

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
SOUTHERN DISTRICT

SUPERIOR COURT

226-2018-CV-00036

JANE DOE

HCDC-FEB12'18AM10:42

v.

NEW HAMPSHIRE LOTTERY COMMISSION

**THE NEW HAMPSHIRE LOTTERY COMMISSION'S MOTION TO DISMISS AND  
RESPONSE TO THE PLAINTIFF'S COMPLAINT FOR DECLARATORY JUDGMENT  
AND INJUNCTIVE RELIEF**

The New Hampshire Lottery Commission ("Commission" or "State"), by and through its counsel, the Office of the Attorney General, respectfully submits this Motion to Dismiss and Response to the Petitioner's Complaint for Declaratory Judgment and Injunctive Relief. While Petitioner has filed an expansive complaint, the sole legal issue before this Court is whether the Commission is required to release a copy of a redeemed ticket with the winner's name and hometown upon receipt of a valid Right to Know Request under RSA 91-A. For the reasons set forth at length below, the Commission believes that it is legally obligated to release the document with the name and hometown of the Petitioner pursuant to RSA 91-A.

**FACTUAL BACKGROUND**

The Commission was recently approached by counsel for Petitioner who informed the State that their client had possession of a winning ticket for the Powerball jackpot drawing which occurred on January 6, 2018. The Commission received a copy of the front of the ticket and was able to confirm that it is likely the winning ticket for the approximately \$560 million jackpot. The Petitioner's counsel further advised the State that their client had placed her personal

information on the back of the ticket, including her name and hometown. The Commission advised the Petitioner's attorney that upon redemption, the ticket will become a governmental record. Additionally, the Commission informed the Petitioner's counsel that the Commission is legally obligated to release the document pursuant to RSA 91-A and is not legally authorized to redact the name and hometown of Petitioner. The Commission is not yet in possession of Petitioner's ticket and has not yet received a Right to Know request for this ticket but believes that it is likely that such a request will be made.

For the sake of this Motion only, the Commission assumes that all of the remaining facts set forth in the Petition are true.

#### **STANDARD OF REVIEW**

A motion to dismiss should be granted where the allegations in the declaratory judgment petition are insufficient to permit the relief sought in the petition. *See Real Estate Planners v. Newmarket*, 134 N.H. 696, 700-01 (1991). In determining whether a motion to dismiss should be granted, all factual allegations are assumed to be true, and the reasonable inferences that can be drawn from those facts are construed in the petitioners' favor. *Cannata v. Town of Deerfield*, 132 N.H. 235, 240 (1989).

This case presents a matter of statutory interpretation relating to the privacy exemption in RSA 91-A:5, IV. This Court must interpret the Legislature's intent as expressed in the words of the statute considered as a whole and in the context of the overall statutory scheme and not in isolation. *Appeal of Parkland Med. Ctr.*, 158 N.H. 67, 72 (2008); *Liam Hooksett, LLC v. Boynton*, 157 N.H. 625, 628 (2008). Even assuming that the facts alleged in the petition are true, RSA 91-A's strong presumption in favor of disclosure requires a finding that the basic information of a name and hometown on a lottery ticket must be disclosed to the public.

## ARGUMENT

### **I. The Public Has a Constitutional and Statutory Right To Review Government Records With Limited Exceptions.**

The sole issue before this Court is whether the name and hometown on a redeemed lottery ticket must be disclosed in accordance with the provision of the “Right to Know Law” RSA 91-A. The purpose of the Right to Know Law “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. Every citizen has a constitutional and statutory right to inspect all government records in the possession, custody and control of public agencies subject to very limited exceptions. N.H. CONST. pt. I, art. 8; RSA 91-A:4, I; *Mans v. Lebanon Sch. Bd.*, 112 N.H. 160, 162 (1972). Government records include documents accepted by a public agency in furtherance of its official functions. RSA 91-A:1-a (III).

Petitioner does not dispute that the ticket will become a government record once submitted to the Commission for payment, but seeks an exemption from disclosure pursuant to RSA 91-A:5, IV, which applies to “files whose disclosure would constitute invasion of privacy.” Courts interpret the Right to Know Law with a view to providing the utmost information in order to best effectuate the law’s “statutory and constitutional objectives.” See *CaremarkPCS Health v. N.H. Dep’t of Admin. Servs.*, 167 N.H. 583, 587 (2015). As a result, courts broadly construe provisions favoring disclosure and interpret the exemptions restrictively. *Id.* Entities seeking to avoid disclosure of material bear a heavy burden to shift the balance towards non-disclosure. *N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit*, 169 N.H. 95, 111 (2016).

In this matter, Petitioner represents that she will be providing a lottery ticket to the Commission that bears the name, address, hometown and phone number of the purported winner.

Even if the winner elects to assign the ticket to another legal entity, such as a trust, the ticket itself will need to be submitted in its original form. Whiting out, reconstruction, tampering or other alteration of the ticket violates Powerball Administrative Rules and could lead to a disqualification of the ticket. *See* NH Admin Rules Sw 3001.05. Accordingly, Petitioner requests a declaration and order that prevents the Commission from releasing any information contained on the ticket relating to the identity of Petitioner. Should the Commission receive the ticket from Petitioner with personal information and a Right to Know Request is made for that ticket, the Commission believes it is legally obligated to release the ticket with the name and hometown listed on the ticket and will redact any other personal information.

Courts have applied a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV. *Lamy v. N.H. Public Utils. Comm'n*, 152 N.H. 106, 109 (2005). First, the court must evaluate whether there is a privacy interest that would be invaded by the disclosure. *Id.* If no privacy interest is at stake, the Right to Know Law mandates disclosure. *Id.* Whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party's subjective expectations. *Id.* Second, the court must assess the public's interest in disclosure. *Id.* Disclosure of the requested information should inform the public about the conduct and activities of their government. *Id.* Finally, the court must balance the public interest in disclosure against the individual's privacy interest in nondisclosure. *Id.* In applying this analysis to the facts of this case, the Court should find that Petitioner's interest in protecting her name and hometown is minimal compared with the need for transparency and accountability of a public lottery responsible for hundreds of millions of dollars in gross revenues and prizes on an annual basis.

## **II. The Disclosure of Only A Name and Hometown Does Not Implicate Substantial Privacy Interests.**

New Hampshire courts have recognized that there is only a “modest privacy interest” assigned to an individual’s name and home address which is often publicly available. *Lamy* 152 N.H. at 110 (quoting *Sheet Metal Workers Local No. 9 v. U.S. Air Force*, 63 F.3d 994, 997 (10th Cir. 1995)). The Commission proposes to disclose even less information than that discussed in *Lamy* and plans to release only the name and hometown listed on the ticket. This is consistent with the information traditionally provided not just for lottery winners but also for other individuals who voluntarily engage a governmental agency including applicants for licenses and permits, employees, and contractors.

Moreover, as noted by Petitioner, there is a more limited privacy interest where the individual has voluntarily placed her identity at issue. *See* Complaint at ¶ 40 (citing *Lambert v. Belknap County Convention*, 157 N.H. 375, 384 (2008)). While Petitioner argues that she did not expect to lose her privacy by purchasing the ticket, all lottery participants play the game subject to the New Hampshire Lottery Administrative Rules and other applicable lottery rules. These rules contemplate that a winner of more than \$599 has to produce a valid identification, sign the ticket with a name and address and submit a claim form with personal information. NH Admin Rules SW 602. As such, a lottery participant voluntarily accepts that some degree of information is being submitted to a government entity and may, by extension, be available to the public under RSA 91-A. Other jurisdictions have found that playing the lottery subject to these types of rules limits the expectation of privacy for those who participate. *See Empire Realty Corp. v. New York State Div. of the Lottery*, 230 A.D.2d 270 (1997). Accordingly, Petitioner’s interest in protection of the information of her name and hometown is only modest in light of New Hampshire law and

is even more limited where the information was voluntarily placed at issue by Petitioner's decision to participate in a public lottery.

Petitioner essentially makes two arguments why the disclosure of her name would constitute an invasion of privacy. First, Petitioner argues that winning in excess of a half-billion dollars is life-altering money and that she prefers to live as normal a life as possible. The opportunity for life altering money is the essence of a large jackpot lottery such as Powerball. Petitioner's life will be altered whether her name is released or not. Petitioner's understandable yearning for normalcy after entering a lottery to win hundreds of millions of dollars is not a sufficient basis to shut the public out of the business of the government.

Second, Petitioner argues that her safety will be at risk if she is announced as the winner. To support this position, Petitioner cites to six incidents over a thirty-three (33) year period to demonstrate safety hazards for lottery winners. A close review of Petitioner's internet search, however, does not support these safety concerns. For example, a story relating to the 2017 Massachusetts winner of a jackpot indicated only that the local police voluntarily increased patrols to show their support. See <https://www.cnbc.com/2017/08/26/police-boost-patrols-around-home-of-758-point-7-million-powerball-winner.html>. Additionally, the story of the 1984 Illinois Lottery winner indicated that, despite some badgering after the announcement of his win, the "winnings changed his family's life for the better. He retired at 28. He and his wife invested properly, and were able to live off the money and send their children to college." <https://www.nbcnews.com/news/us-news/can-you-spare-million-why-it-pays-stay-anonymous-after-n70071>. The remaining stories fail to demonstrate a security risk from release of a lottery winner's name.

It is Petitioner's burden to shift the presumptive posture of disclosure of a government record. Petitioner's privacy concerns must be reviewed under an objective standard, not her subjective perception of security concerns. The security concerns laid out in the Complaint are not substantiated and are inconsistent with the Commission's experience in dealing with many large jackpot winners over the years.<sup>1</sup> Neither these smattering of articles nor the supporting affidavits identify an objective security risk to the Plaintiff that cannot be managed through appropriate security precautions, including engaging law enforcement as necessary, in advance of the public disclosure of the ticket. As a matter of law, there are no objective privacy concerns sufficient to overcome the public's right to inspect public documents.

### **III. The Public Has A Substantial Interest In Ensuring Transparency In the Operation of a Public Lottery.**

The purpose of the Right to Know Law is to provide the utmost information to the public about what its "government is up to." *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996) (quotations omitted). This transparency ensures "that the Government's activities be opened to the sharp eye of public scrutiny." *Lamy*, 152 N.H. at 113 (quotation omitted). The New Hampshire Lottery Commission is a public body responsible for conducting lotteries within the State and regulating other forms of gaming. RSA 284:21-h. The Commission generated more than \$300 million in gross revenue and disbursed nearly \$220 million in prizes during 2017. See <http://www.nhlottery.com/Files/PDFs/YearlyRevenue>. Over the course of its existence, the Commission has transferred over \$1.8 billion to the State for funding of education. *Id.* Accordingly, work of the Commission is vital to the interests of New Hampshire citizens who rely on the lottery as an important funding source for State and local government.

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<sup>1</sup> To the extent that the Court denies the Commission's Motion to Dismiss, the Commission would like the opportunity to submit testimony or affidavits regarding the Commission's long experience working with large jackpot winners.

Public trust and confidence is essential in all government functions. This interest is particularly heightened with respect to a state-operated lottery responsible for fairly administering games where hundreds of millions of dollars are disbursed. Lottery participants, whose ticket money is pooled to create a jackpot, have an interest in ensuring that the games played are on the level and that the winners are bona fide lottery participants. This interest is significantly furthered by disclosure of the winners and their hometowns so that players can see that the games produce real and geographically representative winners of these prizes. This transparency provides an extra level of scrutiny to ensure that winners are picked at random and not funneled to favored people or locales. In the spirit of this transparency, the Commission regularly publishes the names and hometowns of winners of various lottery games on its website with the consent of the winners. *See* <https://nhlottery.com/Winners.aspx>.

In 2014, the Legislature passed HB 1244 which forbid the Commission from publicly disclosing the name of a person awarded a prize except with the written consent of that person.<sup>2</sup> This event is significant for two reasons. First, the Legislature's action implied that it did not believe or intend the language of RSA 91-A:5, IV to prohibit the disclosure of lottery winners, otherwise this bill would have been superfluous. Second, Governor Maggie Hassan vetoed the bill based on the importance of the public's interest in transparency in the lottery. Governor Hassan's veto statement included the following:

In New Hampshire, we have a long history and tradition of open and transparent financial stewardship of our publicly funded, government-administered operations and funds. Since 1964, the first-in-the-nation New Hampshire Lottery has served our state and local communities well by providing players with a well-regulated and secure recreational gaming experience while providing more than \$1 billion in revenues to public education. The Lottery owes much of its success to a reputation built on public confidence and trust, and that reputation has been well preserved by the Commission's current executive director and his staff.

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<sup>2</sup> The provision would have applied to the Tri-State Lottery games.



HB 1244 seeks to prohibit the Lottery Commission from publicly disclosing the names of lottery winners in all instances, asserting a personal right of privacy as the primary justification.

While this consideration is a well-intentioned one, transparency in the administration and operation of our New Hampshire Lottery games and sweepstakes, and the Lottery Commission that oversees it, is paramount to ensuring continued trust and confidence in our Lottery and all of our public institutions.

Current law recognizes the privacy interest of those individuals who have had the good fortune of winning the New Hampshire Lottery by not requiring the Commission to disclose the names of winners proactively. However, if the names of lottery winners are entirely precluded from the light of public disclosure then accountability and oversight is ultimately diminished and the opportunity for potential corruption is born.”

In New Hampshire, we value personal privacy, as well as integrity and trust in our public institutions, and both are critical to our democracy. Balancing these interests is something we strive to do on an ongoing basis and something that the current system for disclosure at the Lottery Commission does well.

Governor Hassan Veto Message, dated June 13, 2014. The Legislature subsequently sustained the Governor’s veto.

Disclosure of the names of lottery winners is not something done for the sake of curiosity or sales promotion. It is done to provide transparency to the public and ensure that the Commission is operating with integrity and accountability. As such, this information informs the public about the business of the Commission and what the citizen’s government “is up to.”

**IV. The Public’s Interest in a Transparency in the Lottery Process Substantially Outweighs the Petitioner’s Privacy Interest.**

The Commission is pleased and proud to have a \$560 million Powerball Jackpot winner here in New Hampshire and is willing to work with the winner to assist her in any manner allowed under the law. At all times, however, the Commission must act in accordance with

statutory and constitutional requirements. In this instance, the Commission is legally obligated to make public documents available even if they contain the name and hometown of a jackpot winner.

The Commission does not dispute that Petitioner has an interest in remaining anonymous. This interest, however, is mitigated by the limited information to be disclosed about the winner and Petitioner's voluntary participation in this game. Petitioner's desire for normalcy and anonymity is substantially outweighed by the public's right to transparency in the operation of lottery games. This transparency helps ensure the integrity of the lottery and the accountability for the Commission's handling of hundreds of millions of dollars of revenue on an annual basis. The bedrock principle of the Right to Know law is that transparency ensures the proper operation of democratic institutions. Because of the fundamental nature of the public's right to examine these government documents, this Court must construe RSA 91-A provisions favoring disclosure and interpret the exemptions restrictively. As such, the court must dismiss Petitioner's Complaint seeking protection of the lottery ticket, including her name and hometown, from disclosure.

WHEREFORE, the Commission requests that this honorable Court:


- A. Deny Petitioner's Complaint for Declaratory Judgment and Injunctive Relief;
- B. Issue an Order that the Commission may respond to a "Right to Know" request by disclosing the a name and hometown that appears on a Lottery Ticket;
- C. Make any other Orders as justice may require.

Respectfully submitted,

NEW HAMPSHIRE  
LOTTERY COMMISSION

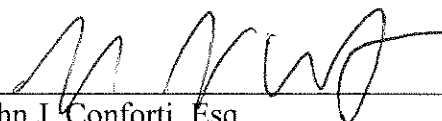
By its attorney,  
GORDON J. MACDONALD  
ATTORNEY GENERAL

Date: February 12, 2018

  
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**Certificate of Service**

I certify that a copy of the foregoing has on this 12<sup>th</sup> day of February, 2018, been sent via U.S. Mail, postage prepaid, and email to Steven Gordon, Esq.

  
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John J. Conforti, Esq.