

**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**

July 17, 2017

**ORDER DENYING APPLICANT'S MOTION FOR PROTECTIVE ORDER AND
CONFIDENTIAL TREATMENT OF BUSINESS DIRECTORY**

This Order denies the Applicant's Motion for a Protective Order and Confidential Treatment of a business directory that was provided in response to a request by the Subcommittee.

I. Background

On May 18, 2017, the Applicant sent correspondence to businesses along the Project route that provided an update on the Project and an outline of its plan to support the communities throughout the construction process, including plans to develop a comprehensive Business Directory that will be used by Northern Pass workers. *See* Attachment A to Applicant's Motion, p. 2. The Applicant provided businesses the opportunity to be included in the directory. *Id.*

On June 2, 2017, the Subcommittee requested that the Applicant provide a copy of the Business Directory. *See* Transcript, Day 12, Morning Session (June 2, 2017) at p. 127.

On June 30, 2017, the Applicant sent correspondence to the Administrator of the Committee enclosing a copy of the Business Directory and contemporaneously filed the instant Motion. The following parties oppose the Motion: Deerfield Abutters; Non-Abutters Bethlehem to Plymouth; Abutters and Non-Abutters Pittsburg to Stewartstown; Whitefield to Bethlehem Abutters; Southern Non-Abutters (Ashland to Deerfield); Municipal Groups 1 South, 2, 3 South, and 3 North; Society for the Protection of New Hampshire Forests (Forest Society); Non-Abutters Stark to Bethlehem; Sugar

Hill Historical Museum; North Country Scenic Byways Commission; and Stark to Northumberland Overhead Abutters.

Counsel for the Public, Municipal Groups 1 South, 2, 3 South, and 3 North, and the Forest Society filed objections.

II. Standard of Review

A state agency must undertake a three step analysis to determine whether information should be exempt from public disclosure under the Right to Know Law, RSA 91-A:5, IV. *See Lambert v. Belknap County*, 157 N.H. 375, 382-383 (2008); *Lamy v. Pub. Utils. Comm'n*, 152 N.H. 106, 109 (2005). The first prong of the analysis is to determine if the Applicant has identified a privacy interest. *Lambert*, 157 N.H. at 382. If a privacy interest is invoked, then the agency must assess whether there is a public interest in disclosure. *Id.* Disclosure should inform the public of the activities and conduct of the government. *Id.* at 383. If disclosure does not serve that purpose then disclosure is not required. *Id.* Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure. *Id.*

III. Position of the Parties

A. Applicant

The Applicant requests a protective order regarding the Business Directory consistent with the terms and conditions contained in prior protective orders in this docket. The Applicant argues that the Business Directory should be exempt from disclosure under RSA 91-A, *Access to Governmental Records and Meetings*. The Applicant contends that the business owners have a privacy interest and that the Applicant has an interest in protecting “the confidential, commercial, or financial business information aspect of the Business Directory.” *See Motion*, p. 3. The Applicant asserts that disclosure of the Business Directory “may unnecessarily subject the business owners to adverse financial or

commercial impacts, and may negatively affect the [Applicant] to the extent other business owners may be discouraged from participating in this effort.” *Id.* The Applicant argues that because the Business Directory was compiled to be provided to the hundreds of workers who will be constructing the Project, it also constitutes proprietary commercial information of the Applicant, and is exempt from disclosure. Regarding the other elements of the RSA 91-A inquiry, the Applicant contends that, if there is a public interest in disclosure, that interest does not outweigh the interest in protecting the privacy of the business owners.

B. Counsel for the Public

Counsel for the Public argues that the Applicant’s Motion fails to articulate how the information in the Business Directory constitutes confidential, commercial, or financial information or how its disclosure would constitute invasion of privacy, as it is merely a list of businesses that workers may frequent while working on the Project. Counsel for the Public argues there is nothing proprietary about such a list and that it does not constitute a trade secret as it will be disseminated to each of the hundreds of workers that would be in and around the towns along the proposed Project route during construction.

Counsel for the Public’s view is that disclosure of the Business Directory would not be an invasion of privacy. Specifically, Counsel for the Public asserts that, while the Applicant contends that disclosure would have adverse financial or commercial impacts to business owners, the Applicant fails to specify how this would come to pass given that the idea behind the Business Directory is that it will increase customer flow to the businesses. Counsel for the Public argues that the Business Directory does not fall within the types of information exempt from disclosure under RSA 91-A:5, IV and is comprised of names of businesses and identification of the town in which each is located and that this information is otherwise publicly available.

Counsel for the Public argues that any purported privacy interest cannot outweigh the public's interest in disclosure when the Applicant intends to freely disseminate the information to hundreds of workers, and that businesses that have voluntarily chosen to participate know the information they provide will be broadly disseminated so there can be no reasonable expectation of privacy.

C. Municipal Groups 1 South, 2, 3 South and 3 North

Municipal Groups 1 South, 2, 3 South, and 3 North (the Municipalities) argue that the Business Directory is not exempt from disclosure because: (1) the Business Directory encourages workers to patronize the businesses listed within it; (2) the Business Directory has already been disseminated to contractors and will continue to be disseminated to businesses that choose to be added to the Business Directory; (3) there is no indication that the Business Directory has been marked confidential or those to whom it has been disseminated have had to execute confidentiality agreements; and (4) the Business Directory is not a trade secret and nothing is confidential about the information within it. The Municipalities also note that Samuel Johnson, the Senior Project Manager at Burns & McDonnell Engineering Company, voluntarily offered to provide a copy of the directory to the Subcommittee. The Municipalities state that the Applicant's website invites businesses to join the directory, indicates that it will be provided to thousands of workers, and contains videos from business owners stating that the Project will support their businesses. The Municipalities contend that there is no privacy interest at stake and contend that, even if there were a privacy interest, it would not outweigh the public interest in disclosure. The Municipalities argue that since the Applicant has proffered testimony that the disruption to businesses will be mitigated during construction because workers will be patronizing local businesses, and has relied on the Business Directory to support those statements, it is appropriate that all parties to the proceeding have an opportunity to evaluate those statements by reviewing the Business Directory.

D. Forest Society

The Forest Society argues that the Applicant has failed to identify a sufficient privacy interest to warrant confidential treatment of the Business Directory. The Forest Society submits that a list of business names and contact information that will be freely distributed to non-governmental employees does not constitute commercial or financial information protected from disclosure under RSA 91-A:5, IV. The Forest Society argues that even if the information sought to be protected would be exempt from disclosure, the business owners and the Applicant do not have a reasonable expectation of privacy in the information because it is presumably public and the participants knowingly included their information in the document. The Forest Society argues that the Applicant has failed to explain how or why disclosure would unnecessarily subject Business Owners to adverse financial or commercial impacts. The Forest Society suggests that, presumably, the Applicant is suggesting that participating business owners may be perceived as supporting the Project and may suffer negative consequences from customers or members of the public opposed to the Project. The Forest Society argues this is not a sufficient privacy interest.

The Forest Society also argues there is a compelling interest in disclosing the Business Directory. Specifically, the Forest Society argues that the parties to this docket and members of the public have an interest in viewing all information the Applicant and its witnesses have relied upon or referenced in their testimony especially where, as here, the Applicant's witness volunteered to provide the directory during a hearing in these proceedings.

IV. Analysis

RSA 91-A provides that governmental records are generally made available for public inspection. RSA 91-A:4. Certain information and/or records are exempt, including "confidential,

commercial, or financial information ... and other files whose disclosure would constitute invasion of privacy.” RSA 91-A:5, IV.

The Applicant failed to demonstrate that the information contained in the Business Directory constitutes confidential, commercial, or financial information and that disclosure would constitute an invasion of privacy. The Applicant also failed to demonstrate that it has any privacy interest in the information in the Business Directory, and has similarly identified no privacy interest at stake for the business owners and relies on a general conclusion. The Applicant has disseminated the information in the Business Directory to numerous business owners, has solicited businesses to be included in the directory with the promise that it will be provided to hundreds of workers who may bring business, and advertised the potential benefits of being included in the directory to local businesses. Business owners who voluntarily chose to be included in the directory were made aware that it would be widely disseminated. Under these circumstances, there can be no reasonable expectation of privacy by the Applicant or the listed business owners.

There is a public interest in disclosing the Business Directory. The Applicant has cited it as a perceived benefit of the Project. Therefore, even if there were a privacy interest in non-disclosure, that interest would be outweighed by the public interest in disclosure. The Applicant’s Motion for Protective Order and Confidential Treatment of the Business Directory is denied.

SO ORDERED this seventeenth day of July, 2017.



Martin P. Honigberg, Presiding Officer
Site Evaluation Committee