

**STATE OF NEW HAMPSHIRE  
DEPARTMENT OF STATE  
BUREAU OF SECURITIES REGULATION**

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**IN THE MATTER OF:**

Local Government Center, Inc.; et al

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Case No.: C-2011000036

**LOCAL GOVERNMENT CENTER'S RESPONSE  
TO NEW HAMPSHIRE BUREAU OF SECURITIES REGULATION'S  
MOTION FOR CLARIFICATION**

Respondents Local Government Center, Inc. and affiliated entities, and Maura Carroll (hereafter, "LGC"), submit this *Response to the New Hampshire Bureau of Securities Regulation's* (hereafter, "the Bureau," or "BSR") *Motion for Clarification*, stating the following:

**A. The BSR Has Failed to List the Documents on Its Vaughn Index Pursuant to the Presiding Officer's November 14, 2011 Order.**

1. BSR's *Motion for Clarification* (the "Motion") asks this Presiding Officer whether it is required to produce and/or list documents in its possession that relate to the Respondents and that were generated by BSR attorneys and staff. In doing so, the BSR argues that it is not required to produce to the Respondents or list on its Vaughn Index internal E-mails and communications that relate to LGC and the issues raised in the *Staff Petition for Relief*. Additionally, BSR attempts to sidestep the question of whether it is required to produce and/or list documents generated by Secretary of State William Gardner that relate to LGC and issues raised by the BSR's *Staff Petition*.

2. The BSR filed its Motion prior to any Order by the Presiding Officer on the discovery issues argued during the November 21, 2011 hearing. Thus, the Motion is premature with respect to whether the BSR is required to produce the documents to the Respondents.

However, pursuant to the Presiding Officer's Order dated November 14, 2011, the BSR should have already listed the responsive documents on its Vaughn Index. Accordingly, the BSR is in violation of the Presiding Officer's Order. *See* Order dated November 14, 2011 at ¶ 3 (ordering the BSR to provide Respondents with a Vaughn Index describing withheld documents and the legal basis for the withholding).

3. Upon information and belief, the internal communications and E-mails that the BSR continues to withhold and that are not listed on the BSR's Vaughn Index include, but are not limited to, communications that relate to LGC and the issues raised in the Staff Petition; the two Segal Reports (December 29, 2010 and July 28, 2011); proposed legislation concerning RSA 5-B; the BSR's regulatory oversight and/or investigation of LGC and the other risk pools from July 22, 2009 through September 2, 2011; its decision to not investigate and/or prosecute other RSA 5-B entities; discussions concerning the enforcement of RSA 5-B; and likely other exculpatory information.

4. The documents that are the subject of the BSR's *Motion for Clarification* are relevant to LGC's defenses to the *Staff Petition* as listed in LGC's Answer to the *Staff Petition* filed on January 6, 2012. Specifically, these defenses include the BSR's authority to regulate LGC and the other risk pools prior to June 29, 2009; LGC's selective prosecution claim; the lack of prior complaints concerning LGC's actions notwithstanding the numerous annual filings made by LGC; the lack of rulemaking on regulatory standards by the BSR concerning the topics raised in the *Staff Petition*; issues regarding the vagueness of RSA 5-B and RSA 421-B; and allegations regarding the Securities Act, as well as the other defenses raised by LGC.

5. Now LGC responds to the *Motion for Clarification* to correct the numerous inaccurate, misleading, and patently false statements within the Motion.

**B. LGC Requested Internal E-mails and Other Communications of BSR Attorneys and Staff in Its October 11, 2011 Document Request.**

6. First, the BSR claims that LGC never specifically requested production of “internal” E-mail communications of BSR attorneys or staff. These claims are repeated throughout pages 1 through 4 of the BSR’s *Motion for Clarification*.

7. These claims are not factually accurate; and LGC has advised the BSR which specific document requests within LGC’s October 11, 2011 Document Requests seek these communications. In its pleading, however, BSR fails to reference all of the document requests that LGC has cited to the BSR. *See Motion for Clarification* at ¶ 8 (citing only Document Requests 1 and 2 of LGC’s October 11, 2011 Document Requests).<sup>1</sup>

8. LGC’s October 11, 2011 Document Requests, attached as Appendix A, made broad requests seeking “all” documents and communications concerning several topics, including the BSR’s various Reports relating to LGC, the allegations within Counts I to IV of the *Staff Petition for Relief*, and several issues regarding RSA 5-B.

9. Within the “Definitions” section of LGC’s October 11, 2011 Document Requests, “all” is defined to include “each” or “any” of the requested documents and communications. It should be obvious that this includes internal as well as external E-mails and other communications by BSR attorneys and staff.

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<sup>1</sup> In addition to Document Requests 1 and 2, LGC advised the BSR that it sought internal communications of BSR attorneys and staff in the following Requests: Document Request 3 (that sought all documents and communications concerning or supporting the BSR’s Report to the Legislature released on December 30, 2010); Document Request 4 (that sought all documents and communications concerning or supporting the allegations in Count I of BSR’s Staff Petition); Document Request 5 (that sought all documents and communications concerning or supporting the allegations in Count II of BSR’s Staff Petition); Document Request 6 (that sought all documents and communications concerning or supporting the allegations in Count III of BSR’s Staff Petition); Document Request 7 (that sought all documents and communications concerning or supporting the allegations in Count IV of BSR’s Staff Petition); and Document Request 8 (that sought all documents that supported the requested relief in BSR’s Staff Petition). *See* Appendix A, LGC’s October 11, 2011 Document Requests (emphasis added). LGC has referenced several other Document Requests to the BSR, including Document Requests 9; 16-18; 27-28; 31; 35-37; 40; 44-46; and 48 that reasonably could be construed to seek internal communications of BSR attorneys and staff.

10. Indeed, the BSR admits that during the November 21, 2011 hearing, LGC specifically referenced not receiving copies of communications in connection with “internal discussions with the Bureau.” *See* BSR’s Motion for Clarification at ¶ 3.

11. Knowing that LGC specifically referenced internal discussions within the Bureau during the November 21, 2011 hearing, it is difficult to comprehend how BSR can then go on to claim that LGC did not properly seek this information. This is particularly true where during the November 21, 2011 hearing, LGC—in addition to seeking copies of communications regarding internal discussions within the Bureau—specifically highlighted not having received sufficient and in many instances any E-mails from numerous BSR attorneys and staff, including Director Joseph Long, Staff Attorney Kevin Moquin, Attorney Earle Wingate, and Forensic Examiner Kevin Bannon.

**C. The BSR Has Failed to Produce or List All of Secretary Gardner’s E-mail Communications.**

12. With respect to LGC’s requests for E-mails to and from Secretary of State William Gardner that relate to LGC, the BSR first raised this issue during a Meet and Confer on November 29, 2011. At that time, the BSR sought a clarification as to whether the October 11, 2011 Requests sought Secretary Gardner’s E-mails and in response, LGC confirmed that it was seeking those documents.

13. On December 21, 2011, the BSR wrote to LGC’s counsel and stated that it would list on its Vaughn Index various E-mails received by Secretary Gardner. Thus, LGC requests a formal order in this regard requiring the BSR to list any and all E-mails received by Secretary Gardner to make certain that all E-mails are listed on its Vaughn Index. In addition, to avoid any confusion, LGC respectfully requests that the Presiding Officer issue an order requiring the BSR to obtain and produce and/or list on its Vaughn Index all E-mails to and from Secretary Gardner

to any third party that relate to LGC for the time period of July 22, 2009 through September 2, 2011.

**D. BSR's Claim That LGC's Requests for E-mails and Other Communications by BSR Attorneys and Staff, and Secretary of State Gardner is Untimely Lacks Merit.**

14. In addition to BSR's claim that LGC never sought internal communications or Secretary of State Gardner's E-mails, BSR's fallback position is that if LGC had requested these documents, any such request is untimely and, thus, BSR does not need to produce the documents or list them on its Vaughn Index.

15. This claim similarly fails as discovery in this matter does not close until March 27, 2012. The BSR has certainly received the requests prior to the close of discovery and, therefore, any attempt by the BSR to prevent the Respondents from obtaining the referenced communications under a claim that the requests are "untimely" is without merit.

**E. LGC's November 18, 2011 Motion to Compel Sought an Order Compelling BSR to Either Produce Documents or List All Communications on BSR's Vaughn Index.**

16. Contrary to BSR's allegations at ¶ 16 of its Motion, LGC stated within its November 18, 2011 *Motion to Compel Document Production* that "LGC believes that BSR is withholding documents improperly." See LGC's Motion to Compel at p. 12.

17. LGC went on to request that the BSR be ordered to "describe the documents withheld in their Vaughn Index so as to provide LGC with the necessary information to challenge the withholding." *Id.* at p. 13.

18. LGC also requested the Presiding Officer to "compel BSR to fully comply with LGC's [October 11, 2011] request for production." See LGC's *Motion to Compel* at p. 13. Thereafter, during the November 21, 2011 hearing, LGC raised the issue that it had not received sufficient and in many instances any documents from several BSR attorneys and staff.

Accordingly, BSR's claim that these issues were not requested in LGC's *Motion to Compel* is contrary to the record and not factually accurate.

**F. During the Informal Conference on December 6, 2011, LGC Provided the BSR with a List of the Documents at Issue.**

19. At ¶ 5, the BSR asserts that during the informal conference on December 6, 2011, LGC did not list the internal E-mail communications on the list provided to the Presiding Officer. A review of the document provided to the Presiding Officer (attached as Appendix B), however, addressed documents that were listed on BSR's Vaughn Index, and that were being withheld. The documents raised by the BSR's instant Motion, however, have not been produced or listed on BSR's Vaughn Index and, thus, would not have been set forth on the document/list provided to the Presiding Officer on December 6, 2011.

20. Amazingly, the BSR omits the fact that LGC produced a separate document/list to BSR on December 6, 2011 that set forth documents requested by LGC that neither have been produced by the BSR nor listed on the BSR's Vaughn Index, and that LGC had requested. *See* Appendix C. It is troubling that the BSR failed to reference this document in its *Motion for Clarification* as the document clearly lists (1) E-mail communications from BSR attorneys and staff and (2) E-mails to or from Secretary of State William Gardner that relate to LGC.<sup>2</sup> *See* Appendix C, provided to the BSR on December 6, 2011.

21. Indeed, the document lists E-mail communications from Director Joseph Long, Deputy Director Jeffrey Spill, Staff Attorney Kevin Moquin, Forensic Financial Examiner Kevin Bannon, and E-mails to and from Secretary of State William Gardner. *Id.*

**G. The BSR Has Made Inconsistent Claims Regarding the Reason It Refuses to Produce or List the Requested Documents on Its Vaughn Index.**

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<sup>2</sup> LGC had sought the assent of the BSR to provide this document to the Presiding Officer but the BSR refused to provide its assent.

22. The BSR has asserted that even if LGC had requested internal communications and Secretary Gardner's E-mails and other communications, it does not have to produce them or list them on its Vaughn Index because the documents comprise attorney work product. *See* BSR's *Motion for Clarification* at ¶¶ 17; 22-24; and 30-31. In taking this position, the BSR believes that the Presiding Officer and all Respondents should not question the BSR's claim of privilege and the BSR should be able to unilaterally conclude that it does not have to list the documents on its Vaughn Index.

23. The BSR's position is contrary to the Presiding Officer's Order dated November 14, 2011,<sup>4</sup> inconsistent with its own practice of providing documents for an *in camera* review where it has asserted attorney work product protection, and is an attempt to preclude LGC from challenging the assertion of privilege. Indeed, where parties in this case have asserted attorney work product, Parties have listed the documents on their respective Vaughn Indexes and submitted the documents to the Presiding Officer for an *in camera* review.

24. In this instance, the BSR has unilaterally decided that it is not required to follow this practice regarding internal communications of BSR attorneys and staff that are responsive to LGC's Document Requests.

25. In an attempt to shield the BSR from having to reference these communications on its Vaughn Index and/or produce them to the Presiding Officer, the BSR threatens that if the Presiding Officer were to review the communications at issue, it would "irreparably taint these proceedings." *See* BSR's *Motion for Clarification* at ¶ 31. The BSR also claims that if the Presiding Officer reviewed its internal communications, the mere review of the documents would somehow prevent the BSR from obtaining a fair hearing. *Id.* at ¶ 32.

26. The BSR then goes on to incorrectly state that if the Presiding Officer were to order an *in camera* review of the communications at issue, the Presiding Officer would be “gaining a prejudicial perspective on the thoughts and impressions of BSR counsel” ... “the very thing the work-product doctrine was intended to prevent.” *See id.* The BSR confuses the purpose underlying the attorney work product protection. The attorney work product protection is designed to protect litigants from its adversary’s thoughts and impressions concerning trial strategy, not to protect judges or hearing officers from this material as the BSR asserts. *See Riddle Spring Realty Co. v. State*, 107 N.H. 271, 275 (1966).

27. Further, simply because communications are sent by attorneys and may reflect legal thinking, the communications do not necessarily fall within attorney work product protection. *See* Appendix D, *United States of America v. Textron, Inc. and Subsidiaries*, 577 F.3d 21, 29-30 (1st Cir. 2009) (“It is only work done in anticipation of or for trial that is protected. Even if prepared by lawyers and reflect legal thinking, ‘[m]aterials assembled in the ordinary course of business, *or pursuant to public requirements unrelated to litigation*, or for other non-litigation purposes are not under the qualified immunity provided by this subdivision [attorney work product].’”) (emphasis added). Here, LGC has requested E-mails and other communications of the BSR attorneys and staff that were sent or received during the course of BSR’s regulatory oversight and/or investigation of LGC. Thus, the BSR, as a public regulator, is required to release such communications unless the documents fall within the strict confines of attorney work product. *Id.*

28. Later in the same Motion, the BSR completely changes the basis for withholding the documents from attorney work product to a claim that the communications are “entirely irrelevant to the proceedings.” *See Motion for Clarification* at ¶ 32.

29. The fact that BSR has made inconsistent claims for withholding the requested documents supports LGC's request that the Presiding Officer order BSR to produce the requested documents or, at a minimum, list the documents on BSR's Vaughn Index and produce the documents for an *in camera* review by the Presiding Officer to determine whether the basis for withholding these communications is, in fact, valid.

30. It is difficult to imagine how "entirely irrelevant communications" would somehow taint the proceedings and prejudice the Presiding Officer. Nevertheless, judges and hearings officers throughout the country routinely review inadmissible evidence in making rulings on such matters as *motions in limine*, motions to suppress, and, of course, in instances such as the instant one; whether documents are being properly withheld. Here, there is even less of a concern as the Rules of Evidence do not apply to these proceedings. *See* RSA 421-B:26-a, XX.

31. There is no question that this Presiding Officer could review documents *in camera*, make rulings as to whether the documents are discoverable, and thereafter conduct an impartial hearing. Indeed, the Parties have agreed that he could do just that and previously have submitted documents and communications *in camera* for review by this Presiding Officer.

**H. The BSR's Claim that RSA 91-A Prevents Disclosure of Relevant, Responsive Documents to Parties in this Pending Matter Is Not Germane.**

32. In addition to asserting that the BSR does not have to produce the documents in this proceeding, BSR goes on at length arguing that it does not have to produce its "private files" to anyone, even under a Right-to-Know request. *See* RSA 91-A.<sup>3</sup> The BSR's arguments fail to

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<sup>3</sup> In doing so, BSR asserts that it is a law enforcement agency for purposes of the Right-to-Know law without citing any applicable law. The Secretary of State is charged with enforcing the securities laws within the State of New Hampshire pursuant to RSA 421-B:21. He may, as he has done in this case, appoint designees to administer the provisions of RSA 421-B. To assert that the New Hampshire Secretary of State is a law enforcement agency has no

appreciate that Respondents are entitled to the requested documents pursuant to its state and federal due process rights triggered by the administrative hearing process.

33. In any event, the BSR's position that it has "private files" is contrary to the obvious fact that it is a governmental entity and, subject to the public's review of its documents. *See* RSA 421-B, generally (no exclusions provided).<sup>4</sup>

34. Regardless of the claims that BSR does not have to produce these documents subject to RSA 91-A—a claim that if litigated would fail—the BSR should be required to either produce or list the documents on its Vaughn Index in this case. LGC, as well as the other Respondents, are entitled to documents that are relevant or that would lead to the discovery of admissible evidence. *See Desclos v. Southern New Hampshire Medical Center*, 153 N.H. 607, 611 (2006). This is particularly true where requested documents and communications of BSR attorneys and staff may contain exculpatory evidence.

**I. Even If RSA 91-A was Applicable, the Supreme Court in *Lodge v. Knowlton* Held That Withheld Documents Should Be Submitted for an *In Camera* Review.**

35. The BSR cites *Lodge v. Knowlton*, 118 N.H. 574, 576-77 (1978) in discussing why it does not need to produce these documents under the Right-to-Know law. BSR, however, fails to mention that the Supreme Court in *Lodge*, in discussing "police investigatory files" (something the BSR attempts to compare its files to), held that the trial court should "require *in camera* review" of the documents to determine whether the documents should be disclosed.<sup>5</sup>

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support in the statutes or case law. Accordingly, BSR's attempt to shield itself from disclosure under a claim that it is a law enforcement body is unpersuasive.

<sup>4</sup> The BSR also incorrectly concludes that the documents would not be subject to disclosure under the Right-to-Know law due to a claim that there is not a dispute as to the factual nature of the documents. Here, there is a dispute and thus the documents would be subject to disclosure. *See* BSR's Motion for Clarification at 23, citing *Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973).

<sup>5</sup> In *Lodge v. Knowlton*, the New Hampshire Supreme Court reiterated that the purpose of our Right-to-Know law, RSA 91-A, "is to ensure ... the greatest possible public access to the actions ... and records of *all* public bodies ..." (citing RSA 91-A:1) (emphasis is original). This law is codified within the New Hampshire Bill of Rights under

See Appendix E, *Lodge v. Knowlton*, 118 N.H. at 577 (“court should also in this case, and in future cases, require *in camera* review”). This is precisely what LGC has repeatedly requested and expected BSR to do with documents that are responsive to LGC’s Document Requests. Accordingly, if BSR insists on relying upon the *Lodge* decision, it should be comfortable with the process set forth by the New Hampshire Supreme Court in that decision; that is, that the documents be submitted to this Presiding Officer for an *in camera* review.

WHEREFORE, LGC respectfully requests that the Presiding Officer:

- A. Order that the BSR produce documents in response to the October 11, 2011 Document Request or list the documents on BSR’s Vaughn Index;
- B. Specifically order that the BSR produce and/or list all internal communications of BSR attorneys and staff from July 22, 2009 through September 2, 2011;
- C. Specifically order that the BSR produce and/or list all E-mails to or from Secretary of State Gardner’s from July 22, 2009 through September 2, 2011; and
- D. Grant such other and further relief as may be deemed just and proper.

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Part 1, Article 8, and provides that “the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.” Here, BSR seeks to do just that: prevent access of records of the entity charged with regulating risk pools.

Respectfully submitted,

LOCAL GOVERNMENT CENTER, INC.;  
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REAL ESTATE, INC.;  
LOCAL GOVERNMENT CENTER  
HEALTHTRUST, LLC;  
LOCAL GOVERNMENT  
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NEW HAMPSHIRE MUNICIPAL  
ASSOCIATION PROPERTY-  
LIABILITY TRUST, INC.;  
LGC-HT, LLC;  
LOCAL GOVERNMENT CENTER  
WORKERS' COMPENSATION  
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MAURA CARROLL,

By Their Attorneys:  
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Dated: January 9, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this 9<sup>th</sup> day of January 2012, forwarded copies of the within Response to New Hampshire Bureau of Securities Regulation's Motion for Clarification *via* E-mail to counsel of record.

/s/ Brian M. Quirk