

**THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

No. 2015-06

Joint Application of Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site and Facility

**PARTIAL OBJECTION OF COUNSEL FOR THE PUBLIC TO APPLICANTS'
UNASSENTED-TO MOTION FOR PROTECTIVE
ORDER AND CONFIDENTIAL TREATMENT**

A. Background

On October 19, 2015, Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy (the “Applicants”), submitted a Joint Application for a Certificate of Site and Facility (the “Joint Application”) to the New Hampshire Site Evaluation Committee (the “Committee” or “SEC”) to construct a transmission line through New Hampshire (the “Project”).

In addition, on October 19, 2015, the Applicants filed an Unassented-to Motion for Protective Order and Confidential Treatment (the “Motion”) pursuant to RSA 91-A, for a protective order that would provide for the confidential treatment of extensive portions of the Applicants’ filings. More specifically, the Applicants seek a protective order to preserve the confidentiality of the following: 1) certain proprietary business information, including the Prefiled Direct Testimony of Julia Frayer and her attached report (the “Frayer Report”), 2) archaeological resources data, and 3) information on native plant and animal species. Applicants’ Motion, 1.

For the reasons stated below, Counsel for the Public, by his attorneys, the office of the Attorney General and Primmer Piper Eggleston & Cramer PC (“Primmer”) opposes the Motion and respectfully requests that the Committee deny the Motion with regard to the Frayer Report in

whole or in part. Counsel for the Public does not oppose the Motion with regard to the archeological data or information on native plants and animal species, so long as such is limited to the legally protected information and parties may get access under appropriate and reasonable non-disclosure terms.

B. Discussion

The State of New Hampshire's Right to Know Law, RSA 91-A, was enacted to "increase public access to governmental proceedings in order to augment popular control of government and to encourage agency responsibility." *Soc'y for Prot. of New Hampshire Forests v. Water Supply & Pollution Control Comm'n*, 115 N.H. 192, 194 (1975).

In general, the Right to Know Law provides that all governmental records in the possession, custody or control of a public body or agency must be open and available for public inspection. RSA 91-A:4, I, *See also* N.H. Admin Rule Site 104.01. The Right to Know Law does contain exemptions. RSA 91-A:5. Furthermore, Site 104.01(b) gives a presiding officer or chairperson the power to determine certain documents are not exempt from disclosure pursuant to RSA 91-A:5.

The Balancing Test and the Public Interest

The Applicants assert the exemption found in RSA 91-A:5, IV entitles them to the confidential protection of significant information contained in the Frayer Report. They base this argument on RSA 91-A:5, IV, which provides, in pertinent part, that agencies are allowed to withhold from public disclosure "confidential, commercial, or financial information... and other files whose disclosure would constitute invasion of privacy." Counsel for the Public has had an opportunity to review the entire Frayer Report and discuss the specific claims for exemption advocated by the Applicants. Although we generally concur that some of the information in the

Frayer Report falls into this exemption, Counsel for the Public does not believe that all of the information provided in the redacted version of the Frayer Report satisfies this standard.

Information that a movant asserts is confidential is not exempt on a per se basis. *Order on Partially Assented to Motion for Protective Order and Confidential Treatment for Certain Confidential, Commercial and Financial Documents*, Application of Laidlaw Berlin BioPower, LLC, NH SEC Docket No. 2009-02, 3 (June 9, 2010). The Committee must perform a balancing test to determine whether the information is exempt from public disclosure. *Order on Pending Motions and Further Procedural Order*, Application of Groton Wind, LLC, NH Committee Docket No. 2010-01 (Dec. 14, 2010).

In *Lamy v. New Hampshire Public Utilities Commission*, the New Hampshire Supreme Court described the three part test used to determine if information should be protected from public inspection pursuant to the Right to Know Law. 152 N.H. 106, 109 (2006). The first step requires the Committee to determine if there is a privacy interest at stake that would be invaded by disclosure. *Id.* If no privacy interest is at stake, disclosure is mandated. *Id.* However, if a privacy interest is at stake, the Committee must then assess whether there is a public interest in disclosure. *Id.*

If there is a public interest in disclosure, the last step requires the Committee to balance such interest against the individual's privacy interest in nondisclosure. *Id.* See also, *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 553 (1997) (noting the agency must perform a balancing test to determine if the public's interest in disclosure outweighs the applicant's interest in protecting its information). Therefore, a motion for a protective order should be denied when the balance tips in favor of the public's interest in disclosure. See *N.H. Housing Fin. Auth.*, 142 N.H. at 556.

The Applicants assertion of a privacy interest must be balanced against the public's interest in disclosure. Counsel for the Public argues that the public's interest¹ in disclosure of the information contained in the Frayer Report is critically important for the public to assess the overall benefits of the Project. Despite filing voluminous sets of testimony, the Frayer Report is the one piece of evidence that comprehensively discusses the Applicants' claimed benefits of the Project and the method in which those benefits were determined. The Project is unprecedented in size and scope and will have a lasting physical impact on the State for generations. The public deserves the opportunity to review the claimed Project benefits and how they were determined and then weigh in with their perspectives. This is especially important for those that have not moved to intervene in the proceeding or those that were denied intervention.

In their Motion, the Applicants failed to acknowledge or address the interest the public has in disclosure of this information. Instead, the Applicants skip this step in the analysis and state any such public interest is outweighed by their privacy interests. Applicants' Motion, 8, ¶ 17. The Committee should not accept this conclusory statement and should seriously consider the public's right to have access to the information presented in the Frayer Report.

The Right to Know Law was intended to serve concerns about "informing the citizenry about the activities of their government." *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 477 (1996). The purpose of the law is "to provide the utmost information to the public about what its government is up to." *Id.* at 476 (quotation omitted). *See also, Lamy*, 152 N.H. at 111. Therefore, when an exemption is claimed because disclosure would be an invasion of privacy, there should be an examination of "the nature of the requested document or material and its relationship to the basic purpose of the Right to Know Law." *Id.*

¹ Please note that the interest of the public in having access to this information is separate from the interest of the Counsel for the Public in having this information. Counsel for the Public has had access to an unredacted version of the Frayer Report.

In other words, there is a valid public interest in disclosure when the information sheds light on the conduct of the agency. *N.H. Housing Fin. Auth.*, 142 N.H. at 555 (noting the public purpose to be served “is to increase public knowledge about how the authority operates.”); *Order on Partially Assented to Motion for Protective Order and Confidential Treatment of Documents Requested by Committee in Order and Amended Certificate of Site and Facility with Conditions, Application of Laidlaw Berlin BioPower, LLC*, NH SEC Docket No. 2011-01, 5-6 (October 11, 2011) (granting protective order because the information would do little, if anything, “to inform the public about the activities and conduct of the government.”).

In addition, the New Hampshire Supreme Court has recognized the Right to Know Law helps further the State constitutional requirement that “the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.” *Goode v. N.H. Legislative Budget Assistant*, 148 N.H. 551, 553 (2002); *see also* N.H. CONST. pt. 1, art. 8. As a result, although the law does not guarantee unrestricted access, as evidenced by the exemptions, questions regarding the law should be resolved with a view to providing the maximum amount of information “to best effectuate the statutory and constitutional objective of facilitating access to all public documents.” *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 581 (2006). Furthermore, the motivations of the party seeking disclosure “are irrelevant to the question of access.” *Petition of Keene Sentinel*, 136 N.H. at 128.

Even when recognizing that the Applicants may have stated some cognizable privacy interest in non-disclosure, the public’s interest in disclosure, as described above, is so significant that any reasonable balancing as required by the New Hampshire Supreme Court must result in a decision rejecting the exemption of the information discussed above. Counsel for the Public respectfully requests that, when the Committee performs the balancing as required by the Right

to Know Law, the Committee ascribes the utmost importance to the public's right to have access to this critical information. As Counsel for the Public has reviewed the entire Frayer Report and evaluated each claim of confidentiality according the Right to Know Law's balancing test, it would be willing to share such detailed point-by-point analysis with the Committee. Given the outstanding Motion, this analysis would need to be submitted under seal.

C. Conclusion

For the reasons discussed above, Counsel for the Pubic respectfully requests the Committee deny the Applicants' Motion with regard to the Frayer Report in whole or in part. Subject to the caveat previously stated, *supra* at 2, Counsel for the Public does not object to the Motion in regard to archeological and natural resource information.

Respectfully submitted,

COUNSEL FOR THE PUBLIC,

By his attorneys,

Dated: April 7, 2016

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OBJECTION OF COUNSEL FOR THE PUBLIC TO APPLICANTS' UNASSENTED-TO MOTION FOR PROTECTIVE ORDER AND CONFIDENTIAL TREATMENT has this day been forwarded via e-mail or mail to persons named on the Distribution List of this docket.

Dated: April 7, 2016

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