State of New Hampshire
Supreme Court

NO. 2006-0020

2006 TERM

JUNE SESSION

ATV Watch

v.

New Hampshire Department of Resources & Economic Development

RULE 7 APPEAL OF FINAL DECISION OF
MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF PLAINTIFF, ATV WATCH

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Parties and Interests

All terrain vehicles (ATVs) are four-wheeled motorized vehicles with powerful engines and large aggressive tires. They are designed for travel over rough terrain. ATVs are controversial because although fun, they are loud, potentially dangerous, and cause severe erosion. ATV Watch,[1] the petitioner here, is a non-profit advocacy organization incorporated in New Hampshire, whose goal is to monitor the use of ATVs on public lands and to provide education relating to their use. *See* <www.atvwatch.com>. The New Hampshire Department of Resources and Economic Development (DRED) has statutory direction "to develop a system of trails for ATVs . . . on both public and private lands, " RSA 215-A:41, II, and "to balance the demand" for ATV trails with "other, non-motorized recreational trail uses, . . . [p]otentially conflicting management goals for state lands, and . . . [p]rotection of wildlife and ecologically important areas." RSA 215-A:41, I.

II. Right to Know Request and Sequence of Letters

On November 27, 2004, ATV Watch made a request under New Hampshire's Right to Know law, RSA 91-A, indicating an interest in learning about the State's "plan to purchase approximately 6,000 acres in northern New Hampshire to develop an ATV park." LETTER FROM WALTERS TO DRED (Nov. 27, 2004), *appx.* at 1. The letter requested "[a]ll information on the property itself (surveys, maps, studies or investigations related to the property), . . . regarding funding of the purchase, . . . [and] related to the siting of ATV or other types of trails on the

[1]The name of the organization changed from ATV Free NH to ATV Watch during the course of this litigation.

property." The letter requested "[a]ll communications . . . between [DRED] and any other parties," and "[a]ny contract information relating to the purchase including any letter of intent." *Id.*

On December 1, DRED responded, noting its intention to comply with ATV Watch's request, but noting "matters of confidentiality regarding our negotiations of the property under consideration." DRED also indicated it had referred the request to the Attorney General for review. LETTER FROM MCLEOD TO WALTERS (Dec. 1, 2004), *appx.* at 2. On December 13, December 17, and then again on January 4, 2005, ATV Watch wrote to DRED first indicating it had not received any reply, then its eagerness to receive a substantive reply, and then its frustration at not having received any documents. *See* LETTER FROM WALTERS TO MCLEOD (Dec. 13, 2004), *appx.* at 3; LETTER FROM WALTERS TO MCLEOD (Dec. 17, 2004), *appx.* at 4; LETTER FROM WALTERS TO O'KANE (Jan. 4, 2005), *appx.* at 5.

On January 6, forty days after its request, DRED mailed to ATV Watch some very general information – several newspaper articles, a communication from a cross-country ski club, an ATV industry press release regarding trails in West Virginia, some demographic information about the City of Berlin produced by the Department of Employment Security, and what appear to be several City of Berlin tax maps. LETTER FROM GAMACHE TO WALTERS (Jan. 6, 2005), *appx.* at 6.

On January 14, after learning more about the park from two newspaper articles, *see* Paula Tracy, *Timber Owner Pitches ATV Park*, UNION LEADER (Jan. 14, 2005); Anne Saunders, *7,200 Acres Eyed for ATVs*, UNION LEADER (Jan. 13, 2005), ATV Watch again wrote to DRED expressing its dissatisfaction that the materials it received were largely unresponsive to its request, and reiterating what information it was seeking. LETTER FROM WALTERS TO O'KANE

(Jan. 14, 2005), *appx.* at 7.

Meanwhile on January 12, 2005, the Governor and Executive Council[2] met and approved a contract to hire a valuation company to appraise the land. NH GOVERNOR AND COUNCIL MINUTES (Jan. 12, 2005), *appx.* at 219. Immediately after the meeting ATV Watch met with Sean O'Kane, Commissioner of DRED, to discuss the lack of public disclosure regarding the park. On January 25 ATV Watch wrote to Mr. O'Kane thanking him for the meeting and reiterating its request, LETTER FROM WALTERS TO O'KANE (Jan. 25, 2005), *appx.* at 9, and the next day ATV Watch wrote to the Attorney General again expressing frustration at not having gotten the information it sought. LETTER FROM WALTERS TO EDWARDS (Jan. 26, 2005), *appx.* at 10.

On January 21, more than two weeks after the G&C met, ATV Watch received from DRED the proposal the agency had made to the Executive Council to hire an appraiser and some documents associated with it, as well as several e-mails among DRED officials regarding the proposal, an e-mail from a citizen to DRED expressing support for an ATV trail, and several newspaper articles.

Also on January 26, DRED wrote a letter to ATV Watch answering some of ATV Watch's general questions, but declining to provide specific documents, including an appraisal report of the property. LETTER FROM GAMACHE TO WALTERS (Jan. 26, 2005), *appx.* at 11.

On February 1, DRED provided some additional general documents. In its letter DRED claimed that all documents it had were disclosed, but that several documents would not be

[2]For convenience, the Governor and Executive Council will hereinafter be referred to by its colloquial moniker, "G&C."

released pursuant to an exemption to the Right to Know law. The named non-disclosed documents included a set of notes composed by Bill Carpenter, Administrator of DRED's Land Management Bureau, which "includes potential comparable properties and values." DRED also indicated it would not disclose any appraisal of the property until the purchase is completed. LETTER FROM O'KANE TO WALTERS (Feb. 1, 2005), *appx.* at 14. On March 17, DRED provided a small but fairly detailed map of the proposed property purchase. LETTER FROM GAMACHE TO WALTERS (Mar. 17, 2005), *appx.* at 16.

III. Superior Court Petition and Orders

Before filing its petition in the Superior Court, ATV Watch sent seven letters to DRED, met with Commissioner O'Kane, had numerous phone conversations with officials at DRED and the Attorney General's office in an attempt to compel disclosure of information related to the proposed purchase of land for development of an ATV park. Dissatisfied with the delays, unresponsive and untimely disclosures, and continued refusal to disclose documents, including the appraisal report, on February 14 ATV Watch filed a Petition in the Merrimack County Superior Court asking for an injunction to mandate DRED's compliance with the Right to Know law, and for fees and costs. PETITION FOR INJUNCTIVE RELIEF, FEES AND COSTS PURSUANT TO RSA 91-A:7 AND 8 (Feb. 14, 2005), *appx.* at 21. The Petition described ATV Watch's requests, set forth the materials disclosed and withheld, noted that if DRED's plan comes to fruition it would create "what would become New Hampshire's third largest park," and complained that "[i]f the public does not even know where the property is located or what the plan is for trail locations, it precludes the public from being in a position to 'provide input in all decisions'" regarding the plan. PETITION, *appx.* at 21 (quoting RSA 215-A:41, II(f)).

The Petition contained 15 prayers, lettered "A" through "O."

- Prayers A & B requested a declaration that because DRED's responses took many more than the number of days specified in the statute, and DRED refused to disclose documents including the appraisal report, it was not in compliance with the Right to Know law;

- Prayers C, D, E, F, G, H & I requested findings that DRED unlawfully withheld documents specifically identified by DRED (including a letter of intent, property map, notes of Bill Carpenter, the G&C proposal, and e-mails between DRED officials Bill Carpenter and Paul Gray), and also withheld other documents such as deeds, tax maps, soil maps, and gravel maps that were necessary to the appraisal process;

- Prayers J, K & L requested findings that DRED maintains insufficient documentation to adequately comply with the Right to Know law;

- Prayer M requested a finding that DRED has demonstrated a pattern of noncompliance;

- Prayer N requested an injunction to address the pattern; and

- Prayer O asked for fees and costs.

PETITION, ***appx.*** at 21.

The court (***Kathleen McGuire***, J.) held a hearing in March 2005, after which it issued an order.

- The court dismissed Prayers A & B. It found that "although DRED did not respond within the statutory time period, it did respond with reasonable speed." The court also found that "DRED has represented that it has disclosed all non-privileged documents in its possession." It held that "while DRED was in technical violation of the statute, some violations were not its fault and others were harmless." ORDER (Apr. 7, 2005), ***appx.*** at 57-58.

- The court delayed decision on Prayers C, E, G & H. Finding it did not have enough information to make a decision, it ordered the parties to file memoranda regarding whether the requested information falls within the Right to Know exemption for "confidential, commercial, or financial information." ***Id.*** at 58-59, 63.

- The court dismissed as moot Prayer D because the requested map had been recently disclosed after DRED used it at a public meeting. *Id.* at 60.

- The court dismissed Prayer F because the requested G&C documents had at that point been released. The court noted that DRED acknowledged "due to an oversight, it was tardy in releasing the documents but did release them after they were considered by the Governor and Council. . . . Although DRED may have technically violated the statute, this violation has not prejudiced the petitioner." *Id.* at 60.

- The court dismissed Prayers I & J because they requested information pursuant to RSA 215-A:41, which the court found does not apply until the land becomes the property of the State. *Id.* at 61.

- The court dismissed Prayer K because the court found that ATV Watch did not meet the elements necessary to issue an injunction. *Id.* at 61.

- The court dismissed Prayer L for similar reasons as Prayers I, J & K. *Id.* at 62.

- The court dismissed Prayer M because the court did not find a pattern of noncompliance. *Id.* at 62.

- The court dismissed Prayer N because the court found that ATV Watch did not establish the elements necessary for an injunction. *Id.* at 62.

- In its April 7, 2005 order the court dismissed Prayer O regarding costs because DRED did not have a "knowing" violation, and regarding fees because ATV Watch was not represented by an attorney. *Id.* at 63. In its November 16, 2005 order the court denied ATV Watch's requests for costs and fees based on its finding that the State's reliance on *Perras v. Clements* was reasonable.

Numerous letters back and forth between ATV Watch and DRED continued, and by early November 2005, about a year after its Right to Know request, ATV Watch got much of the information it wanted – although the property appraisal report was not disclosed until December 2005 and other documents were continuing to be released as late as February 2006.

In the superior court, memoranda and responses were filed, and motions to reconsider

were denied.[3] The court (*Kathleen McGuire*, J.) held another hearing in November 2005, after which it issued a final order. There the court dismissed as moot the remaining Prayers C, E, G & H because "it appears that the State has provided petitioner with the documents." ORDER (Nov. 16, 2005), *appx.* at 89.

IV. Four Batches of Disclosures

The documents at issue here pertain to "all information on the property itself," "all information regarding funding of the purchase," and "all communications related to the property," as noted in ATV Watch's Right to Know request. LETTER FROM WALTERS TO DRED (Nov. 27, 2004), *appx.* at 1. Also at issue are documents specifically identified by DRED but which it refused to disclose, and which were noted in ATV Watch's superior court petition.

Those documents that were released can be organized into four separate batches.

A. January 21, 2005 Disclosure

The dates on these documents range from October 2004 to January 12, 2005, and include documents related to the G&C request to approve a contract to appraise the proposed property purchase. (Prayer F). They were released to ATV Watch on January 21, more than a week after the January 12 meeting. The delay was critical because not having the documents deprived ATV Watch and the public of its opportunity to apprize decision-makers, before their meeting, regarding the wisdom of approving the appraiser contract. In its pleadings DRED circularly claimed the documents did not become public records that were disclosable until after the G&C meeting: "DRED cannot release Governor and Council Resolutions until after they are considered

[3]An appeal was taken to this Court, but was withdrawn because decisions on the remaining prayers were still pending. *ATV Watch v. NH Department of Resources and Economical* [sic] *Development, Bureau of Trails*, N.H. Sup.Ct. No. 2005-0325.

by the Governor and Executive Council as they are not considered subject to disclosure until they are considered." DRED'S MOTION TO DISMISS PETITION FOR INJUNCTIVE RELIEF (Mar. 21, 2005) ¶ 7f , *appx.* at 32.

Also on January 21, DRED released e-mails (Prayers G & H) between Paul Gray, Chief of the Bureau of Trails at DRED, and Bill Carpenter, Administrator of DRED's Land Management Bureau. The communications took place on November 22, 2004, just four days after ATV Watch's November 17 request for information, and pertain to the bids submitted by various appraisers in preparation for the then-upcoming G&C meeting. E-MAILS (Nov. 22, 2004), *appx.* at 216. It is unknown why the e-mails were disclosed when they were – perhaps just due to the persistence of ATV Watch in repeatedly asking – but months later in its superior court pleadings DRED claimed they were non-disclosable both because they relate to the G&C resolution, and because they were "preliminary drafts" exempt from disclosure pursuant to RSA 91-A:5, IX.[4] DRED'S MEMORANDUM OF LAW IN RESPONSE TO THE APRIL 5TH COURT ORDER (Apr. 18, 2005), *appx.* at 64, 69-70.

B. March 17, 2005 Disclosure

The second release was a small but fairly detailed map of the property to be purchased (Prayer D). This document was probably in existence for some substantial time before it was released to ATV Watch on March 17, 2005, four months after its Right to Know request. On that date, however, DRED conducted a public-relations event and snowmobile tour, arranged by

[4]There were actually two sets of e-mails. In its memorandum of law, DRED conflated them, and presented arguments about other emails that DRED had not even identified as existing. These others were dated December 1, 2004, were among Paul Gray, Bill Carpenter and Chris Gamache, and were eventually disclosed to ATV Watch on October 31, 2005. *See* DRED'S MEMORANDUM OF LAW IN RESPONSE TO THE APRIL 5TH COURT ORDER (Apr. 18, 2005), *appx.* at 64, 69-70.

a member of the Executive Council, and attended by a variety of public officials and the press. In the letter accompanying the map, DRED wrote that it was being released at that time because the "map is being shown today to reporters and other attendees of a snowmobile ride, in the Berlin area." LETTER FROM GAMACHE TO WALTERS (Mar. 17, 2005), *appx.* at 16; *see also* DRED'S MOTION TO DISMISS PETITION FOR INJUNCTIVE RELIEF (Mar. 21, 2005) ¶7f , *appx.* at 32, 35 ("DRED did release the map to ATV Watch on or about March 18, 2005, as DRED needed to use the map in a public presentation regarding the property which then made it a public document."); *1/21/05 Motions Hearing* at 20-21 ("Last week, due to numerous requests and due to a requirement that there needed to be a public hearing based on [Executive] Councilor [Ray] Burton's demands, the map was released publicly at a public hearing. . . . As a result, the map status changed at that point, and once that happened, that document was released immediately to the ATV Watch group. That is how documents, possibly, change status. . . . The map was released last week, and that was released because it was used in a publication.").

C. October 31, 2005 Disclosure

1. Letter of Intent

The third release included the letter of intent between DRED and the landowner (Prayer C) indicating an agreement "to work cooperatively towards the proposed acquisition by the State of an estimated 5,000 to 7,000 acres of timberland . . . in the Township of Berlin, NH, for the purpose of establishing a state-owned and operated ATV Park." The one-page agreement establishes that the parties will later agree to terms of sale, and gives the State access to the land for a survey. It does not contain any promise of confidentiality, nor set forth any details. INTENT OF THE PARTIES (Sept. 28 & Oct. 4, 2004), *appx.* at 115. The document was finalized on October

4, 2004, six weeks before ATV Watch's Right to Know request, but not disclosed until October 31, 2005, eleven months after the request.

The reason given by the State for the delay in disclosure was that the letter of intent was "confidential, commercial, or financial" and thus exempt from the Right to Know law, but that it somehow lost that nature on October 31, 2005 when the proposal to purchase the property was placed on the agenda for the G&C meeting which occurred two days later.

2. Handwritten Notes

Another document released that day was a two-page set of handwritten notes by Bill Carpenter, (Prayer E). NOTES (Dec. 1, 2004), *appx*. at 217. Although nearly illegible, on their face the notes are believed to be from a meeting Mr. Carpenter attended on December 1, 2004. It appears from the notes that attending the meeting were several people from the White Mountain National Forest – Tom Wagner, Manager; Ken Crevier, Land Manager; and Katie Stewart, District Ranger – several people from DRED – Sean O'Kane, Commissioner; Paul Gray, DRED's Trails Bureau chief; and Bill Carpenter himself. Also attending were Rodger Krussman, Project Manager of the organization Trust for Public Lands.

On the other page of the notes there is a list of people who may have participated in the meeting at some point. The list includes John Gallus, who acted as broker for one of the land purchases that ultimately composed part of the DRED acquisition; Tom and Scott Dillon, the landowners; St. Laurent, the family who owned part of the land DRED appraised before the Dillons (or DRED) acquired it; Charlie Baylies, Dillon's forester; and other names which are not discernible.

This group appears to have discussed several matters. One was how a three-way deal

could be arranged that would solve a problem whereby a 97-acre landlocked parcel owned by the White Mountain National Forest would become contiguous with its other holdings. Another was that before the transaction the landowners would be allowed to carve out some lots with highway frontage that could be developed, and to cut the trees from 5,000 to 6,000 acres. It also appears that the group talked about an agreement to acquire the Jericho Lake Park from the City of Berlin, the federal government's interest in a portion of the land on which to build a proposed prison, some private development, and a cross-country ski operation. The State's interest in the land was for "Destination ATV – largest in the NE."

The group talked about the State's acquisition and some sort of deal or competing deals whereby DRED would provide money from the Land-Water Conservation Fund and other sources.

The handwriting is hard to read and one can only guess – from a knowledge of surrounding events – to what the sparse notations refer. Nonetheless, the meeting appears to have been a serious discussion among the major players about possible terms of sale. It took place just two weeks after ATV Watch's Right to Know Request, but was not disclosed until eleven months after.

These notes are important to ATV Watch and the public for several reasons. At the G&C meeting in January 2005, just a few weeks after the meeting memorialized by the notes, DRED told the G&C that the purchase was not for an ATV park. *See* Anne Saunders, *7,200 Acres Eyed for ATVs*, UNION LEADER (Jan. 13, 2005), when "Destination ATV - Largest in the NE" was clearly discussed. Second, the deal was shaping up to include – and later included – provisions that Dillon would maintain logging and gravel rights, as well as the frontage along the state

highway. And most obviously, the purchase involved use of the State's money. Not having the notes prevented the public from questioning its representatives about the wisdom of the deal, and even if some allegations can be characterized as the mere rant of a paranoid organization opposed to the transaction, *see DeVere v. Attorney General*, 146 N.H. 762 (2001) (requester believed low-number license plates allocated to privileged persons), the document raises questions ATV Watch felt deserved timely answers.

The reason given for the delay in disclosing the handwritten notes was the same as the letter of intent – the notes were alleged to be "confidential, commercial, or financial" and thus exempt from the Right to Know law, but that they somehow became something different – and thus disclosable – when the request to approve the purchase of the Berlin land was considered by the G&C. LETTER FROM GAMACHE TO WALTERS (Jan. 6, 2005), *appx.* at 6.

3. Landowner's Review of the Appraisal

Another document disclosed to ATV Watch on October 31, 2005 was a cover-letter from DRED to Messers. Dillon, the landowners, which indicated the State was providing its appraisal report to them, and sought their acceptance of the appraisal. LETTER FROM CARPENTER TO DILLON (Mar. 31, 2005), *appx.* at 17.

This letter is important because it shows that the landowners were asked to provide their approval of the State's appraisal nine months before it was disclosed to ATV Watch and the public.

D. December 19, 2005 Disclosure

Another release included the 100-page appraisal report of the land to be purchased.[5] The appraisal was performed on November 22, 2004, a few days *before* ATV Watch's Right to Know request.[6] It was not released to ATV Watch, however, until December 19, 2005, over a year *after* its request. It is not known what prompted the eventual disclosure, but the record suggests it was merely ATV Watch's persistence. LETTER FROM O'KANE TO WALTERS (Dec. 19, 2005), *appx.* at 20.

Though squarely included in Prayer B, the appraisal is not specifically listed in ATV Watch's petition to the superior court because ATV Watch was not yet aware of its existence at the time of filing. But the document was clearly covered by ATV Watch's November 27, 2004 Right to Know request, it was extensively discussed in the hearings below, the state argued against its disclosure, and it is one of the key documents sought by ATV Watch because it provides a basis for the public to evaluate the prudence of DRED's proposed acquisition.

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[5]To this day the State is continuing to impede the public's right to know by having accepted the appraisal under terms which bars ATV Watch's ability to disseminate its contents without prior consent. LETTER FROM SOWLE TO WALTERS (Nov. 16, 2005), *appx.* at 19.

[6]This lawsuit does not address the surprising inconsistency that the appraisal was done a month-and-a-half before the G&C approved the hiring of an appraiser, nor the possibility that DRED's disclosure delays were prompted by the inconsistency. These matters became contentious during the January 12, 2005 G&C meeting. *See* <http://www.nhexecutivecouncil.com/index1.htm> (streaming video of meeting).

SUMMARY OF ARGUMENT

After identifying the parties and their interests, ATV Watch lays out the sequence of events that lead to this litigation, explains the documents at issue, and describes the circumstances and timing of their release.

ATV Watch first argues that the court below erred in ruling that this case became moot when the documents were released.

It then reviews settled principles governing construction of the Right to Know law, noting that its disclosure provisions are expansive and its exemptions are narrow.

ATV Watch argues that "harm" or "prejudice" are not a valid considerations in Right to Know cases that concern the timing of disclosures, and that the court erred in basing its decision on such factors. It then reviews the statute's disclosure timetables, points out that DRED did not comply, and argues that the court was wrong to excuse the failures.

ATV Watch notes that none of the exemptions contained in New Hampshire's Right to Know law apply to this case, including those for "confidential," "commercial," or "financial" information, nor for personal notes or preliminary drafts. It then argues that *Perras v. Clements*, relied on below, does not apply to the appraisal or any other document in this case.

ATV Watch then points to another statute which provides for the establishment of ATV trails, that also has disclosure provisions, and argues that it guarantees access to the records ATV Watch sought.

ATV Watch then alleges that DRED's decisions regarding classification of documents as secret were arbitrary made, and that they should not have been given any credence by the court.

Finally, ATV Watch argues that the court erred by not enjoining DRED to keep better documentation, and by not awarding to ATV Watch fees and costs for its efforts.

ARGUMENT

I. The Court Should Have Reached the Merits of Issues Regarding Disclosed Documents Rather Than Treating Them as Moot

The court found many of ATV Watch's claims moot because by the time of its order (almost nine months after ATV Watch filed its petition), the documents ATV Watch was seeking had been disclosed.

Disclosure, however, does not end Right to Know cases. Pursuant to the Right to Know statute, there are several post-disclosure remedies, including enjoining future violations, RSA 91-A:8, III, "invalidat[ing] an action of a public body or agency taken at a meeting held in violation" of the statute's provisions, RSA 91-A:8, II, and making an award of fees and costs. RSA 91-A:8, I. *See Goode v. New Hampshire Office of Legislative Budget Assistant*, 148 N.H. 551, 553 (2002) (lower court ruled case moot upon disclosure of documents but this Court reached merits because of outstanding attorneys fees issue).

Second, automatic mooting of Right to Know cases on the basis of disclosure would allow the question of whether an agency acted within the law to perpetually evade review, *Asmussen v. Commissioner, New Hampshire Dept. of Safety*, 145 N.H. 578, 591 (2000); *Royer v. State Dep't of Empl. Security*, 118 N.H. 673, 675 (1978), particularly when, as here, the court proceedings took nine months.

Finally, declining review based on mootness would allow an agency to circumvent the law by delaying release of documents until they were no longer relevant or until the eve of judicial proceedings.

Accordingly, this Court should remand for a consideration of the merits, or in the alternative, because the record is before this Court, decide the issues presented.

II. Provisions of New Hampshire's Right to Know Law Mandating Disclosure are Construed Expansively, and Exemptions are Construed Restrictively

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 provisions mandating disclosure are read expansively, and exemptions to disclosure are read restrictively. *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 546 (1997). The constitution also compels that a stringent test be applied to withheld information.

> 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, __ N.H. __, 888 A.2d 1236, 1245 -1246 (decided Dec. 30, 2005) (discussing court records) (citations and quotations omitted).

As explained below, contrary to these constitutional and statutory principles, the court erred by excusing untimely disclosures, accepting DRED's arbitrary explanations for eventually releasing documents, injecting "prejudice" into its analysis, finding that exemptions apply, and refusing to enjoin DRED's conduct.

III. Prejudice is Not a Valid Consideration in Right to Know Timely Disclosure Cases

The lower court dismissed portions of ATV Watch's Petition based on its findings that delays in disclosure were "harmless," and the delay "has not prejudiced" ATV Watch. ORDER (Apr. 7, 2005), *appx.* at 58, 60.

This Court has made abundantly clear that the motivations of a party seeking disclosure are irrelevant to the question of access to public records. *Petition of Keene Sentinel*, 136 N.H. 121, 128 (1992) ("We cannot dictate what should and should not interest the public. Were the court to do so we would overstep our judicial authority by substituting our preferences for those of the individual. Accessibility of information assumes and encourages a community of people free to think as it chooses and act according to its collective will.").

Most Right to Know cases deal only with whether a record should or should not be withheld. *See e.g., New Hampshire Civil Liberties Union v. City of Manchester*, 149 N.H. 437 (2003). In such cases, if "harm" or "prejudice" were an issue, they would be measured by a court asking: 1) what was demanded? and 2) did the disclosures meet the demands? These may be appropriate questions which present no constitutional problems.

This case, however, deals with *when* documents were disclosed. To measure "harm" or "prejudice" in the context of timeliness, the court must necessarily ask: 1) when was the document received, and 2) was that fast enough for the petitioner's purposes? The requester's purposes, however, is not a legitimate topic of inquiry in Right to Know jurisprudence, making "harm" or "prejudice" incapable of judicial resolution.

Accordingly, the court below erred in dismissing portions of ATV Watch's petition based on its finding that ATV Watch did not sufficiently suffer by the tardy disclosures.

IV. Agency Must Make Records Available Immediately or Within Five Days

The Right to Know law requires that the government "make available . . . public record[s] within its files when such records are immediately available. If a public body or agency is unable to make a public record available for immediate inspection . . . it ***shall***, within 5 days of request, make such record available." RSA 91-A:4, IV (emphasis added). Thus

> a record's immediate availability for release merely requires that the record be made available upon request. If a record has been requested, but it is not available for immediate release, the agency has five days to make it available or give some other written response.

Goode v. New Hampshire Office of Legislative Budget Assistant, 145 N.H. 451, 453-454 (2000). A court has no authority to expand, waive or excuse this timetable. *In re Bazemore*, __ N.H. __ (decided April 11, 2006) ("the word 'shall' makes enforcement of a provision mandatory").

Because the timetables are mandatory, there is no room in the statute for excusing tardy disclosures, or for determining that a standard-less "reasonable speed," ORDER (Apr. 7, 2005), ***appx.*** at 58, is acceptable. The time provisions of government disclosure laws are central to their purpose of enabling citizens to inform themselves of their government's activities. *See Hayden v. U.S. Dept. of Justice*, 413 F.Supp. 1285 (D.C.D.C. 1976) (quoting Congressional record of FOIA, "excessive delay by the agency in its response is often tantamount to denial"); *In re Russell C.*, 120 N.H. 260 (1980) (statutory time limits mandate compliance within them).

The intent of the Right to Know law is not to notify citizens about what their government did, but in a democratic society, to give citizens the opportunity to influence what their government is doing. Accordingly, the court was in error by substituting a measure of "reasonable speed" for the specific timing requirements set forth in the statue, by dismissing ATV Watch's prayers for relief based on "technical violations" of the timing requirements, and by finding the delays were "harmless" or because they didn't "prejudice[] the petitioner."

V. Language of Statutory Exemptions to Right to Know Law Does Not Apply to Any Known Document in this Case

The Right to Know Law exempts from its provisions, "[r]ecords pertaining to . . . "confidential, commercial, or financial information." RSA 91-A:5, IV. In its pleadings, DRED was not specific regarding which of these exceptions apply to which documents.

A. Exemption For "Confidential" Information Does Not Apply

"To show that information is sufficiently 'confidential' to justify nondisclosure, the party resisting disclosure must prove that disclosure is likely: (1) to impair the State's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Union Leader v. HFA*, 142 N.H. at 554 (quotations and citations omitted). If one of these elements are met, the court must then "balance the public interest in disclosure of the requested information against the government interest in nondisclosure." *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 475 (1996).

At the outset, the State has no standing to claim the second condition – harm to the competitive position of a private party – and no such claim has been made here by the State or by anyone else.

The first condition – impairing the State's ability to obtain information in the future – does not apply. First, it is believed that the State has not anywhere made a claim that timely disclosure of the documents at issue here would have impaired its future ability to obtain information. Thus the issue was not preserved.

Second, if the State made such a claim, it would have to go beyond a mere allegation of impairment. *See, Burke Energy Corp. v. Department of Energy*, 583 F.Supp. 507, 511 (D.C.Kan.

1984) ("a blanket allegation of harm does not alone constitute sufficient evidence"); *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976) ("generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA, since such allegations necessarily elude the beneficial scrutiny of adversary proceedings, prevent adequate appellate review and generally frustrate the fair assertion of rights under the Act"). The State would have to offer evidence to substantiate its claim of impairment.

> To show impairment of future investigatory capabilities the agency must adduce factual data from which the [trial] court may infer that disclosure is likely to make others reluctant to cooperate on future investigations. To show substantial competitive harm, the agency must show by specific factual or evidentiary material that (1) the person or entity from which information was obtained actually faces competition; and (2) substantial harm to a competitive position would likely result from disclosure of the information in the agency's records.

Calhoun v. Lyng, 864 F.2d 34, 36 (5th Cir. 1988). *See also Nadler v. F.D.I.C.*, 92 F.3d 93 (2nd Cir 1996); *Critical Mass Energy Project v. Nuclear Regulatory Com'n*, 975 F.2d 871 (D.C. Dir. 1992).

The record reveals no effort by the State to "adduce factual data" and there is nothing in the record beyond the "blanket allegation" from which the court could "infer that disclosure is likely to make others reluctant to cooperate on future investigations."

Third, even if the matter were preserved and the data were adduced, there is nothing in the documents ATV Watch sought that might impair future data gathering.

Fourth, in balancing the private and public interests, examination of the documents show that the State had little interest in nondisclosure. Nothing in them is particularly private, nor do they betray any competitive secrets. ATV Watch had a clearly discernible interest in the documents so that it could advocate before state agencies and its elected representatives.

Accordingly, the documents here do not qualify for the confidential information exemption, and should have been disclosed immediately upon request.

B. Exemption For "Commercial" or Financial" Information Does Not Apply

By its terms, the exemptions for commercial or financial information also do not apply to any document in this case

> The terms "commercial or financial" encompass information such as business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition. Whether documents are commercial depends on the character of the information sought. Information is commercial if it relates to commerce. Thus information may qualify as "commercial" even if the provider's . . . interest in gathering, processing, and reporting the information is noncommercial. Conversely, not all information generated by a commercial entity is "financial or commercial."

Union Leader v. HFA, 142 N.H. at 553 (quotations and citations omitted). Given these definitions, the documents here do not qualify for the commercial or financial information exemptions, and they should have been disclosed immediately upon request.

VI. *Perras v. Clements* Does Not Apply to the Appraisal or Any Other Document in This Case

The State argued, and the lower court found reasonable, that DRED's nondisclosures were justified by this Court's opinion in *Perras v. Clements*, 127 N.H. 603 (1986).

In *Perras*, the State had condemned a portion of the plaintiff's land to widen a highway. Several of the other property owners whose land was affected had already settled with the State, but the plaintiff had not. To gain a more effective position in the ensuing eminent domain litigation, the plaintiff sought under the Right to Know law the State's appraisal of his own land and that of his neighbors. This Court held, after balancing the interests, that the public would be harmed by the disclosure because it would undercut the State's ability to bargain, and thus denied disclosure of the appraisal.

Although *Perras* involved an appraisal, its relation to ATV Watch's case ends there.[7] *Perras* was an eminent domain proceeding – the State was taking a narrow strip of land along a highway in which nobody except the State would have an interest. The land which DRED was purchasing here, however, was valued at $2.2 million and comprised upwards of 7,200 largely unspoiled acres which has enormous value for recreation, development, forestry, mining, and other uses. At least two entities of the federal government – to expand the White Mountain National Forest and to establish a federal prison – were interested in buying portions. As the landowners insisted on retaining the land with road frontage, it can be presumed that others are

[7]Most cases involving appraisals arise in the context of property taxation records, and courts have generally considered them non-exempt from states' freedom of information laws. *See e.g.*, *Gold v. McDermott*, 347 A.2d 643 (Conn. Super. Ct. Appellate Sess. 1975); *Herald Co., Inc. v. Tax Tribunal*, 669 N.W.2d 862 (Mich. App. 2003); *Menge v. City of Manchester*, 113 N.H. 533 (1973); *DeLia v. Kiernan*, 293 A.2d 197 (N.J. Super. 1972); *Szikszay v. Buelow*, 436 N.Y.S.2d 558 (1981); *South Carolina Tax Com'n v. Gaston Copper Recycling Corp.*, 447 S.E.2d 843 (S.C. 1994); *Associated Tax Service, Inc. v. Fitzpatrick*, 372 S.E.2d 625 (Va. 1988).

interested in those portions.

The condemnation in *Perras*, moreover, was by its nature a forced sale, among arms-length parties. Here, however, all sides of the transaction were willing participants, *see* Paula Tracy, *Timber Owner Pitches ATV Park*, UNION LEADER (Jan. 14, 2005).

The balancing of public and private interests in *Perras* was the reverse of the balance here.

The plaintiff in *Perras* wanted the State's appraisal of his own property in an apparent effort to elevate his bargaining position. Because it was a condemnation proceeding, the *Perras* plaintiff was sure, as the Court pointed out, to get the appraisal as part of discovery. Moreover, the plaintiff had yet other ways of getting it – although the State would not make unilateral disclosure, it was happy to exchange appraisals with the plaintiff. Finally, the *Perras* plaintiff also wanted the appraisals of the land belonging to his similarly-situated neighbors. As those documents may have contained private information, their privacy interests had to be considered. The public interest in disclosure in *Perras* was slight – the plaintiff was self-focused, and the natural result of disclosure would be to drive up the price.

In ATV Watch's case, however, the public would have benefitted by the disclosure.

By the time *Perras* reached the courts, the decision to condemn the plaintiff's land had already been made in some presumably democratic process in which due process rights were fulfilled; it was only the amount of money to be paid that was in dispute. Here, there was not yet any decision to buy the land; the appraisal documents were part of the democratic decision-making. By releasing the appraisal before the transaction was consummated, the public could have reacted to it by either welcoming or disapproving the prospect of spending State money for

ATV trails. Whether welcoming or disapproving, the reaction would have gauged the public desire for the purchase. Finally, in ***Perras*** the plaintiff was engaged in a scheme whose private purpose essentially subverted the public nature of the Right to Know law. ATV Watch, however, is the quintessential Right to Know plaintiff – a membership organization seeking to educate the public.

The circumstances of ATV Watch's situation are so different from ***Perras*** that the two cannot be harmoniously analogized. ***See Appeal of Town of Nottingham***, __ N.H. __, slip op. at 14 (decided May 19, 2006) (refusing to apply definition of word construed in private will clause to statutory construction involving great public interest). Accordingly, ***Perras*** does not control this case.

VII. Notes That are not Personal nor Preliminary Drafts Should have Been Disclosed

After this Court decided *Goode v. N.H. LBA*, 145 N.H. at 451, the Legislature amended the Right to Know statute to exempt "notes or other materials made for personal use that do not have an official purpose," RSA 91-A:5, VIII, and "[p]reliminary 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" an agencies' commissioners. RSA 91-A:5, IX.

The notes with which Bill Carpenter memorialized his meeting with the landowner and others do not fit within these exceptions. They have an official purpose in that they were made during a meeting he attended in his official capacity and they related to that position. Although there is no way to know whether they were circulated to higher-ups at DRED, they were available, they do not constitute a preliminary draft of any document, and are in their final form. Thus they are not exempt from disclosure.

VIII. ATV Trails Statute Supplements Right to Know Law

Freedom of information acts do not stand alone, and other laws can supplement or create exemptions to them. *Baldrige v. Shapiro*, 455 U.S. 345 (1982); *Professional Firefighters of New Hampshire v. Healthtrust, Inc.*, 151 N.H. 501 (2004).

RSA 215-A contains the New Hampshire policy regarding establishment of ATV trails. It provides that "[i]n furtherance of the public interest, [DRED] shall work to develop a system of trails for ATVs . . . that . . .[p]rovides opportunities for public input in all decisions regarding development of new or significantly revised trail systems on state lands." RSA 215-A:41, II(f). Such "opportunities" would surely include the most fundamental decision-making concerning on what lands to develop ATV trails.

As the statute requires opportunities for public input in all decisions regarding the development of ATV trails, it supplements the Right to Know law. Its legislative history bears this out. During its consideration there was a legislative study committee. Its report found:

> Local communities and ATV clubs should have representation during the decision making process. It's an opportunity to demystify the process and make it more inclusive. Involvement of the local community could head off subsequent opposition.

STUDY COMMITTEE REPORT ON ALL-TERRAIN VEHICLES AND TRAIL-BIKES, CHAPTER 259 (Dec. 28, 2001).

Because of the controversial nature of ATV trails and their potential to conflict with other land uses, the Legislature made clear that, in the public interest, DRED is obligated to provide maximum opportunity for public input regarding the establishment of ATV trails. Thus, any effort to not disclose information must be particularly carefully scrutinized, and have a compelling

justification that outweighs the statutory recognition of the public benefit in disclosure.

The court below found that the statute does not apply because the land was not yet acquired and thus technically not yet "state lands." But another section of the same statute *requires* DRED to establish ATV trails on land it buys with ATV registration fees. RSA 215-A:23, VII(c). There is no dispute that the purchase of the property here was made with those fees. Thus if DRED bought the land with that money, but then did not establish ATV trails, it would be in violation of the statute.

Construing the statute so that it does not become operative until after ATV trails are already established in accord the legislative mandate negates the equal legislative mandate of public input concerning on what lands ATV trails should be established. This is a result not intended by the legislature, and thus in error.

Accordingly, the court erred in finding DRED's nondisclosures did not violate both statutes, RSA 91-A and RSA 215-A: 41, II(f), and in not remedying the violations.

IX. DRED's Classification of Documents Was Arbitrary

Any arbitrary agency action is invalid, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), including arbitrary classification of documents. *Ray v. Turner*, 587 F.2d 1187, 1208 (D.C. Cir. 1978); *Bell v. U.S. Dept. of Defense*, 71 F.R.D. 349, 355 (D.N.H., 1976); *In re Muszalski*, 52 Cal.App.3d 475, 481, 125 Cal.Rptr. 281, 284 (Cal. App. 1975).

If there are set procedures for deeming documents confidential, and the agency followed them, arbitrary classification is unlikely. *See Serbian Eastern Orthodox Diocese for United States of America and Canada v. Central Intelligence Agency*, 458 F.Supp. 798, 801 (D.C.D.C. 1978). But when an agency's procedure is informal, it is likely arbitrary. *See, e.g, Billington v. U.S. Dept. of Justice*, 233 F.3d 581 (D.C. Cir. 2000).

In ATV Watch's case, DRED followed no discernible procedures in determining that the documents here were not disclosable. Its explanations for disclosing them betray the arbitrary classification.

There is no known rule of law making G&C resolutions or their associated documents secret until the item is considered by the G&C (as DRED initially claimed), or until the item is placed on the G&C agenda (as DRED later claimed). DRED's decision to use documents for a public relations snowmobile ride likewise does not suddenly change the inherent nature of a document from secret to public or from dangerous to tame. While it is possible to imagine that consummation of a transaction could change classification of documents, DRED waived that claim by disclosing its appraisal to the landowner nine months before it allowed the public to see it. *See Goode v. New Hampshire Office of Legislative Budget Assistant,* 148 N.H. at 558. At

best these decisions were arbitrary; at worst they are indicative of an agency hiding information until it is convenient or politic to release it, or until its release can no longer impact its actions. In any case, DRED's actions had no rationale basis, and the court therefore erred in excusing them, giving them any credence, and denying relief based on them.

X. Court Should Have Ordered DRED to Keep Better Documentation

ATV Watch's Right to Know Request broadly requested "[a]ll information" about the property, its purchase, funding of the purchase, and siting of ATV trails. LETTER FROM WALTERS TO DRED (Nov. 27, 2004), *appx.* at 1. Until after the proposal to purchase the property was placed on the G&C agenda, ATV Watch got little of substance from DRED.

It is unknown if documents continue to be withheld, but a review of what was disclosed does not give reasonable confidence that the agency made full and timely disclosure.

For instance, the resolution presented to the G&C regarding hiring an appraiser appears to have sprung from DRED fully considered and fully written. Surely the idea germinated at some time long before the G&C meeting, and surely that germination left behind some sort of paper or electronic trail. Yet the only documents DRED claimed it had were several e-mails that talk about a bidding process that had already been concluded.

Another example is the genesis of the availability of the land itself. In the documents that were disclosed to ATV Watch, there is an assumption that the landowner owned land and that DRED desired to purchase it. There is no record of correspondence between the landowner and DRED before the appraisal detailing, for instance, what portion of his two parcels the landowner was interested in selling, how the landowner came to acquire one of these parcels (a transaction in which Senator John Gallus was the broker) *after* the State had appraised it, *SED Valuation, LLC*, APPRAISAL REPORT (Nov. 22, 2004) at 9, *appx.* at 116, 129, or who approached whom with the idea of a purchase.

This paucity of paper prompted ATV Watch, in its petition before the superior court, to request a variety of injunctions requiring DRED to keep sufficient documentation of its activities

(Prayers J, K, L, M & N).

The Right to Know statute specifically provides for injunctions in these circumstances. RSA 91-A:8, III ("the court may issue an order to enjoin future violations of this chapter"); *see also* RSA 91-A:7. Yet the court summarily dismissed ATV Watch's request for an injunction on the grounds that it was not an appropriate use of the remedy. Because DRED's disclosures were not a plausible totality of the documents that one would reasonably expect to exist, the court erred.

XI. Court Should Have Awarded Fees and Costs

The Right to Know law provides for costs and fees when an agency fails to disclose non-exempt information, when the agency "knew or should have known" that the information was not exempt and the person was compelled to file a "lawsuit in order to make the information available." RSA 91-A:8. The purpose of an award of fees is to promote compliance with the statute's objectives. *Bradbury v. Shaw*, 116 N.H. 388, 391 (1976).

Because the documents at issue fall so far short of the statutory exemptions and the timing of their release was so arbitrary, it appears DRED knew they were disclosable. Moreover, the State's arguments based on *Perras v. Clements*, 127 N.H. 603 (1986), was spurious, such that it should have known the documents were disclosable.

There is little doubt that ATV Watch's lawsuit is the only thing that forced disclosure. *Goode*, 148 N.H. at 558.

For instance, during this litigation DRED changed its position regarding when in the G&C process documents become disclosable. DRED first claimed its documents were not available until after the G&C had already voted on a matter; later it claimed they were not available until after the matter was on the agenda, but before the vote. *Compare* LETTER FROM GAMACHE TO WALTERS (Jan. 6, 2005), *appx.* at 6 ("those documents are not public until the Governor and Executive Council consider this request"); *3/21/05 Motions Hearing* at 21 ("those documents are all confidential until Governor and Council considers them"); DRED'S MOTION TO DISMISS PETITION FOR INJUNCTIVE RELIEF (Mar. 21, 2005) ¶ 7f , *appx.* at 35 ("DRED cannot release Governor and Council Resolutions until after they are considered by the Governor and Executive Council as they are not considered subject to disclosure until they are considered.") *with* DRED'S

OBJECTION TO ATV WATCH'S MOTION FOR RECONSIDERATION (May 2, 2005), *appx.* at 84 ("According to G&C procedures, at the time the agenda is released, the items on the agenda can be viewed by the public.").

Also for instance, DRED claimed on four separate occasions that it had released everything in its possession pertaining to ATV Watch's Right to Know request, only to later make another disclosure. *See* LETTER FROM GRAY TO WALTERS (Nov. 2, 2005), *appx.* at 18 ("[P]lease be advised that we have now released to you all of the documents pertaining to the DRED's negotiation with Tom and Scott Dillon for the purchase of property in the City of Berlin"); *11/9/05 Trn.* at 5 ("ATV Watch has every document in the possession of DRED at this time that's related to this matter."); LETTER FROM SOWLE TO WALTERS (Nov. 16, 2005), *appx.* at 19 ("DRED has produced all documents it has regarding the Jericho Lake Project."); DRED'S OBJECTION TO MOTION TO RECONSIDER (Dec. 8, 2005), *appx.* at 105 ("DRED asserts that it has provided every document in its possession that responds to ATV Watch's right-to-know requests."). Obviously at least three of these claims were false and those cast doubt on the fourth. But without this litigation DRED would have had no compulsion to have gone beyond the first release.

Accordingly, the court erred by not making an award of fees and costs. Although ATV Watch was not represented by a lawyer below, it did incur costs and fees including fees for legal consultations. For this appeal, costs and fees are again requested.

CONCLUSION

Based on the foregoing, ATV Watch respectfully requests this Honorable Court to find that DRED was in violation of the timetable and substantive requirements of the Right to Know law and the public input provision of the ATV law, to issue an injunction forcing compliance, and to award attorneys fees and costs.

Respectfully submitted,

ATV Watch,
By its Attorney,

Law Office of Joshua L. Gordon

Dated: June 18, 2006

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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.

I hereby certify that on June 18, 2006, copies of the foregoing will be forwarded to Anne M. Edwards, Esq., Associate Attorney General.

Dated: June 18, 2006

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