

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket 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

**COUNSEL FOR THE PUBLIC'S OBJECTION TO MOTION FOR PROTECTIVE
ORDER AND CONFIDENTIAL TREATMENT BUSINESS DIRECTORY**

Counsel for the Public, by his attorneys, the Office of the Attorney General and Primmer Piper Eggleston & Cramer PC, hereby objects to the Applicants' Motion for Protective Order and Confidential Treatment Business Directory (the "Motion").

1. Applicants' motion seeks a protective order to "preserve the confidentiality of proprietary and confidential commercial information relating to the Business Directory that is described in Applicants' Exhibit 144." Mtn. at 1. Applicants claim that "the Business Directory, which is provided redacted as Attachment B, contains confidential, commercial, or financial information, the disclosure of which would constitute an invasion of privacy of the businesses that comprise the Business Directory." *Id.*

2. In light of that claim, Applicants seek to fit the Business Directory attached to its motion within the exception to disclosure under RSA 91-A (a.k.a. the Right-to-Know Law) found in RSA 91-A:5, IV. That exception to disclosure provides that "[t]he following governmental records are exempted from the provisions of this chapter:

Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

RSA 91-A:5, IV.

3. As the party seeking to prevent disclosure of the record in question, Applicants bear the burden of justifying the non-disclosure they seek. *See Associated Press v. State*, 153 N.H. 120, 138 (2005). Applicants' motion fails to articulate how the information contained in the Business Directory constitutes "confidential, commercial, or financial information" or how its "disclosure would constitute invasion of privacy" and falls far short of the burden Applicants must meet to justify the non-disclosure they seek. *See* RSA 91-A:5, IV.

A. The Business Directory Does Not Constitute Proprietary Commercial Information.

4. Applicants have failed to demonstrate that the Business Directory constitutes proprietary commercial information of the Applicants. The Business Directory is evidently comprised of merely a list of businesses that have chosen to voluntarily submit their business information to Applicants to be included in a list of businesses that workers on the Project might frequent while working on the Project. There is nothing proprietary about such a list.

5. Under New Hampshire law a trade secret entitled to protection must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." RSA 350-B:1. Attachment A explains that Applicants "are developing a comprehensive business directory that will be used by Northern Pass workers [and] [t]he directory will be given to each one of the *hundreds* of workers who will be in and around the towns along the proposed Northern Pass route during construction." Attachment A at 2 (emphasis added). A truly proprietary trade secret cannot be widely and casually disseminated in such a manner.

B. Disclosure of the Business Directory Would not be an Invasion of Privacy.

6. Applicants' assertion of "invasion of privacy" is unspecified and unquantified. It essentially amounts to "a generalized concern for personal privacy [that] is insufficient to meet the [Applicants'] burden of demonstrating the existence of a sufficiently compelling reason to prevent public access." *Associated Press v. State*, 153 N.H. 120, 137 (2005). The New Hampshire Supreme Court has rejected such general privacy concerns in the personal and private circumstances of individuals getting divorced and held that "[w]hile [the Court] recognize[s] the importance of the right to privacy, '[t]he [public's] right of access to ... sealed records must be weighed and balanced against privacy interests that are articulated with specificity.'" *Id.* Having failed to articulate the requisite specificity here, Applicants' motion must be denied. *See Lamy v. New Hampshire Pub. Utilities Comm'n*, 152 N.H. 106, 109 (2005) (requiring disclosure of business names and addresses where no privacy interest articulated apart from the assertion that the businesses had a privacy interest in the information).

7. The Applicants claim that disclosure of the information "may unnecessarily subject the business owners to adverse financial or commercial impacts, and may negatively affect the Applicants to the extent other Business Owners [sic] may be discouraged from participating in this effort." Mtn. at 3. The Applicants fail to specify *how* their speculation could come to pass and how business owners could potentially be subjected to adverse financial or commercial impacts by the disclosure of their names and town locations or why that would be a possibility given that the purpose of the Business Directory is to increase business flow to their businesses. At best it is a generalized privacy concern that has been held to be insufficient.

C. **The Information in the Business Directory Does Not Fall Within the Exception in RSA 91-A:5, IV.**

8. Applicants' motion further fails to demonstrate that disclosure of the Business Directory would constitute an invasion of privacy because the information purportedly contained in the Business Directory is not of the kind identified as an exception to disclosure in RSA 91-A:5, IV.

9. Attachment B to Applicants' motion is a redacted sheet stating "NP Business Directory Company Name Town," with two columns for "Company" and "Town." It would appear that the information sought to be withheld is simply the name of a business and the town in which it is located. There is nothing about disclosure of that otherwise publicly available information that would "constitute an invasion of privacy," and Applicants have not demonstrated otherwise. RSA 91-A:5, IV; *see also* RSA 350-B:1 (excluding from the definition of trade secret information that is generally known or readily ascertainable).

10. Applicants' Attachment A provides a letter sent by Applicants to one of the businesses listed on the Business Directory. *See* Attachment A at 1. The name and address information of that business are not redacted. *Id.*

11. Attachment A explains the Business Directory to local businesses in an effort to enlist their participation in the Directory. *See* Attachment A at 2. The Attachment explains that Applicants "are developing a comprehensive business directory that will be used by Northern Pass workers [and] [t]he directory will be given to each one of the *hundreds* of workers who will be in and around the towns along the proposed Northern Pass route during construction." *Id.* (emphasis added).

12. Consequently, hundreds of workers are going to be given access to the Business Directory that Applicants seek to prevent the public from seeing. One cannot balance away the

public's interests in disclosure when Applicants plan to freely disseminate the very same information to hundreds of its workers to be used freely as a guidebook of where they should spend their money during the construction project. *See, e.g., Reid v. New Hampshire Attorney Gen.*, 169 N.H. 509, 152 A.3d 860, 875 (2016) ("Thus, information that, under an objective standard, would be expected to become public in due course, should not give rise to the same privacy interest as information for which public exposure would, objectively, never be anticipated.").¹

13. Furthermore, Attachment A reveals that the businesses that have chosen to participate in the Business Directory are fully aware that the information they provide will be broadly disseminated to hundreds of workers on the construction project. There can be no reasonable expectation of privacy under such circumstances, which is required for invasion of privacy. *Fischer v. Hooper*, 143 N.H. 585, 590 (1999). Accordingly, disclosure of the information provided cannot as a matter of law constitute invasion of privacy.

14. Far from an invasion of privacy, wide disclosure of the information in the Business Directory is precisely the enticement offered by inclusion in the Directory. The enticement is that Applicants' workers will be working "in your area, spending money that will boost your local economy." Attachment A at 2. The very purpose for a business' participation in the Directory is exposure of the business's information to many people and disclosure far and wide is what is sought, not what is feared.

¹ Applicants further offer no safeguards that Applicants intend to establish to ensure that if this Subcommittee were to issue a protective order for the Business Directory Applicants' workers would not inadvertently or intentionally disclose that information in violation of that order. The order Applicants seek subjects its workers to potential exposure for violation of the order.

15. This proceeding, by design, is an open and public proceeding, including the Subcommittee's deliberations, to ensure transparency. The public's interest in transparency extends to the Business Directory.

16. Applicants have failed to identify any interests in need of protection by a protective order. The interests of the public in full disclosure of the Business Directory outweigh any unspecified claims of privacy or proprietary information.

WHEREFORE, Counsel for the Public respectfully requests that the Site Evaluation Subcommittee:

- A. Deny Applicants' Motion for Protective Order and Confidential Treatment Business Directory; and
- B. Grant such other relief as the Court deems just.

Respectfully submitted,

COUNSEL FOR THE PUBLIC,

By his attorneys,




Dated: July 10, 2017

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Dated: July 10, 2017

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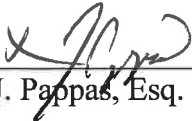
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CERTIFICATE OF SERVICE

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

Dated: July 10, 2017

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