

# State of New Hampshire Supreme Court

NO. 09-\_\_\_\_\_

ATV WATCH, &a

v.

NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION

NOTICE OF MANDATORY APPEAL  
Pursuant to Supreme Court Rule 7(1)(A)

By: Joshua L. Gordon, Esq.  
Law Office of Joshua Gordon  
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# State of New Hampshire Supreme Court

## NOTICE OF MANDATORY APPEAL

This form should be used for an appeal from a final decision on the merits issued by a superior court, district court, probate court or family division court except for a decision from: (1) a post-conviction review proceeding; (2) a proceeding involving the collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; (6) a probation revocation proceeding; (7) a landlord/tenant action or a possessory action filed under RSA chapter 540; (8) from an order denying a motion to intervene; or (9) a domestic relations matter filed under RSA chapters 457 to 461-A, except that an appeal from a final divorce decree or from a decree of legal separation shall be a mandatory appeal.

1. COMPLETE CASE TITLE AND DOCKET NUMBERS IN TRIAL COURT

*ATV Watch and Andrew Walters v. State of New Hampshire,  
Department of Transportation, No. 08-E-0030*

2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)

Merrimack County Superior Court (*Philip P. Mangones, P.J.*)

3A. NAME & ADDRESS OF APPEALING PARTY

Andrew Walters  
ATV Watch  
PO Box 34  
Fitzwilliam, N.H. 03447

3B. NAME, FIRM, ADDRESS & TELEPHONE  
NUMBER OF APPELLANT'S COUNSEL

Joshua L. Gordon  
New Hampshire Bar No. 9046  
Law Office of Joshua Gordon  
26 S. Main St., #175  
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4A. NAME & ADDRESS OF OPPOSING PARTY

The State of New Hampshire  
Department of Transportation  
7 Hazen Drive  
Concord, N.H. 03301

4B. NAME, FIRM, ADDRESS, & TELEPHONE  
NUMBER OF OPPOSING COUNSEL

Edith L. Pacillo  
Office of the Attorney General  
33 Capital St.  
Concord, N.H. 03301  
(603) 271-3671

5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT

Arthur B. Cunningham, Esq. (representing appellant below)  
79 Checkerberry Ln.  
Hopkinton, N.H. 03229  
(603) 746-2196

6. DATE OF CLERK'S NOTICE OF DECISION  
OR SENTENCING

Clerk's Notice of Final Order  
September 28, 2009

DATE OF CLERK'S NOTICE OF DECISION  
ON POST-TRIAL MOTION

None.

7. CRIMINAL CASES: DEFENDANT'S  
SENTENCE AND BAIL STATUS

n/a

8. APPELLATE DEFENDER REQUESTED?

No.

9. IS ANY PART OF CASE CONFIDENTIAL? IDENTIFY WHICH PART AND CITE AUTHORITY

The case concerns documents the State has not publicly released.

10. IF ANY PARTY IS A CORPORATION, NAMES OF PARENTS, SUBSIDIARIES & AFFILIATES

n/a

11. DO YOU KNOW ANY REASON WHY ONE OR MORE SUPREME COURT JUSTICE WOULD BE DISQUALIFIED FROM THIS CASE?

Judge Conboy presided over proceedings following this court's remand in *ATV Watch v. DRED*, 155 N.H. 434 (2007). Other than it being the same plaintiff, however, there is no known connection between that case and this, and ATV Watch knows of no reason Judge Conboy would be recused.

IF YES, FILE MOTION FOR RECUSAL, SUPREME COURT RULE 21A

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY?

Yes.

IF YES, COMPLETE TRANSCRIPT ORDER FORM

13. LIST SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH.

#### RELEASE AND EXEMPTIONS ERRORS

1. Is that portion of the Right-to-Know law which exempt from release preliminary drafts, notes, 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 an unreasonable restriction to the right of access to governmental proceedings provided in Article 8 of the Constitution of the State of New Hampshire?
2. Do documents and materials which are produced by a state employee and which pertain to the conduct of public business have an official purpose and are therefore disclosable under the Right-to-Know law?
3. Are documents and materials which are produced by a state employee and which pertain to the conduct of public business personal notes or draft documents if they are circulated beyond the original author and therefore disclosable under the Right-to-Know law?
4. May a public body arbitrarily limit the scope, such as the content or range of dates, of a right to know request narrower than the scope set forth in the request?
5. Was the *Vaughn* index filed by the agency sufficiently specific to enable meaningful review, when it lacked crucial information, did not comprise a comprehensive list of documents, and contained other errors?
6. Did the court err in holding that certain documents, or portions thereof, were exempt from disclosure, on the basis that they were drafts, personal notes, attorney/client-privileged, or any other Right-to-Know exemption?
7. Did the court err in not ascertaining that the agency disclosed certain documents beyond the Right-to-Know deadlines, when they were immediately available?
8. Did the court err in failing to order the agency to provide sufficient reasons for denying disclosure of certain documents, or portions thereof?
9. Did the court err in failing to review the actions of the office of the attorney general, when that office, on behalf of another agency, made decisions regarding the classification, disclosure, and exemption status of certain documents or portions thereof?
10. Did the court err in failing to rule on whether the placement of an automatically generated header or footer on a public document, which arbitrarily limits its disclosure to the public thus reversing the Right-to-Know presumption that government document are presumed public unless statutorily exempt?

11. Did the court err in failing to make a determination regarding whether certain documents were released when they were presumptively subject to disclosure?

12. Did the court err in holding that the state allowably withheld certain documents or portions thereof, when they were timely contained in the requestor's initial request and in its Right-to-Know suit?

13. If a public body has possession of a governmental record which is subject to disclosure, is it a violation of the Right-to-Know law to withhold it if the requestor already has the record or it is available from a source other than the governmental body; that is, does a requestor bear the burden of demonstrating that a record is not in its possession or not available from another source in order to compel disclosure from the public body?

#### DISCOVERY ERRORS

14. Did the court err by requiring the Right-to-Know requestor to seek the court's permission to engage in discovery, by limiting discovery to matters narrower in scope than authorized by court rules, by finding the requestor did not establish grounds for discovery, and by generally ruling that discovery rules in Right-to-Know actions differ from other civil suits?

15. Did the court err by preventing the Right-to-Know requestor from discovering the identities of those responsible for defendant's Right-to-Know compliance, and those who classified, withheld, or redacted certain documents, thereby preventing the requestor from discovering potential witnesses who could testify regarding the integrity of the claimed exemptions?

16. Did the court err by preventing the Right-to-Know requestor from discovering whether the defendant fully complied with the Right-to-Know request, whether all identifiable documents were disclosed, the dates documents were available, how or why document searches were limited in scope and the methodology of document searches, the extent to which documents were circulated among those within and without the agency, and other matters related to the disclosure and withholding of certain documents, thereby preventing the requestor from discovering evidence of whether exemptions were properly invoked or waived, whether the agency disclosed all documents pertaining to the request, and whether the agency complied generally with the Right-to-Know law?

#### REMEDIES ERRORS

17. Does the Right-to-Know law provide for an award of attorney's fees only when the attorney files an appearance on behalf of the plaintiff, or does the Right-to-Know law also provide for an award when the attorney acts as a consultant to a *pro se* plaintiff?

18. Did the court err in holding that the requestor did not obtain information as a result of this suit, and that the suit was not necessary to obtain it?

19. If a Right-to-Know suit results in the release of documents as the suit is litigated, does the Right-to-Know law continue to provide for an award of attorney's fees incurred subsequent to the release of the documents?

20. When a document is withheld from disclosure prior to the filing of a suit but subsequently released during the course of the suit, was the document released as a result of the suit for the purposes of the attorneys fees provision of the Right-to-Know law?

21. Does the Right-to-Know provide for an award of attorneys fees if a suit does not result in the release of a specific document, but rather results in the release of information more generally, such as a change in state policy regarding classes of information subject to disclosure?

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#### 14. CERTIFICATIONS

I hereby certify that, upon information and belief, every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.



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Joshua L. Gordon, Esq.

I hereby certify that on or before the date below copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).



October 28, 2009

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Joshua L. Gordon, Esq.

#### ATTACHMENTS

(1)	CLERK'S NOTICE (Sept. 28, 2009)	8
(2)	ORDER (Sept. 18, 2009)	9

## TRANSCRIPT ORDER FORM

### INSTRUCTIONS:

1. If a transcript is necessary for your appeal, you must complete this form.
2. List each portion of the proceedings that must be transcribed for appeal, e.g., entire trial (see Superior Court Administrative Rule 3-1), motion to suppress hearing, jury charge, etc., and provide information requested.
3. Determine the amount of deposit required for each portion of the proceedings and the total deposit required for all portions listed. Do not send the deposit to the Supreme Court. You will receive an order from the Supreme Court notifying you of the deadline for paying the deposit amount to the trial court. Failure to pay the deposit by the deadline may result in the dismissal of your appeal.

LIST EACH PORTION OF CASE PROCEEDINGS TO BE TRANSCRIBED						
Date of Proceeding	Type of Proceeding	Length of Proceeding	Name of Judge(s)	Steno/ Recorded	Previously Prepared?*	Deposit
2/11/08	Hearing	1 hour	<i>Mangones, J.</i>	Recorded	no	\$175
6/24/08	Hearing	1 hour	<i>Mangones, J.</i>	Recorded	no	175
12/23/08	Hearing	1 hour	<i>Mangones, J.</i>	Recorded	no	175
<b>DO NOT SEND DEPOSIT AT THIS TIME</b>						<b>TOTAL DEPOSIT: \$525</b>

### SCHEDULE OF DEPOSITS

#### Length of Proceeding

Hearing or trial of one hour or less  
Hearing or trial up to ½ day  
Hearing or trial of more than ½ day  
Previously prepared portions

#### Deposit Amount

\$ 175  
\$ 450  
\$ 900/day  
Number of pages x \$.50 per page per copy if additional copies are needed

NOTE: The deposit is an estimate of the transcript cost. After the transcript has been completed, you may be required to pay an additional amount if the final cost of the transcript exceeds the deposit. Any amount paid as a deposit in excess of the final cost will be refunded. The transcript will not be released to the parties until the final cost of the transcript is paid in full.

\* For portions of the transcript that have been previously prepared, indicate number of copies that were prepared.



**THE STATE OF NEW HAMPSHIRE**  
**Merrimack County Superior Court**  
163 N. Main Street  
P. O. Box 2880  
Concord, NH 03301 2880  
603 225-5501

**NOTICE OF DECISION**

ARTHUR B CUNNINGHAM ESQ  
79 CHECKERBERRY LANE  
P O BOX 511  
HOPKINTON NH 03229

08-E-0030 ATV Watch et al v. State of N.H. Dept. of Transportation

Enclosed please find a copy of the Court's Order dated 9/18/2009  
relative to:

**Court Order**

09/28/2009

William McGraw  
Clerk of Court

cc: Edith L. Pacillo

THE STATE OF NEW HAMPSHIRE  
SUPERIOR COURT

MERRIMACK, SS.

08-E-0030

ATV WATCH  
AND  
ANDREW WALTERS

v.

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF TRANSPORTATION

**ORDER**

Plaintiffs ATV Watch and Andrew Walters have brought a motion for entry of a final order in this matter. They have requested a determination concerning whether defendant State of New Hampshire Department of Transportation ("NHDOT") had provided timely responses to plaintiffs' Right-to-Know requests and related matters. Additionally, plaintiffs request a ruling on whether or not their Right-to-Know suit had been made necessary because of the timing of NHDOT's responses and whether plaintiffs are entitled to counsel fees and costs.

NHDOT notes that the Court has already addressed issues concerning the privileges asserted by NHDOT and whether or not the requested materials had been required to be provided to plaintiffs. The State has also responded that plaintiffs' post-order motions essentially constitute a request to reconsider the Court's prior orders and that the plaintiffs' request is untimely and without merit.

The issues concerning privilege have been litigated and have been resolved in favor of the State. No further determination, therefore, is required as to the privilege matters. On the issues concerning the timeliness of production of documents, the Court would note that plaintiffs had not been represented by legal counsel at the time plaintiffs had originally sought the materials under the Right-to-Know Law and at the time the Court had engaged in an in camera review of the documents.

In its order of February 23, 2009, the Court had addressed issues regarding whether or not discovery would be allowed in terms of issues of sanctionable conduct as asserted by plaintiffs. The Court had written:

The Court would note that even if the traditional discovery rules were to be applied in the present Right-to-Know context, the plaintiffs have not established sufficient grounds for further discovery. As discussed above, the Court's June 24, 2008 order had provided that the "plaintiffs shall articulate their reasons to believe that sanctionable conduct may have been engaged in by defendant or its agents." The plaintiffs [sic] not articulated sufficient reasons they have for believing that the defendant had engaged in sanctionable behavior. Rather, plaintiffs appear to be seeking discovery in order to then articulate such reasons, a procedure which the Court did not provide for in the above-noted order.

Order, dated February 23, 2009, at 5.

Petitioners presently seek a determination that respondents had failed to timely provide responses to petitioner's Right-to-Know request. Petitioners also seek counsel fees regarding any such delay.

Petitioners had raised the timeliness issues at the initial hearing that had been held. However, at the time of their Right-to-Know request to respondent, and at the time of the Right-to-Know hearing, petitioners were not represented by counsel. Thus, to a large degree, petitioners appear to be seeking a remedy of an assessment of counsel fees for a period of time during which petitioners did not have legal counsel and during which they had not incurred expenses for legal counsel. ATV Watch v. N.H. Dep't. of Res. & Econ. Dev., 155 N.H. 434, 442 (2007).

Even assuming that NHDOT's providing of the requested documents had not been timely under the provisions of RSA 91-A:4, IV, petitioners have not established grounds for assessment of counsel fees. Petitioners' request for an assessment of counsel fees is, therefore, denied.

#### PETITIONERS' REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact: 1, granted, but request appears to have been for then-prospective documents; 2, granted as to first sentence, second sentence is argumentative; 3, granted with exception of argumentative "with the factually unsupported statement;" 4, excessively compound; 5, granted, but also see request #1; 6, excessively compound; 7, granted, but see request #1; 8, granted;



9, granted with exception of footnote 2, and with exception of last sentence. Document speaks for itself; 10, compound; 11, compound; 12, compound.

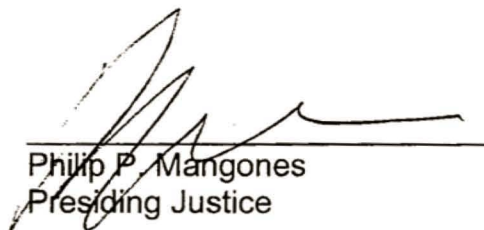
Conclusions of Law: 1, compound, but Court finds that the State's response had not been provided within time requirements of RSA 91-A:4, IV; 2, compound; 3, compound; 4, compound; 5, see decree.

#### STATE'S REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW

1, granted; 2, granted; 3, granted; 4, granted; 5, granted; 6, granted; 7, granted; 8, granted; 9, see decree and prior orders; 10, granted; 11, granted; 12, granted; 13, granted; 14, granted, but the Court had no reason to question the authenticity of the representation; 15, neither granted nor denied and argumentative; 16, granted; 17, granted; 18, granted; 19, granted; 20, granted as to first sentence, order speaks for itself; 21, granted; 22, granted; 23, see decree; 24, granted; 25, granted as to first sentence, second sentence may contain typographical error; 26, granted; 27, granted; 28, granted, concerning the production of documents; 29, see decree; 30, see decree; 31, see decree.

SO ORDERED.

9-18-09  
Date

  
Philip P. Mangones  
Presiding Justice