

STATE OF NEW HAMPSHIRE

DEPARTMENT OF STATE

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IN THE MATTER OF: )  
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 Local Government Center, Inc.; )  
 Government Center Real Estate, Inc.; )  
 Local Government Center Health Trust, LLC; )  
 Local Government Center Property-Liability Trust, )  
 LLC; )  
 Health Trust, Inc.; )  
 New Hampshire Municipal Association Property-Liability )  
 Trust, Inc.: )  
 LGC – HT, LLC )  
 Local Government Center Workers’ Compensation )  
 Trust, LLC; )  
 And the following individuals: )  
 Maura Carroll; Keith R. Burke; Paul G. Beecher; )  
 Peter J. Curro; April D. Whittaker; Timothy J. Ruehr; )  
 Julia A. Griffin; and John Andrews )  
 )  
 RESPONDENTS )

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Case No.: C-2011000036

**ORDER ON PARTIES’ MOTIONS TO COMPEL PRODUCTION**

**BACKGROUND**

On November 21, 2011 in Concord, New Hampshire a hearing was conducted on the parties’ several motions and corresponding responses thereto filed or joined by the differing parties to this enforcement action relating to the extent to which the respective parties are entitled to receive documents, records and other recorded information from each other as part of the present discovery activities. At the hearing before the undersigned presiding officer, parties were represented by counsel who had the opportunity to address this issues presented by their filings and undertake oral argument in support of their respective positions.

Prior to the start of the hearing, Attorney Roy W. Tilsley, Jr. filed an appearance for BSR and participated in the subsequent hearing. Also, the LGC (term is used to collectively refer to LGC and all of its entities and its executive director, Maura Carroll) filed a response to the BSR's "Motion to Compel, Preserve and Enforce Subpoena" prior to the start of the hearing. Upon the request of BSR to submit a supplemental memorandum of law following the hearing and with due allowance given to the several respondents to respond to the supplemental memorandum submitted by the BSR, the record was held open until December 5, 2011.

On December 14, 2011 a partial order was issued specifically addressing one aspect of the discovery conflict that existed between the parties. The December 14, 2011 decision specifically addressed those aspects of the BSR's "Motion to Compel, Preserve and Enforce Subpoena", dated November 18, 2011, addressing the authority of the BSR to conduct an on-site examination of the financial operations of the LGC and to interview certain individuals related to the LGC through employment, governance, or agency. That same order addressed the BSR's authority to obtain additional documents from LGC and provided at Section E that "[t]he related production of documents requested in the BSR subpoena dated 9/13/11 not yet produced by LGC or otherwise properly withheld for cause shall be provided to the BSR and may also be provided to other counsel of record upon request." The instant decision addresses the remaining aspects of the parties' respective production requests and responses raised by the parties related to that November 21, 2012 hearing and supplemental post-hearing written submissions of the parties.

Without repeating the extensive background of the subject of these administrative proceedings as provided in the previous December 14, 2011 order, it is sufficient to note that the underlying matter arises from a staff petition submitted by the Bureau of Securities Regulation ("BSR") alleging that the named respondents, as appear in the caption above, undertook a series of acts resulting in violation of RSA 5-B, "Pooled Risk Management Programs" and RSA 421-B, "Securities". Pursuant to RSA 421-B:26-a,V a "Notice of Order" issued on September 2, 2011

by the secretary of state granting the BSR petition and initiating the hearing process that has brought these parties to this point in their procedural actions where each is seeking to obtain certain documents, records, and other recorded information related to the merits of the BSR's allegations as contained in its petition against the respondents.

The parties have previously produced information, but have been unable to reach agreement on all production requests. The BSR and the LGC have each now filed motions during this "discovery phase" of these proceedings seeking the other's production of certain additional information. The individuals named as respondents are also requesting production either by direct motion, respondent Andrews' "Motion to Compel Production of BSR's Interviews, Statements and Summaries of Same" or by joining in the direct motions filed by LGC and Andrews.

For efficiency and in the event that it was to be determined by the presiding official, after the close of the record, that a party's discovery request subject to this order sought relevant information and was reasonably calculated to lead to the discovery of admissible evidence, the BSR and LGC have each prepared in advance of hearing and produced a so-called, "*Vaughn* index" accompanied with correlated documents being withheld by that party in the event an "*in camera*" review became necessary. The index takes its name from *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir.1973), and requires a correlation of the information that a party decides to withhold with the particular justification for withholding. The withholding party provides a description of the document and reference to a page numbering system, *e.g.* Bates numbering, and describes the basis for exclusion from production of a part or all of the contents of that document .

Following the review of all relevant filings regarding the production issues presented at hearing and the content of offers and oral arguments made, the undersigned presiding officer determines as follows:

## FINDINGS OF FACT

1. In or about 2009, the BSR exercised its statutory responsibility to regulate RSA 5-B, “Pooled Risk Management Programs” and began an investigation of the activities of LGC related to the provision of certain health and health related services and products to political subdivisions.
2. Its investigative activities caused it to submit a staff petition, pursuant to RSA 421-B:26-a, to the Secretary of State.
3. On September 2, 2011 the Secretary of State granted the staff petition submitted by the Bureau of Securities Regulation (“BSR”) and issued a “Notice of Order”, pursuant to RSA 421-B:26-a,V, to the above captioned entities and individuals as well as two other individuals whose names have previously been withdrawn on request of the BSR without objection and are no longer parties in this matter.<sup>1</sup>
4. The respondent LGC had retained counsel to represent it in the instant administrative proceedings and its counsel have appeared and actively participated in these proceedings.
5. Additional counsel representing other individuals who were named as respondents have also appeared to represent the rights of those individuals.<sup>2</sup>
6. On September 13, 2011 the BSR issued a “Subpoena *Duces Tecum*” and letter requests, dated 9/13/11 and 10/19/11, on the LGC requesting production of certain documents related to these proceedings. A referenced letter request allegedly made

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<sup>1</sup> Subsequent to the November 21,2011 hearing but prior to the issuance of this order, three additional individuals initially named in the BSR Petition have been released as parties: Berry, MacDonald, and Moltenbrey.

<sup>2</sup> N.B. Counsel representing the LGC and its other business or institutional entities also represents individual respondent Maura Carroll, presently the Executive Director of LGC. Former Director Andrews has retained separate counsel. Individual respondents Burke, Beecher, Berry, Curro, Griffin, Ruehr and Whittaker have retained shared counsel. Individual respondents Moltonbrey and MacDonald share separate counsel.

on October 31, 2011 was admitted by the BSR at hearing not to have been sent to LGC.

7. On November 18, 2011 the BSR filed a motion that, among other things, requested that the LGC be ordered to produce the documents falling within the several categorical requests contained in its previous requests.
8. On November 18, 2011 the LGC filed a motion that, among other things, requested that BSR be ordered to produce documents falling within the several categorical requests contained in its previous requests.
9. On December 4, 2011 the BSR filed its response to the LGC production motion.
10. On November 18, 2011 the respondent Andrews filed its “Motion to Compel Production of BSR’s Interviews, Statements and Summaries of Same” to which the other individuals named as respondents joined by oral motion. Aside from the Andrews request for witness summaries, the requests therein contained fall within the requests sought by the LGC.
11. The BSR and LGC represented that each would continue to provide information to the other that was subject to discovery and inform the presiding officer of problems they encountered in doing so.
12. The BSR specifically represented that it believed there could be other material within its several staff members’ offices, that it would undertake a good faith search for discoverable information and would provide such information to respondents that was subject to discovery and update its *Vaughn* index correspondingly.

13. The LGC represented that it had begun to provide information to the individuals named as respondents and were in the process of working out an agreed process for that production.
14. On November 21, 2011 the LGC filed its objection to the BSR production motion that, among other things, argues that it has provided a substantial number of documents matching the requests of the BSR and had withheld certain documents from disclosure based upon claims of privilege.
15. The BSR and LGC filed post-hearing supplemental legal memoranda that were made a part of the record of the November 21, 2011 hearing.
16. The BSR motion made reference to a letter request dated 11/15/11 but its scope was to be later determined between the parties because it had been represented as a contingent request in the event similar information was not obtained through the on-site examination ordered on December 14, 2011.
17. On December 2, 2011 the BSR filed a “Motion to Amend” its previous production motion to, among other things, reiterate its 11/15/11 letter requests into formal motion form, but again that request was considered contingent upon whether there would be an on-site examination or not.
18. On December 5, 2011 the LGC filed its objection to the BSR request to amend.
19. The BSR and LGC have exchanged requested material in the form of records, reports and other documents prior to, and subsequent to, the issuance of the secretary of state’s notice on September 2, 2011. No party believes that they have, to the date of the hearing, been provided all information sought in their respective requests of another party.

20. The BSR and LGC have each produced a *Vaughn* Index describing the records it has produced to date and describing those records over which it claims a legal privilege excluding disclosure and providing the basis for the assertion that those particular documents are not subject to disclosure.
21. The LGC submitted to the presiding officer one set of documents, including redactions with an accompanying Vaughn index and a duplicate set of documents containing no redactions allowing the presiding officer to view the complete text of each document to which the LGC asserted a privilege.
22. The BSR submitted to the presiding officer one set of documents with no redactions and with an accompanying Vaughn Index over which the BSR asserted complete privilege to the entire text contained within the withheld documents.
23. In or about the time that the LGC undertook some form of reorganization, Robert Lloyd was retained as outside legal counsel to the LGC.
24. At the time the record of the November 21, 2011 hearing was closed, discovery was continuing and specific answers responsive to the original petition and defenses asserted by the respondents had not been required nor submitted by the respondents.
25. The BSR staff petition has four counts alleging facts and violations in four major areas: (1) corporate formation; (2) management; (3) sale of securities; and (4) the accumulation of surplus.
26. All other relevant facts previously admitted or stipulated by the parties, or found, or administratively noticed by the presiding officer are incorporated into this decision.

## **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**

In making determinations regarding parties’ pre-hearing discovery of information held or in the control other parties, the presiding officer is guided by the New Hampshire standard that encourages officials responsible for the conduct of the judicial or administrative proceedings to approach discovery conflicts between parties with a liberal or broad perspective favoring disclosure. This New Hampshire approach results in an adjudicative procedure that: (1) disfavors the practice of “surprise” at the final hearing on the merits; (2) contains the belief that pre-hearing discovery of information assists the parties in preparing their respective cases; and, (3) diminishes protracted discovery conflicts among reasonable counsel that are costly to parties, adversely affect judicial economy, and fail to serve the truth seeking purpose of administrative and judicial hearings. The presiding officer is permitted to keep discovery within reasonable limits and avoid " open-ended fishing expeditions" or harassment to ensure that discovery contributes to the orderly dispatch of judicial business. There are also countervailing considerations that may act to limit discovery in some instances, as when the scope of the request is unreasonably broad, or requiring production that is unreasonably burdensome, or when the

information sought falls within legally recognized privileges such the attorney-client privilege or attorney work product confidentiality.

In this particular matter there is a specific statutory privilege relevant to the management of discovery and pertaining to “claims analysis or claims management” information that “shall be privileged and confidential and not subject to disclosure to any third party.” (RSA 5-B:7). Where, as in this matter, there are multiple parties engaged in contested litigation and such information may reasonably be deemed relevant to the proceedings regarding the financial costs and amount of reserves, the presiding officer interprets this statutory privilege not to be absolute, but rather finds that it must yield to the litigation process involving the very operation of the pooled risk management program including the costs of operation and the level of reserves. Access to such information is not unlimited and protective treatment of any information deemed discoverable will be imposed. In light of this determination, all parties shall be compelled to adhere to the protective instructions contained within this order that address the handling of any such confidential information related to claims analysis or claims management as those terms may be reasonably interpreted in RSA 5-B.

After reviewing the filings and exhibits of the parties, listening to the offers and oral arguments of the parties and reading the parties’ post-hearing submissions, I have reviewed the categorical document requests of the parties at issue and find that the requests of each party for information held or controlled by another party appear relevant to the issues raised by the parties and appear reasonably calculated to lead to the discovery of admissible evidence in this administrative hearing with the exception of the request for production of summaries of witness interviews not previously memorialized. Information is relevant if it tends to make the existence of any fact consequential to the determination of the action more or less probable than it would be without admission of the evidence. I also find that the scope of the respective requests are not unreasonably broad or burdensome for the following reasons: (1) the effect of the previous order

to allow the BSR to conduct an on-site examination, essentially negating or minimizing the scope of its 11/15/11 requests for production; (2) the nature of these proceedings involving the examination of many financial transactions among numerous LGC entities; (3) the number of individuals who are alleged to have participated in, or undertaken, acts in violation of the governing statutes; (4) the multi-year period of time over which actions are alleged to have occurred; and, (5) with consideration to the use of, and reliance upon, information technology to maintain and store some of the information sought and the resulting number of related documents that can be generated. Again, the general exception to this determination and the allowance of mutual and shared production of discovery materials pertains to the requests of the BSR for paper copies of information that otherwise may have been obtained in digitalized format as a result of the activities of the parties surrounding the on-site examination addressed in a previous order. Production of duplicative information in both written and digitalized format is unnecessary. Therefore, to the extent that digitalized information has been obtained by the BSR during its on-site examination or otherwise provided to it or other parties by the LGC, the LGC is not required to provide duplicate documents on paper as this may be overly burdensome.

These general findings related to the parties' categorical requests subject to the motions and responses presented for this hearing are subject to the following specific rulings related to specific information or document production requests of each party and the application of the protections accorded attorney-client privilege and attorney work product.

*Rulings on Specific Categorical Production Requests of the Bureau of Securities Regulation (BSR)*

Notwithstanding the general findings above, there are some specific denials within the categorical requests for production made by the BSR of the LGC. They are as follows: The BSR subpoena *duces tecum* is not enforced as to the requests for interviews appearing in ¶ 23-¶26 for

reasons addressed in the previous December 14, 2011 order, excepting limited informal discussion reasonable to the conduct of the on-site examination. Other information sought by oral interrogatory shall be obtained by deposition as consistent with the December 14, 2011 order. Also, requests for billing records or invoices “from any lawyer or law firm...” as appear in ¶ 31 is not compelled if the same would reveal legal advice or legal strategy in which case LGC may redact such privileged information appearing on the bill or invoice. The LGC need not generate new bills to comply with that request. However, billing amounts must be produced as relevant to the use of pooled risk management program funds put at issue by the BSR. In addition, the request for a “statement as to who was responsible ...” as appears in ¶ 33 is denied to the extent that it requests the creation of a document as opposed to the production of an existing document.

Beyond my earlier stated prohibition regarding duplicative requests in both digitalized and printed format as could result from the letter request of November 15, 2011, that letter also contains a request in ¶ 20 for the LGC Entities to “[p]rovide any subsequent events to the December 31, 2011 financial statements and related documentations of the LGC Entities.” I find this request to be ambiguous as “events” is not defined in the definition section of the request, and requires an unreasonable degree of speculation to comply, and therefore do not require attempted production by LGC in response to it. If LGC in the context of discussions with the BSR have gained an understanding of that term as used in the BSR request, it may of course offer to meet the request. Also, the request contained in ¶ 22 of the November 15, 2011 BSR request appears to seek production of information essentially the same as that requested in ¶ 19 of its September 19, 2011 requests and, to the extent that it is duplicative, LGC is not compelled to produce documents in response to this later request. The other BSR requests of September 13, 2011; October 19, 2011 and non-duplicative requests of November 15, are to be interpreted as continuing in effect and requiring supplemental responses and production as commonly applied

under discovery practice adhered to in New Hampshire subject to the findings contained in the December 14, 2011 order where the presiding officer addressed certain limitations on the BSR regarding any attempt to incorporate additional charges of statutory violations within these instant administrative proceedings.

*Rulings on Specific Categorical Production Requests of the Local Government Center (LGC)*

The LGC's requests for production of documents are dated October 11, 2011; and November 9, 2011. Notwithstanding the general findings above, there are some specific denials within the categorical requests for production made by the LGC of the BSR. They are as follows:

The LGC letter request, dated October 11, 2011, at ¶13 seeks the production of “[c]opies of all communications with the law firm of Molan, Milner & Krupski, PLLC” and ¶14 seeks the production of “[c]opies of all communications with Attorney Glenn Milner.” Other than to allege or imply that Attorney Milner and his firm are “agents” (See Motion Exhibit B, Letter request dated 11/9/11, p.3, re: Document Requests 10-14) of the Professional Fire Fighters of New Hampshire there is little in the record to establish that communication between Attorney Milner and the BSR or communications between his law firm and the BSR are relevant to these proceedings or could reasonably be calculated to lead to the discovery of admissible evidence. Without further development of the reason for these requests, such requests are denied at this time. Also, the requests contained in the October 11, 2011 letter at ¶ 24, ¶25, ¶27-29, and ¶31 to the extent that they would require the BSR to disclose any copies of communications or copies of documents that would reveal the existence of an investigation in progress or contemplated to occur are denied as irrelevant investigatory information.

The determinations I have made that the BSR and LGC requests for production, except for those specifically addressed in the preceding four paragraphs, qualify as allowable requests

for pre-hearing discovery of information held or controlled by LGC does not mean that privileged information within the categories of information requested must be provided without further analysis. It does mean that specific information and records claimed to be privileged must be appropriately described, citing a legal basis for the claimed privilege, and must appear in the *Vaughn* index of the party claiming the privilege.

Further analysis is accomplished through a so-called “*in camera*” review that is conducted by the presiding officer. The *in camera* review is triggered if there is a reasonable probability that the records subject to the request and over which a privilege is asserted contain information that is material and relevant to a party’s case. I find after reviewing the filings and exhibits of the parties, listening to the offers and oral arguments of the parties and reading the parties’ post-hearing submissions have satisfactorily shown there is a reasonable probability that the cited documents withheld by the other party contain information that is material and relevant to their case preparation. In this matter, there has been no challenge by any party to the submission of documents purported to be subject to the protections of privilege for *in camera* review by the presiding officer. Both LGC and BSR have submitted a set of documents containing text, in whole or in part, over which they claim an exclusion from discovery. Both parties have submitted a corresponding *Vaughn* index to the presiding officer to facilitate conduct of the *in camera* review. In the context of the *in camera* review the presiding officer has, to the extent that there is both privileged text and non-privileged text appearing within a single document, distinguished between the two types of content and has himself redacted privileged information, or if appropriate allowed a party’s submitted redaction of privileged text to stand.

A significant number of the documents segregated by LGC and BSR in their binders accompanied by their *Vaughn* index for *in camera* review related to the November 21, 2011 hearing call for an application of the “attorney-client privilege” and confidential protection accorded the “attorney work product.” 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. Notwithstanding this recognized protection, the privilege can be pierced under certain conditions and can be waived if the communications relate to a matter that has been put into issue by the party asserting the privilege. The BSR has argued that where an attorney has provided “business” advice and not legal advice, the former is not covered by the attorney-client privilege. As I did not find any advice spoken by an attorney that was not legal in considering redactions in my review, I do not address it further.

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.

*Determinations on Documents Included in the LGC Vaughn Index claimed to be privileged.*

Upon representation of parties’ counsel that the BSR and LGC have reached agreement on many documents initially requested by BSR but withheld by LGC, LGC presented to the

presiding officer a binder containing the documents remaining for review. The binder contained two copies of each requested document, one with the requested redactions of LGC and the other set with no redactions. The specific documents requested for production by the BSR in its motion and for which non-disclosure is sought by the LGC and reviewed for purposes of this order are as follows:

Bates Page Reference

1. LGC-AH002591 - 002596
2. LGC-AH002621 - 002627
3. LGC-AH002643 – 002655
4. LGC-AH002798 - 002802
5. LGC-AH008105 - 008110 (duplicate of #1)
6. LGC-AH008177 - 008189 (duplicate of #3)
7. LGC-AH008222 – 00827
8. LGC-AH008254 - 008258 (duplicate of #4)
9. LGC-AH00826 – 00843
10. LGC-AH009600 – 00917 (duplicate of #9)
11. LGC-AH0010800 – 0010801
12. LGC-AH0011909 – 0011912
13. LGC-AH0011913 - 0011915

Upon review of the non-redacted version of each document, the redacted portion represents a valid assertion by LGC of attorney-client privilege. I find that the documents numbered above as #'s 1,2,3,4, and therefore their corresponding duplicates #'s 5,6,8,10 are each discoverable subject to the redactions of text as submitted by the LGC. Document #7 is

discoverable subject to the redactions of text as submitted by the LGC. Document #9 and its corresponding duplicate Document #10 are discoverable subject to the redactions of text as submitted by the LGC as each redaction that appears represents a valid assertion by LGC of the corresponding privilege as described in its *Vaughn* index. Document #11 is discoverable subject to the redactions of text as submitted by the LGC as each redaction that appears represents a valid assertion by LGC of the corresponding privilege as described in its *Vaughn* index. Document #12 and #13 are not discoverable in their entirety as each is solely a document containing direct legal advice to LGC.

*Determinations on Documents Included in the BSR Vaughn Index claimed to be privileged.*

LGC has requested production of documents from BSR as appear in the LGC motion and earlier letter requests. Notwithstanding that it was the BSR action in filing the staff petition that initiated these proceedings, that party has represented that it has undergone several disruptions that have hindered its compliance with the discovery requests of LGC, Andrews and the other individuals named as respondents for information in connection with these proceedings. Chief among these has been the representation of the unavailability of their initial lead counsel in the preparation for, and presentation of, the BSR case at this discovery hearing and difficulty in determining the physical contents of the lead counsel's office during his absence. In addition, it was represented at the hearing that there were relatively few original documents generated by the BSR during its investigation to the date of hearing as its case was, to a great extent, founded upon documents previously provided by LGC as part of the BSR investigation preceding its filing of the staff petition. Also, as the lead counsel for BSR was also the lead investigator, his unavailability contributed to some initial confusion in complying with LGC document requests. While this circumstance may have created a degree of frustration in those seeking document production from the BSR, I believe that a good faith effort was undertaken by this government entity to locate documents subject to the requests of LGC and the other respondents. I also accept

the representation at hearing that a thorough search will be undertaken subsequent to the hearing to meet the respondents' requests for the appropriate production records. That said, the parties have pledged to continue to meet the requests made by other parties for information as discovery continues during these proceedings.

As to the documents in contest subject to this order, the BSR did not choose to redact any portions of documents over which it claims a protection from disclosure. By that non-action it has presented its binder to the presiding officer for his open determination of what text, if any, within these documents is not protected from discovery at this time. The BSR's accompanying *Vaughn* index describes the basis claimed to support the non-disclosure of each document. While the presiding officer is charged with making such a determination during *in camera* review, it should be noted that a party's effort in considering selective redaction prior to submission for *in camera* review can facilitate that review and assist that process. Further, the BSR manner of submitting multiple documents, *e.g.* e-mails, copied onto a single page further compounds the process of *in camera* review. The specific documents requested for production by the LGC in its motion and for which non-disclosure is sought by the BSR amount to nearly 300 pages, and as was revealed during the presiding officer's review, contain a substantial amount of duplication of information. The designated groups of pages that are reviewed for purposes of this order are as follows:

Bates Page Reference

1. BSR- 00001724 – BSR-00001857
2. BSR-00002119 – BSR-00002148
3. BSR-00002153 – BSR-00002160
4. BSR-00002162 – BSR-00002165
5. BSR-00002166 – BSR-00002179

6. BSR-00002186 – BSR-00002197
7. BSR-00002224
8. BSR-00002249 – BSR-00002255
9. BSR-00002290 – BSR-00002293

As to the contents of Group 1, I find the following pages discoverable in full or subject to the redactions of text as may be found on each page representing a valid assertion of the protection accorded “work product.”<sup>3</sup>: 1725, 1729, 1740, 1769, 1774, 1778-1789, 1791, 1793, 1794, 1799, 1803, 1807, 1808, 1813, 1814, 1820, 1842, 1855.<sup>4</sup> All others are determined to be work product.

As to the contents of Group 2, I find pages 2135 – 2140 to contain duplicate text of 1724, 1726 – 1728 and 2142 – 2143 to contain duplicate text of 1766 - 1767 and all pages to consist of work product. I find the following pages discoverable in full or subject to the redactions of text as may be found on each page to indicate text determined to be work product (see footnote #3): 2120-2124, 2126, 2127-2133, 2141, 2144-2147.

As to the contents of Group 3, I find the following page discoverable in full (see footnote #3): 2159 all others are determined to be work product.

I did not find a page 2161 in the binder presented indicating its disclosure or a basis for its withholding and therefore no review was made. BSR shall either produce this document directly to the respondents of if privilege or protection is claimed, to the presiding officer for review if it qualifies for *in camera* review.

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<sup>3</sup> Many pages contain only the closing text common to emails “ THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE ADDRESSEE. IT MAY CONTAIN PRIVILEGED OR CONFIDENTIAL INFORMATION THAT IS EXEMPT FROM DISCLOSURE ...” Where a numbered page contains only this text, it has been listed as discoverable essentially to reveal the fewer number of pages actually containing content over which BSR asserts a protection. The presiding officer is not aware of any communication from the BSR or agreement of the parties that such perfunctory information need not be included in production. Where said closing text shares a page with protected content, judicial economy requires that it not be specifically redacted.

<sup>4</sup> For ease of reference the prefix “BSR – 0000” to each page number cited in this section has been ignored.

As to the contents of Group 4, I find the following page discoverable in full (see footnote #3): 2163.

The BSR has asserted that documents within Group 5 are not relevant and therefore are not subject to discovery by the respondents. In light of the general findings at the outset of this discussion that the parties' requests were relevant and reasonably calculated to lead to the discovery of admissible evidence the information capable of being withheld by the BSR is that information that is subject to specific legal privilege or protection. The BSR does not sufficiently state a case that supports the attachment of any such legal privilege or legal protection that would justify exclusion of any page in Group 5. Therefore I find that 2166 – 2179 are discoverable and further note that 2173-2179 are duplicative of 2166-2172 except for the positioning of the date stamp appearing on 2173.

As to the contents of Group 6 the BSR asserts that the contents of the pages enumerated within this group constitute attorney "work product." With the exception of the slight redaction to the August 18, 2011 3:41 PM email appearing on 2192 I do not agree. These pages contain what appear to be an introductory email submitted to the BSR by a member of the North Hampton Municipal Budget Committee containing facts, figures and his own unsolicited comments relating specifically to issues raised by the BSR in its staff petition and at hearing. With scant exception, as redacted, there is no manifestation of attorney effort or expression of an attorney's mental impressions, conclusions, legal opinions or legal theories evident to the presiding officer. Therefore, I find the pages 2186 – 2197 discoverable subject to the redaction of text on 2192.

Group 7 consists of a single email that the BSR claims is "irrelevant." This receives similar treatment as that explained in my consideration of Group 6. In light of the general findings at the outset of this discussion that the parties' requests were relevant and reasonably

calculated to lead to the discovery of admissible evidence, the information capable of being withheld by the BSR is that information that is subject to specific legal privilege or protection. Page 2224 is an email from a taxpayer of the Dresden School District remarking on a potential tax increase brought upon, in his opinion, the provision of group health insurance within the state. The BSR does not sufficiently state a case that supports the attachment of any such legal privilege or legal protection that would justify exclusion this page in Group 6. Therefore 2224 is discoverable by the respondents.

As to Group 8, I find all pages 2249-2255 to be appropriately withheld as work product.

As to the final group, Group 9, I find all pages 2190-2293 to be appropriately withheld as work product.

The last entry on the BSR *Vaughn* index references “Case File: PFFNH v. LGC and the BSR has indicated that its contents have not been Bates numbered. BSR further describes its reason for withholding the file as “Public record and in possession of LGC.” The unnumbered group of documents that may form the contents of the “Case File: PFFNH v. LGC” withheld by the BSR has not been submitted to the presiding officer for “*in camera*” review. I find the stated purpose for withholding to be insufficient to the extent that the BSR has maintained the entitled file. While the BSR is not required to create such a file or obtain such a file from files of the tribunal in which such a case may have been conducted, it is required to produce appropriate documents requested by the LGC to which the BSR does not claim privilege based upon the attorney-client relationship or work product or other privilege.

*Requests of the Respondent Andrews of the BSR*

The individually named respondent, John Andrews, and other individuals who are respondents join in requesting the BSR to produce “copies of any reports of interviews, statements or summaries of interviews to statements obtained or generated by the BSR during the investigation that led to [this administrative proceeding]. Andrews also requests that. “the BSR to produce a summary of each interview” in the event the BSR did not memorialize information obtained from the individuals Andrews assumes the BSR interviewed during its investigation. Alternatively, Andrews requests that the BSR produce a summary of the information each of its witnesses is expected to provide at hearing.

Except for the request that the BSR generate summaries of the information each of its witnesses is expected to provide at hearing, the other requests contained within the so-called “Andrews motion” are encompassed in the treatment accorded production requests throughout the discussion that appear above. Andrews asserts that the due process protections of both the United States Constitution and the New Hampshire Constitution require the BSR to do so. Expressing applicable due process rights in their simplest form the requirement is that a party be entitled to fair notice of his or her hearing and a fair hearing. The judge or hearing officer or other official presiding over a hearing is granted broad discretion in doing his or her best to construct, manage and maintain a fair hearing process. The due process considerations maintained by presiding judicial or administrative officers may vary depending upon whether the matter is criminal, civil or administrative and the discretion granted to the hearing officer within the law.

That said, the presiding officer has already represented to counsel for all parties that as discovery progresses and the witness lists firm up each will be requested to reveal the name of each witness they intend to call as part of their case and to indicate the essence of the testimony they intend to elicit from that witness. Fulfillment of that representation by the presiding officer in concert with cooperation of counsel will contribute to the conduct of a fair hearing.

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 of the issues subject to the November 21,2011 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 December 5, 2011 that is subject to this order those production agreements shall stand.
- B. Upon receipt of this order, the parties shall comply with the orders as they relate to the documents presented by each for *in camera* review and undertake immediate disclosure to the other parties consistent therewith.
- C. The parties' representations that they shall maintain proper preservation of all files during litigation shall remain in effect. Any counsel who have appeared subsequent to those representations shall maintain and preserve all files consistent with the commonly accepted so-called "litigation hold."
- D. Actions undertaken by any of the parties since the record close of this hearing may, or may have already altered the treatment given to particular documents or categories of documents *e.g.* additional motions, answers, defenses raised, new information found, new witnesses, deposition testimony, new issues. In those circumstances a party seeking reconsideration of treatment of a specific request for production may do so by motion stating with specificity the production sought and detailing the factual basis that has changed upon which that request for production should be reconsidered.

- E. 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.
- F. 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.
- G. 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.

So ordered, this 19<sup>th</sup> day of January, 2012



Donald E. Mitchell, Esq.  
Presiding Officer

## SERVICE LIST

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