

STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

IN THE MATTER OF:)

Local Government Center, Inc. *et al*)

Case No.: C-2011000036

RESPONDENTS)

**ORDER REGARDING ADDITIONAL SUBMISSION OF DOCUMENTS BY THE
BUREAU OF SECURITIES REGULATION FOR *IN CAMERA* REVIEW**

BACKGROUND

On December 29, 2012 the BSR filed a “Motion for Clarification” of a November 14, 2011 production order to which the Local Government Center, Inc and its affiliated entities (collectively “LGC”) and Maura Carroll responded on January 9, 2012. After being continued by the BSR at the scheduled January 30, 2012 hearing, said motion was subsequently withdrawn by BSR on February 6, 2012, without objection. In lieu of proceeding with its “Motion for Clarification,” the BSR chose to submit documents for *in camera* review accompanied by a related *Vaughn* index that were previously requested for production by the respondents. The BSR apparently determined the documents submitted were within the previous categorical discovery requests of the respondents, but believed many of the requested documents were subject to privilege or protection. It submitted a “Memorandum in Support of BSR’s Motion to Clarify”, dated February 6, 2012 that, in concert with the respondents’ previous production-related filings for the earlier production hearing, now serve as the basis for consideration of the parties’ respective positions regarding this second *in camera* submission by the BSR. Respondents were in attendance and had the opportunity to raise issues regarding the submission of these documents for *in camera* review. Treatment of these documents, submitted by the BSR for production to the respondents, fulfills the continuing obligation on all parties for the production of documents to other parties as part of discovery. All appropriate prior findings and determinations appearing in the January 19, 2012 order are incorporated into the findings and determinations appearing within this order.

In addition to the previously discussed and presently applicable attorney client privilege and work product protection defenses to disclosure of documents, the BSR articulates what it characterizes to be a “deliberative process” protection accorded to government agencies. The documents over which the BSR seeks to apply this protection appear to include documents that it had previously withheld on the basis that they were “internal documents” or “private files” as characterized in the preceding November production hearing.

JURISDICTION

The secretary of state is responsible for and is granted the authority to conduct adjudicatory proceedings and hearings related to violations of RSA 5-B (the “Pooled Risk Management Programs”) law and RSA 421-B (the “Securities” law). The secretary of state may delegate this responsibility to a presiding officer, and the authority and jurisdiction to conduct such proceedings is exclusive. (See RSA 5-B:4-a, I and RSA 421-B:26-a, I). The presiding officer has the authority to regulate and control the course of the administrative proceedings and dispose of procedural requests. (RSA 421-B:26-a, XIV).

DECISION AND ORDER

There are requests among these parties for the production of documents that have been ruled upon previously and that are to be considered as continuing in effect¹. The BSR is presently in possession of several hundreds of pages of documents sought by the respondents. Many of these documents have been withheld to this point. The documents subject to this order are represented by the BSR not to have been previously submitted to the presiding officer for *in camera* review. In lieu of proceeding with a hearing on the BSR motion for clarification and the respondents’ responses the parties agreed to the production of certain documents by the BSR directly to the respondents as indicated in the BSR *Vaughn* index and the submission of the remaining other documents to the presiding officer for an *in camera* review and appropriate rulings thereon. The *Vaughn* index presented to the presiding officer on February 6, 2012 was represented by the BSR to be current as of the date of submission of these documents to him for review. Those listed documents to which no privilege or protection is asserted by the BSR are presumed to have been produced to the respondents. Previously, many of these documents were neither produced nor included in the BSR’s *Vaughn* index, but unilaterally withheld. No sanctions are imposed upon the BSR because of the confusion that resulted from the abrupt absence of its lead counsel, acute substitution of lead counsel, the subsequent retention of outside counsel and the absence of a sufficient showing of prejudice suffered by the respondents.

As to various documents included in this submission, the BSR asserts on its index one or more of four privileges, protections or exclusions that it believes entitles it to withhold the entire contents of a document or a portion of the text of specific documents. It is not necessary to duplicate much of the legal discussion regarding discovery that was included in the previous January 19, 2012 production order here. The relevant legal principles appearing in that order are incorporated into this order as the BSR relies on essentially the same privileges and protections as it previously raised as to documents that were revealed to the respondents and the presiding officer at that earlier time. However, it has articulated an additional protection referred to as documents that resulted from its “deliberative process” in proceeding with its pre-investigative and investigative activities. During *in camera* review appropriate consideration of the positions previously argued by the parties in connection with document production during the November 21, 2011 hearing and the positions maintained by the parties during the February 6, 2012 hearing was undertaken.

¹ See orders dated December 14, 2011 and January 19, 2012.

In short, the BSR's assertions justifying its withholding of certain documents include the "attorney client privilege"; the attorney "work product" protection; the "deliberative process" exclusion and in a limited instance an assertion that several documents are "irrelevant." At this stage of discovery, where the parties have agreed to allow *in camera* review of certain documents and where the respondents have specifically defined categories of documents for production by BSR, "relevancy" is a determination that is to be made by the presiding officer and not the BSR on its own. The BSR has improperly withheld, not only from production but from submission for *in camera* review, documents numbered in its *Vaughn* index as BSR2520-2527; BSR2522(sic)-2530; BSR2531-2533; BSR 2538-2539.² Therefore, the BSR is to produce hard copies of said documents to the respondents immediately or, if claiming a valid reason it believes the documents should not be disclosed to the respondents, present hard copy to the presiding officer of these pages for his review and also update the affected page of its *Vaughn* index as to these documents, if necessary.

As to the two former bases for withholding asserted by the BSR, the analysis is not unlike that applied to the first batch of documents provided by both parties for *in camera* review.

Generally, information that falls within these two categories need not be produced. The attorney-client privilege protects from disclosure confidential communications between a client and his or her legal adviser where legal advice is the subject of those communications unless the protection is waived. Protection from disclosure is also accorded information that is deemed to be an "attorney's work product." This protection is a qualified privilege and as such may be pierced in certain circumstances. It is within the presiding officer's discretion to determine whether information claimed to be attorney work product is discoverable by another party to these administrative proceedings. The work product of a lawyer consists generally of his or her mental impressions, conclusions, legal opinions or legal theories. The term connotes that the document or information sought is the result of a lawyer's activities undertaken with a view to a pending or anticipated legal proceeding. Work product is more than a mere compilation or recordation of facts. Information falling into this category while subject to protections nonetheless may be discoverable particularly if the party requesting discovery shows a substantial need of the materials in the preparation of its case and that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means. (Order, dated January 19, 2012).

The BSR specifically raises a third protection, namely a so-called "deliberative process" exemption that was not previously addressed in the January 19, 2012 order and therefore requires some recital in this follow-on order. This exemption usually arises in civil proceedings involving our "Right to Know" statute. (See RSA 91-A). Under circumstances presented by actions governed by that statute a governmental agency is usually defending against a request for disclosure of documents and records that are composed during the pre-decisional phase of its decision making process. *ATV Watch v. N.H. Dept. of Transp.*, 161 N.H. 746, 749, 758 (2011).

² For ease of reference the numerals "0000" preceding each BSR page number cited in this section have been ignored.

The New Hampshire Right to Know Law exempts from disclosure, preliminary drafts, notes, and 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. *Id.* at 757, citing RSA 91-A:5, IX. The Court concurred with other jurisdictions and held that the preliminary draft exemption was designed to protect pre-decisional, deliberative communications that are part of an agency’s decision-making process. *Id.* at 758. The Court further held that there is no conflict between Part I, Article 8 of the New Hampshire Constitution and a construction of RSA chapter 91-A that exempts pre-decisional agency documents. *ATV Watch*, 161 N.H. at 758. Rather, the Court upholds the trial courts’ ruling that restrictions on access to preliminary drafts and related notes do not unreasonably restrict access to governmental records. *Id.* Therefore, the deliberative process privilege is recognized as a valid New Hampshire exemption claimed in civil proceedings under the authority of RSA 91-A:5, IX. Whether or not it extends to this administrative proceeding is less settled in New Hampshire.

Attention, during review, was given to the respective rights of due process of all the parties in this administrative proceeding and to the purposes of this administrative proceeding. The voluntary submission of documents for *in camera* review by the BSR in lieu of arguing its motion for clarification is divided into the following groupings: (1) documents submitted to which partial redaction of text, where requested, was approved, and (2) documents submitted to which the entire text is sought to be withheld by the BSR. All references to page numbers are to the numbers ascribed by the BSR to each document.

Documents falling within the first grouping include:

BSR 2712; BSR 2718-2719; BSR 2734; BSR 2739-2740; BSR 7254-2755; BSR 7263-2764; BSR 2768; BSR 2771-2785; BSR 2807; BSR 2895-2902; BSR 2924; BSR 2963; BSR 3079; BSR 3081-3088; BSR 3186-3191; BSR 3615-3618; BSR 3688-3693. Within this group limited text has been redacted from some documents that I find to be properly subject to the protection accorded attorney work product. In finding that work product protection is a sufficient basis upon which to redact the selected text, I do not proceed to further analysis of the “deliberative process” exemption claimed by the BSR over the same documents. The exception to the permitted redactions to these documents is BSR 2712. This document, in its entirety, is to be produced to the respondents as the text suggested for redaction, merely indicates that the email displayed on this document from the sender to its initial recipient, William Gardner in his capacity as Secretary of State, was forwarded to Earle Wingate, an attorney with the BSR. I do not find such a ministerial delegation to qualify as either work product or part of the “deliberative process” as described above.

Within the numbered sequence spanned by the above documents, it is noted that there was no page BSR 3080 listed as either produced or submitted for *in camera* review. Therefore the BSR shall either immediately explain its non-inclusion, produce this document to the respondents, or submit it for *in camera* review if a privilege or protection is asserted that would justify withholding the document in full or subject to redaction.

The second grouping of documents submitted for review contains significantly more documents from the files of the BSR. This grouping of documents has its first reference at the third from last entry on the sixth page of the BSR *Vaughn* index that contains assertions of

privileges or protections by the BSR for this document submission. (N.B. It facilitates *in camera* review if the pages of the *Vaughn* index, itself, are numbered.) In this grouping, BSR 2712 and BSR 2718-2719 are duplicate listings and were included by the BSR in the first group of documents considered above and will not be considered anew.

BSR 2890, BSR 2962, and BSR 2966 are not subject to work product protection as disclosure would not seem to constitute “undue or needless interference” with the BSR preparation of its case, its legal theories or its strategy. And none appear to consist of a lawyer’s “mental impressions, conclusions, opinions or legal theories.” *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 274, 220 A.2d 751, 756 (1966) quoting *Hickman v. Taylor*, 329 U.S. 495, 508 (1947) nor do either of these three appear to represent a pre-decisional, deliberative communication as part of the BSR’s decision making process as discussed above and as anticipated in *ATV Watch v. N.H. Dept. of Transp.*, 161 N.H. 746, 757 (2011) citing RSA 91-A:5, IX. Therefore, these documents are to be disclosed to the respondents.

Within the numbered sequence spanned by the BSR’s *Vaughn* index, it is noted that the entry BSR 3089-3062 appears to contain a data entry error and should appear as BSR 3089-3162. BSR 3205-3242 are labeled as withheld under the authority of a “Confidentiality Order.” If the respondents agree with these documents being withheld from *in camera* review, then the BSR shall indicate such to the presiding officer via submission of a brief statement to that effect and provide a reference to the legal proceeding that resulted in said confidential order.

Within the submission there are seventy-eight pages submitted without legible Bates numbering. It appears that during the numbering or copy making stages of preparation the numbers slipped beyond the lower left edge of the page. Upon review it is believed that these pages would otherwise be labeled BSR 3278-3354, providing they are all sequential submissions. Notwithstanding, I find that the seventy-eight pages may be withheld by the BSR as being properly subject to the attorney client privilege.

There is no page BSR 3548 listed as either produced or submitted for *in camera* review. Therefore the BSR shall immediately either sufficiently explain its non-inclusion, produce this document to the respondents, or submit it for *in camera* review if a privilege or protection is asserted that would justify withholding the document in full or subject to redaction.

Appearing on the next to last page of the BSR *Vaughn* index is an entry of BSR 3557-3558. This is the sole entry on the entire page that is not labeled as being subject to an assertion of the attorney client privilege and is seventh in a line of email exchanges involving attorneys within BSR and the Department of Justice. These circumstances lead the presiding officer to maintain a belief that a clerical error or typographical omission has occurred. Therefore, the BSR is instructed to either submit an updated entry for BSR 3557-3558 to the presiding officer or produce the subject document to the respondents.

Within the document entry labeled as “Handwritten notes of Wingate 2010-2011” spanning numbers BSR 3720-3816 is a two-page email, dated August 4, 2010, rather than a “handwritten note.” It is merely a solicitation for work in the form of a resume addressed to William Gardner as Secretary of State which I find is not material and relevant to these proceedings and need not be produced.

As to all other documents listed in the BSR *Vaughn* index and not addressed in the prior order of January 19, 2012, I find that each may be withheld from production to the respondents as each document is subject to either the attorney client privilege or work product protection as indicated. Having found as such, I reach no further findings on the application of the “deliberative process” exemption.

Lastly, as counsel are aware although others interested in these proceedings may not be, a determination that information must be produced during the pre-hearing procedural phases of administrative hearings is not tantamount to allowing that same information to be admitted as evidence during the hearing.

In conclusion and in addition to the findings and orders to parties already made in the preceding discussion it is further ordered that:

- A. To the extent that the parties have made arrangements agreeable to all other parties regarding the production of information following the close of the record on February 6, 2012 that is subject to this order, those agreements may stand.
- B. Upon receipt of this order, the BSR shall comply with the orders as they relate to the documents presented for *in camera* review at this time and undertake immediate production to the respondents consistent therewith.
- C. As previously instructed and now reiterated, all parties shall maintain proper preservation of all files during these administrative proceedings. Any attorney who has appeared subsequent to previously ordered file protection shall maintain and preserve all files consistent with the commonly accepted so-called “litigation hold.”
- D. All parties, including their own attorneys and personnel necessary to preparation and participation in this administrative proceeding and any other attorneys, experts, or consultants acting as its agents, independent contractors, or employees who are necessary to that same preparation and participation, are prohibited from using or disclosing any information related to claims analysis and claims management of the respondent pooled risk management programs as governed by RSA 5-B:7 for any purpose other than these administrative proceedings by which such information was obtained.
- E. All parties shall return all said claims analysis and claims management information obtained from LGC prior or subsequent to the filing of this petition in this matter at the end of these proceedings or shall destroy such information, and all copies of same, and provide demonstrable evidence to the LGC that it has done so.
- F. The disclosure in this proceeding of any of the information subject to this protective order shall not be considered as precedent for any other administrative or judicial proceeding, nor be interpreted to have eliminated or diminished any privilege, exemption, or protection otherwise held by any party or its counsel over information made available through this order.
- G. All counsel who have appeared subsequent to the earlier protective orders regarding documents and records obtained through discovery are reminded that they and their associated personnel and clients are subject to all protective orders issued in this matter.

H. All previous orders not inconsistent with this order shall remain in force and effect.

So ordered, this 21st day of February, 2012


Donald E. Mitchell, Esq.
Presiding Officer

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