attorney Mark Hodgdon, ~~with a request to coordinate with your attorney~~. Please let me know if you have any comments or concerns. Thank you.

EMAIL FROM MADDALI TO GEGAS & GAMACHE (May 8, 2007), *Appx*. at 100 (unredacted version), *Appx* at 99 (redacted version). ATV-Watch obtained an unredacted copy of the email from DRED. DOT, however, expurgated the words indicated by strike-outs as attorney-client privileged.

It is unclear how the words "with a request to coordinate with your attorney" are privileged. The fact that one agency asked its lawyer to talk to the other agency's lawyer is not a privileged communication. Even if it were, the privilege was waived by its communication with those outside the privileged relationship. Moreover, this example shows the breadth of DOT's claim of privileged communications, thus casting doubt on its other assertions of privilege.

2. Email Headers are not Privileged

Document Z is an email dated May 14, 2007 among DOT staff, which appears to be part of an email chain. EMAIL (May 14, 2007), *Appx.* at 108. Portions of the chain was redacted and withheld from disclosure on the basis that it "contain[s] attorney-client privileged communications." COURT-ORDERED INDEX, *Appx*. at 375. Part of what was blacked out are the email headers – that is, the "to," "from," and "about" lines. ATV-Watch's July 24 RTK request specified that "[i]If any documents are subject to disclosure in part, I am asking for those parts to be disclosed, even if those parts only identify a topic or party to whom the document was circulated." LETTER FROM WALTERS TO BRILLHART (July 24, 2007), *Appx*. at 4. Ironically the State's *Vaughn* index quotes the very header that was blacked out from the document, identifying the expurgations as "Portions of May 14, 2007 e-mail string from Ram Maddali to Bill Watson and Nancy Mayvill forwarding e-mail from Edith Pacillo to Ram Maddali and Christopher Morgan." COURT-ORDERED INDEX, *Appx*. at 375.

Not only is there is no conceivable basis for a claim of privilege with regard to the header information, is also an example of information not timely disclosed and only forced into the open as a result of ATV-Watch's litigation.

Essentially the same situation exists regarding document X. EMAIL (May 23,2007), *Appx.* at 117. Part of what is blacked out appears to be the header information, which is quoted in the *Vaughn* index, appears to be available elsewhere in the email string, and presents no privilege.

3. Documents Disclosed During this Litigation are Not Privileged

As noted, several documents were disclosed during the litigation, referred to by the State as "A," "B," "C," and "D."

The office of the Attorney General gave ATV-Watch one of the documents during the February 11, 2007 hearing, and the second after the hearing in the hallway outside the courtroom. Two days later the Attorney General mailed the third document, along with a letter indicating that despite being disclosed all three "privileged attorney-client communications or work product." LETTER FROM ATTORNEY GENERAL TO ATV-WATCH (Feb. 13, 2008), *Appx*. at 20.

Document "A" is an email is from DOT staff to others at DOT and an assistant attorney general, concerning DOT's procedure for fulfilling ATV-Watch's RTK requests. EMAIL FROM MADDALI TO ROTH &a. (June 8, 2007), *Appx*. at 118. ATV-Watch can discern nothing in the email that is attorney-client privileged.

Document "B" is an email is from DOT staffer Roth to 13 DOT staff and one person employed by the Office of Information Technology, and copied to an assistant attorney general also concerning DOT's procedure for fulfilling ATV-Watch's RTK requests. EMAIL FROM ROTH TO BRILLHART &a. (Aug. 15, 2007), *Appx*. at 184. As above, ATV-Watch can discern nothing in the email that appears to be privileged.

Document "C" (an attachment to document B) is an August 15, 2007 memo from DOT Assistant Commissioner to various staff detailing how to collect documents in response to ATV-Watch's RTK request, and is therefore not privileged. INTER-DEPARTMENT COMMUNICATION FROM DOT ASST. COMM'R TO BUREAU ADMINISTRATORS/DIVISIONS/ PROJECT MANAGERS (Aug. 15, 2007), *Appx*. at 185.

Document "D," was never produced by the State, but procured by ATV-Watch from FHWA as a result of a federal FOIA request. LETTER FROM DOT TO FHWA (May 10, 2007), *Appx*. at 104.[3] It is about parameters and methods for fulfilling ATV-Watch s RTK requests, and ATV-Watch can discern nothing in the document that appears to be privileged.

4. No Privileged Records

Individually none of the documents claimed as privileged are actually privileged, and DOT did not provide sufficient justification for their withholding on that basis. There mere inclusion of a lawyer on a distribution list does not create a privilege. The State made no claim that the documents were prepared for litigation, and even if they were, it made no attempt to show it maintained the privilege by not further disclosing them outside of the privileged circle.

Collectively these documents demonstrate the ease with which the state affixes the label "privilege." The last three documents, "A," "B," and "C," also show that it took litigation to pry them from the state. The State has still not disclosed document "D," which ATV-Watch obtained from FHWA.

The lower court identified and exempted as attorney-client privileged documents C, E, G, J, K, L, M, N, V, X, Z and AA, and the State claimed privilege for the additional documents "A," "B," "C," and "D." ATV-Watch requests this Court review them, determine they are not privileged, rule they should have been timely disclosed, and find that the State knew or should have known they were not exempt.

[3]That ATV-Watch got the document from another source does not diminish the State's duties under the RTK.

V. *Vaughn* Index Did Not Contain Enough Information for Court to Determine Whether Exemptions Applied

Recognizing that in RTK cases "the party resisting disclosure has exclusive control of vital information," *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540, 548 (1997) (punctuation omitted), this Court has often approved the use of a *Vaughn* index, which is "a procedure developed by the federal courts to effectuate the goal of broad disclosure of public documents and [to] assist trial courts in cases involving a large number of documents." *Id.*

"Generally, a Vaughn index will include a general description of each document withheld and a justification for its nondisclosure." *Id.*

> It forces the government to analyze carefully any material withheld, it enables the trial court to fulfill its duty of ruling on the applicability of the exemption, and it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he can present his case to the trial court.

Union Leader Corp. v. HFA, 142 N.H. at 548.

In cases where the attorney-client privilege is claimed as the reason for withholding, the *Vaughn* index must contain further information – the litigation for which the document was generated, and a list of those to whom it was circulated to show the privilege was maintained.

> We believe that, at a minimum, an agency seeking to withhold a document in its entirety under this exemption must identify the litigation for which the document was created (either by name or through factual description) and explain why the work-product privilege applies to all portions of the document.

Church of Scientology v. U.S. Dept. of Justice, 30 F.3d 224, 237 (1st Cir. 1994). "Although the identification and explanation requirements are not to be given a hypertechnical construction, they can neither be brushed aside nor satisfied by vague generalities." *State of Maine v. U.S. Dept. of Interior*, 298 F.3d 60, 69 (1st. Cir. 2002).

In ATV-Watch's case, the *Vaughn* index did not identify a litigation for which the documents were created, did not explain why the privilege applied to the documents or portions of them, and did not seek to show whether the purported privilege was maintained or whether they were circulated thus waiving the privilege. Regarding documents for which a "preliminary draft" or "personal notes" exemption, the index also did not list circulation information.

The index deprived ATV-Watch of the ability to "present [its] case to the trial court." *Union Leader Corp. v. HFA*, 142 N.H. at 548. It also prevented the lower court from doing its job. The court did not have enough information to determine whether the exemptions applied to the documents, or whether claimed privileges were waived. The index was thus insufficient for its alleged purpose.

This Court should remand for a refiling of the *Vaughn* index and a determination of these matters, or simply rule that the State must disclose the documents because it did not sustain its burden of proof for nondisclosure.

VI. ATV-Watch Should Have Been Allowed Discovery so it Could Provide the Court Information Necessary to Make RTK Determinations

Although "discovery may be greatly restricted in FOIA cases," *Heily v. U.S. Dep't of Commerce*, 69 Fed. Appx. 171, 174 (4th Cir. 2003), courts have "stressed the importance of permitting FOIA plaintiffs to take depositions … where the relevant factors are in the control" of the other party. *ABC, Inc. v. USIA*, 599 F. Supp. 765, 768 (D.D.C. 1984).

Discovery is generally available for factual matters, such as "the scope of [an] agency's search and its indexing and classification procedures." *Heily*, 69 Fed. Appx. at 174; *Weisberg v.*

U.S.Dep't of Justice, 627 F.2d 365, 371 (D.C. Cir. 1980) (discovery on adequacy of record search); *Judicial Watch, Inc. v. U.S. Dep't of Comm.*, 127 F. Supp. 2d 228, 230 (D.D.C. 2000) (depositions regarding parameters of search).

Discovery is allowed on "narrow and fact-specific question[s]" that determine the disclosability of a specific document. *Tax Analysts v. IRS*, 214 F.3d 179, 185 (D.C. Cir. 2000) (whether document was confidential tax record); *ABC, Inc. v. USIA*, 599 F. Supp. 765, 768-70 (D.D.C. 1984) (whether transcripts of phone call constitutes personal or agency record).

Discovery is allowed to determine the actions and intent of agency staff in the process of responding to FOIA requests for the purpose of determining whether to award costs and fees. *Gilmore v. United States Dep't of Energy*, 33 F. Supp. 2d 1184, 1190 (N.D. Cal. 1998) (allowing discovery of agency's "policies and practices for responding to FOIA requests, and the resources allocated to ensure its compliance the FOIA time limitations"); *Judicial Watch, Inc. v. U.S. Dep't of Comm.*, 34 F. Supp. 2d 28, 46 (D.D.C. 1998) (allowing discovery of alleged destruction and removal of records).

ATV-Watch sought discovery limited to specific factual issues. It propounded two sets of interrogatories. INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS (May 12, 2008), *Appx.* at 340; INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS (Sept. 16, 2008), *Appx.* at 393. As ATV-Watch made clear, it sought specific facts that the court itself would require to determine the issues in the case – to track DOT's processing of ATV-Watch's RTK requests and its search methodology, to determine whether documents disclosed late had been immediately available, to clarify discrepancies and omissions on the evolving *Vaughn* index regarding which document was identified and whether some were circulated; and

to determine how exemption decisions were made in order to establish the "knew or should have known" standard for recovery of attorneys fees under RSA 91-A:8. *See* MOTION TO EXTEND THE PROCEEDINGS TO ENGAGE IN DISCOVERY (Sept. 17, 2008), *Appx.* at 389; DEC. 23 TRN. at 4-20.

The questions were limited to specific factual questions. ATV-Watch did not seek information risking disclosure of the content of documents or the thought processes that went into their creation.

It is not sufficient to say, as the State claims, that ATV-Watch had its opportunity to cross-examine witnesses on these matters at the initial February 11, 2007 hearing. At that point the State had not yet offered reasons documents were withheld, had not yet filed a *Vaughn* index, and had not yet disclosed several documents. Months after the February hearing the court "as to a number of items, the Court is not sufficiently certain as to which document applies to which description." ORDER (June 30, 2008), *Appx.* at 388.

The court nontheless denied ATV-Watch the ability to conduct any discovery. ORDER (Feb. 26, 2009), *Appx.* at 423. ATV-Watch requests this Court order discovery so it can provide the lower court information necessary to make determinations required by the RTK statute.

VII. Court Should have Awarded Costs and Attorneys Fees

The attorneys fees provision is of critical importance to the RTK scheme. "Without this provision, the statute would often be a dead letter." *Bradbury v. Shaw*, 116 N.H. 388, 391 (1976). The statute provides:

> If any public body or agency or employee or member thereof, in violation of the provisions of this chapter, refuses to provide a governmental record or refuses access to a governmental proceeding to a person who reasonably requests the

> same, such public body, public agency, or person 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 or the proceeding open to the public. Fees shall not be awarded unless the court finds that the public body, public 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. "Accordingly, an award of attorney's fees requires two findings by the superior court: (1) that the plaintiff's lawsuit was necessary to make the information available; and (2) that the defendant knew or should have known that its conduct violated the statute. *New Hampshire Challenge, Inc. v. Comm'r, N.H. Dept. of Educ.*, 142 N.H. 246, 249 (1997).

> The plain language of the statute indicates that the legislature intended for a petitioning party to recover attorney's fees when retention of legal counsel is necessary to secure access to public documents.

ATV Watch v. DRED, 155 N.H. 434, 442 (2007). Thus, in order to prove that the lawsuit was necessary, the plaintiff must show that documents were released after the lawsuit was commenced, and that the plaintiffs had retained counsel at the time the documents were released.

The court here did not reach these issues because it found that no violations of the act. Nonetheless, ATV-Watch should be awarded fees on the facts of this case.

The State thrice admitted that several documents – those designated "A," "B," and "C" by the State – were released after commencement of the suit. *See* LETTER FROM ATTORNEY GENERAL TO ATV-WATCH (Feb. 13, 2008), *Appx*. at 20; OBJECTION AND MOTION TO STRIKE SUMMARY JUDGMENT (Feb. 25, 2008), *Appx*. at 299; JUNE 24 TRN. at 20. The court found that "A" "had not been released prior to suit." PLAINTIFFS FINDINGS OF FACT #9 (July 31, 2009).

Document "A" was handed to Mr. Walters by the State during the hearing. EMAIL FROM MADDALI TO ROTH &a. (June 8, 2007), *Appx*. at 118. Document "B" was given to him in the

hallway after the hearing. EMAIL FROM ROTH TO BRILLHART &a. (Aug. 15, 2007), *Appx*. at 184. Document "C" was mailed to ATV-Watch the next day. INTER-DEPARTMENT COMMUNICATION FROM DOT ASST. COMM'R TO BUREAU ADMINISTRATORS/DIVISIONS/ PROJECT MANAGERS (Aug. 15, 2007), *Appx*. at 185. A fourth, document "D," was never produced by the State, but procured by ATV-Watch from FHWA as a result of a federal FOIA request. LETTER FROM DOT TO FHWA (May 10, 2007), *Appx*. at 104. In addition, the email header information in documents "X" and "Z," discussed *supra*, was also released as a result of the suit.

Although no attorney appeared for ATV-Watch at the February 11, 2008 hearing, and Attorney Arthur Cunningham did not file his appearance until after it, ENTRY OF APPEARANCE (Mar. 1, 2008), *Appx*. at 304, ATV-Watch *was* represented by an attorney. ATV-Watch's lawyer, Arthur Cunningham, filed an affidavit stating he had conferred with ATV-Watch in November 2007 before suit was filed, had been consulted regarding the initial petition commencing this case, and had reviewed a draft of the petition before it was filed. AFFIDAVIT OF ARTHUR B. CUNNINGHAM (July 31, 2009), *Appx*. at 305. The court below found that "[o]n November 16, 2007, Mr. Walters conferred with Attorney Arthur B. Cunningham … regarding the case." PLAINTIFFS FINDINGS OF FACT #8 (July 31, 2009).

As noted, this Court has held that the statute provided for fees "when *retention* of legal counsel is necessary to secure access to public documents." *ATV Watch v. DRED*, 155 N.H. at 442 (emphasis added). The law does not require that an attorney file an appearance before the release – just that one be retained.

It is apparent that the lawsuit was necessary to force release of the post-petition documents. In releasing documents "A," "B," and "C", the attorney general wrote that the reason

for the releases was for the "purpose of responding to allegations in your Petition." LETTER FROM ATTORNEY GENERAL TO ATV-WATCH (Feb. 13, 2008), *Appx*. at 20. It is apparent that had no petition been filed, the documents would not have been released.

ATV-Watch has thus met all the requirements for an award of costs and attorneys fees. The RTK law was violated by late releases and by improperly withheld documents, the lawsuit was necessary to pry some documents from the State, the plaintiff was represented when that occurred, the State knew or should have known that timely release of documents was required, and the State knew or should have known that its withholding was improper given that its claimed exemptions do not apply or were waived. Accordingly, this Court should remand for a calculation of attorneys fees and costs, including the fees and costs associated with this appeal. *ATV Watch v. DRED*, 155 N.H. at 442 ("there may be cases in which an award of appellate counsel fees is warranted under RSA 91-A:8, I").

CONCLUSION

In accord with the foregoing, ATV-Watch requests this Court find that DOT violated the RTK in each of the ways detailed, and that ATV-Watch should have been allowed discovery and remand for that purpose. ATV-Watch requests an order that DOT re-search its records in conformance with ATV-Watch's RTK requests, provide adequate explanations for its withholdings, and disclose documents that should have been. ATV-Watch suggests remanding for an adequate *Vaughn* index or simply an order that the State must simply disclose all documents. ATV-Watch asks for an award of fees and costs associated with the superior court and appellate aspects of this lawsuit, and asks that this Court invalidate DOT's request for waiver from FHWA.

Respectfully submitted,

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Dated: June 8, 2010

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for ATV-Watch requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case are novel in this jurisdiction, because document cases are often susceptible to confusion, and because the outcome of this case may guide the conduct of State agencies and Right-to-Know requesters in the future.

I hereby certify that on June 8, 2010, copies of the foregoing will be forwarded to Edith L. Pacillo, Esq., Assistant Attorney General.

Dated: June 8, 2010

Joshua L. Gordon, Esq.