

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

**IN THE MATTER OF:**

Local Government Center, Inc.; Local  
Government Center Real Estate, Inc.;  
Local Government Center HealthTrust;  
LLC; Local Government Center  
Property-Liability Trust, LLC;  
HealthTrust, 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, Stephen A. Moltenbrey,  
Paul G. Beecher, Robert A. Berry,  
Roderick MacDonald, Peter J. Curro,  
April D. Whittaker, Timothy J. Ruehr,  
Julia N. Griffin, Paula Adriance, John  
P. Bohenko, and John Andrews

Case No.: C-2011000036

**LOCAL GOVERNMENT CENTER'S MOTION TO COMPEL DOCUMENT  
PRODUCTION BY THE BUREAU OF SECURITIES REGULATION**

Respondents Local Government Center, Inc. and affiliated entities, and Maura Carroll (hereafter, "LGC"), move to compel the New Hampshire Bureau of Securities Regulation (hereafter, "BSR") to provide responsive documents to LGC's document requests. At present, BSR has refused to produce responsive documents in its possession and has made objections to LGC's document requests that are not recognized under New Hampshire law.

BSR investigated LGC for more than two years, named 21 corporate and individual respondents, and filed a Staff Petition for Relief seeking in excess of \$100 million dollars. Accordingly, the extent of BSR's document production thus far, or lack thereof, is troubling. LGC asks that the Hearing Officer compel BSR to produce all documents that are responsive to LGC's requests.

## **I. BACKGROUND**

LGC and BSR agreed to provide responsive documents to one another in accord with an Order from the Hearing Officer dated October 6, 2011. LGC issued its First Set of Requests for Production of Documents (“LGC’s Requests”) on October 11, 2011. See Exhibit A, First Set of Requests for Production of Documents, October 11, 2011. Since then, BSR has made several objections to LGC’s requests which have no basis in law, and has refused to comply with several of LGC’s document requests. LGC has made numerous conciliatory efforts and reached out to Bureau many times in order to ensure a smooth, fair, and efficient document production process; efforts which, unfortunately, have not been entirely successful.

### **A. LGC’s Conciliatory Efforts.**

LGC and BSR discussed BSR’s document production at a November 8, 2011 meeting where LGC asked BSR to reconsider its objections to LGC’s Requests. BSR refused. LGC then sent a letter to BSR on November 9, 2011 discussing BSR’s document production and asking BSR to reconsider its objections. See Exhibit B, LGC Letter, November 9, 2011. BSR refused. LGC then met with BSR at an informal conference, attended by the Hearing Officer, on November 10, 2011. BSR refused to change its position. Finally, on November 16, 2011, LGC held a meet-and-confer with BSR in an attempt to resolve BSR’s objections to LGC’s Requests. Following the November 16 meeting, on November 18, 2011, BSR issued a letter in response to LGC’s November 9<sup>th</sup> letter representing that “after a diligent search, the Bureau has concluded that it has produced or withheld (with explanation) all documents responsive to the document requests the Bureau has received.” See Exhibit C, BSR Letter to Brian Quirk, Esq., November 18, 2011.

This motion, seeking to compel BSR to produce the documents withheld, now follows.

**B. LGC's Production.**

On November 4, 2011, LGC produced more than 11,000 pages of documents and a 66-page Index describing the documents and redactions to certain documents.

**C. BSR's Production.**

In comparison with LGC's production, on November 4, 2011 BSR produced 770 pages of documents in response to LGC's requests, the vast majority of which are documents previously provided by LGC to BSR. Thus, the bulk of the documents are not responsive to LGC's Requests.<sup>1</sup> On November 14, BSR produced an "Index of Documents Produced by BSR in the Matter of LGC, Inc. et al" (the "BSR's Vaughn Index," Exhibit D) and an additional 46 pages of documents.

Of the 48 requests in LGC's Requests, BSR produced documents in response to only six (6).

BSR's responses to document requests 1-2 comprise 688 of the overall 721 pages that were produced. A major portion of these documents was produced by LGC to BSR. In response to the remaining 46 document requests, BSR initially only provided 33 pages of documents.

**1. BSR produced no original documents supporting their October 28, 2010 Report.**

Document request 1 asked for "Copies of all documents and communications, excluding those produced by LGC, that concern or support the allegations in BSR's report dated October 28, 2010." See Exhibit A.

In response to document request 1, BSR produced 184 pages, most of which consists of The Lewin Group Report, a 125-page document that was included within the documents

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<sup>1</sup> LGC requested documents held by BSR that had not been previously produced by LGC.

produced by LGC to BSR. A transcript of a House Finance Committee comprises the remaining 58 pages.

BSR's extremely limited document production means, in essence, that there are no additional documents in BSR's possession in response to a request for "all documents" that "concern or support" BSR's October 28, 2010 report. BSR's November 18 letter represented that BSR has produced or withheld, and consequently indexed, all documents responsive to LGC's requests. See Exhibit C.

**2. BSR only produced 114 pages that concern or support their 2-year investigation and resulting \$100+ million petition.**

Document request 2 asked for "Copies of all documents and communications, excluding those produced by LGC, that concern or support the allegations in BSR report dated August 2, 2011." See Exhibit A.

In response to this broad request, BSR produced 504 pages, approximately 390 pages of which had been produced by LGC. Thus, in response to a request for all documents which support the August 2, 2011 report—a 30 page report that was issued after a two-year investigation and which seeks more than \$100 million dollars—BSR initially produced only approximately 114 pages. Subsequent to our meetings, BSR produced 17 additional pages, thus bringing their total independent production to 131 pages.

**3. BSR produced zero documents in response to Requests 3 through 16.**

In response to Requests 3-16, no additional documents were produced.

**a) BSR asserted work-product protection for documents not produced in anticipation of litigation.**

In response to document request 3, BSR refused to produce communications between BSR and The Segal Company, arguing that they relate to BSR's report to the General Court

released on December 30, 2010. The sole basis for refusing to produce these documents is a claim that the communications are protected by the attorney work-product doctrine. See Exhibit E, Bureau's Response to LGC's Requests, November 4, 2011. BSR issued its report to the General Court pursuant to Chapter 149:6, Laws of 2010, however, not in connection with this litigation. Thus, on its face, the foundation for the claim of protection under the attorney work-product doctrine is invalid.

**b) BSR refused to provide documents concerning the Professional Firefighters of New Hampshire.**

Document requests 10-14 ask for documents concerning the Professional Fire Fighters of New Hampshire and its agents. BSR refused to provide any documents in response to these four Requests, stating generally "all communications between BSR and the Professional Fire Fighters of New Hampshire are irrelevant as they are not a party to the above-mentioned action." See Exhibit E, Requests #10, 12-14, BSR 00000699, 701-03. BSR went on to claim that, "[F]urther, all communications between BSR and the Professional Fire Fighters of New Hampshire are not substantive and thus are irrelevant to the above-mentioned action." See Exhibit E, Requests #10, 12-14, BSR 00000699, 701-03. It is unclear whether these documents not produced have been listed in BSR's Vaughn Index.

**4. In response to the requests for documents concerning the Segal Company and their report, BSR only produced BSR's contract with the Segal Company.**

In document requests 18-20, LGC requested documents concerning The Segal Company and its report. Although BSR provided the contracts with The Segal Company in response to document request 18, LGC requested *all* related correspondence and other communications. BSR has refused to produce any remaining responsive documents, arguing that they are protected by the attorney work-product doctrine. See Exhibit E, Requests #18, 20, BSR 00000724, 733.

**5. In response to document requests 19-31, 33-35, and 37-48, BSR produced zero documents.**

BSR has not produced any additional documents in response to document requests 19-31; 33-35; and 37-48.

In particular, with respect to document request 23, BSR has admitted that it contacted and had communications with PricewaterhouseCooper, LLP. As the basis for refusal, BSR states that “there were no substantive communications” and thus claims that the documents are “irrelevant.” See Exhibit E, Response #23, BSR 00000736. It is unclear whether these documents not produced have been listed in BSR’s Vaughn Index.

BSR also refused to provide any documents in BSR’s possession concerning PRIMEX and SchoolCare, which are responsive under requests 24-31. In doing so, BSR stated that the information was “irrelevant as it pertains to an entity that it is not a party to the above-mentioned action.” See Exhibit E, Requests # 24-31, BSR 00000737-44. It is unclear whether these documents not produced have been listed in BSR’s Vaughn Index.

**II. BSR MUST COMPLETE ITS DOCUMENT PRODUCTION**

**A. BSR’s Claims of Work-Product Protection are Invalid.**

BSR’s claims of work-product protection, as grounds for its objections to LGC’s Requests, are invalid. Work-product protection only applies to documents which are prepared in anticipation of litigation by an attorney or at his direction. The documents which BSR seeks to withhold do not meet the necessary requirements of the doctrine, as they were not prepared in anticipation of litigation, and many were not prepared by an attorney or at her direction.

**1. BSR's Communications with the Segal Company were not Prepared in Anticipation of Litigation and are not Protected by the Work-Product Doctrine.**

In response to document request 3, BSR refused to produce communications between BSR and The Segal Company. BSR argued that these documents are protected by the attorney work-product doctrine. These withheld documents are listed on BSR's Vaughn Index on pages 16 – 22.

BSR issued its Report to the General Court pursuant to Chapter 149:6, Laws of 2010, however, not in connection with this litigation. The attorney work-product doctrine only protects documents which are prepared in anticipation of litigation. *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 275 (1966). Thus, these documents were not prepared in anticipation of litigation and are not protected by the doctrine. LGC requests that the Hearing Officer compel BSR to produce these documents.

Furthermore, even if BSR persists in asserting that the communications between BSR and the Segal Company are protected by work-product doctrine, it cannot assert that the communications *from* the Segal Company to BSR are protected. There are multiple entries in BSR's Vaughn index, generally covering pages 16 – 22 and document numbers BSR 00001724 – 1857, which include communications *from* non-lawyer employees at The Segal Company to BSR. See Exhibit D. In addition to not being prepared in anticipation of litigation, the documents and communications *from* The Segal Company do not consist of the mental impressions, conclusions, opinions, or legal theories of a lawyer. Therefore, they are not subject to the protections of the work-product doctrine and must be produced.

**2. BSR's Communications with the Professional Fire Fighters of New Hampshire were not Prepared in Anticipation of Litigation and are not Protected by the Work-Product Doctrine.**

BSR has withheld documents concerning communications between BSR and the Professional Fire Fighters of New Hampshire. These documents are detailed at pages 14 -16 of BSR's Vaughn Index, and generally cover documents BSR 00001626 – 1643. See Exhibit D These documents include communications between BSR and Glenn Milner, attorney for the Professional Fire Fighters of New Hampshire, as well as communications between BSR and David Lang, President of the Professional Fire Fighters of New Hampshire. These documents are not subject to the protections of the work-product doctrine.

First, there is no indication that these documents were prepared in anticipation of litigation, *see Riddle Spring Realty Co. v. State*, 107 N.H. at 275. Thus, these documents are not protected by the doctrine.

Second, David Lang is not an attorney, and therefore the communications *from* David Lang to BSR cannot be the thoughts, mental impressions, conclusions, opinions, or legal theories of a lawyer. Therefore, they are not subject to the protections of the work-product doctrine and must be produced.

Third, regardless of whether the communications from Glenn Milner, Esq. were prepared in anticipation of litigation and contain his work-product, BSR cannot assert the protections of the work-product doctrine on his behalf. The protections of the doctrine rest with the attorney, and cannot be asserted by a third-party. *See Frankford Trust Co. v. Advest, Inc.*, No. CIV.A.93-329, 1996 WL 571793, at \*2 n.3 (E.D. Pa. Oct. 1, 1996). Therefore, at a minimum, the communications from Glenn Milner to BSR are not subject to the protections of the doctrine and must be produced.

**B. BSR's Claims that Certain Documents are "not substantive" and therefore "irrelevant" is not the Correct Standard for Discovery.**

With regard to LGC Requests #10-15, 21, 23-31, and 41-43 and documents concerning the Professional Fire Fighters of New Hampshire, PricewaterhouseCooper, LLP, the New Hampshire General Court, PRIMEX, and SchoolCare, BSR has stated that the requested documents are "not substantive" and "irrelevant."<sup>2</sup> See e.g. Exhibit E, Request #10, BSR 00000699. BSR thus argues that such documents need not be produced. That is not the appropriate standard for discovery.

Relevancy for purposes of discovery is not based upon whether or not a person or entity is a party or whether BSR believes that the documents contain "substantive" communications. For purposes of discovery, documents must be produced if they are either relevant or if they would be reasonably calculated to lead to the discovery of admissible evidence.

The rule for when discovery is appropriate in administrative proceeding is a "liberal one." *Verizon New England, Inc., et al*, New Hampshire Public Utilities Commission (Order No. DT07-011; Order No. 24, 789 (September 21, 2007)). In *Verizon New England, Inc., et al*, the PUC held that "discovery should be relevant to the Presiding or reasonably calculated to lead to the discovery of admissible evidence." *Id.* at 789. "Evidence is relevant if it tends in any way to establish a proposition which is of consequence in an action." *State v. Dustin*, 122 N.H. 544, 546 (1982). Here, as the requests are made in the context of discovery, rather than for admissibility purposes at the hearing, the threshold for production is even lower. The documents must be

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<sup>2</sup> It is unclear whether the documents which BSR is not producing under their theory of irrelevancy are listed on their Vaughn index. BSR's November 18, 2011 letter represents that BSR has either produced all documents responsive to LGC's Requests or withheld documents and listed them on BSR's Vaughn Index. See Exhibit C. However, the wording of BSR's responses to LGC Requests # 10-15, 21, 23-31, and 41-43 permits the interpretation that BSR believes the requested documents are "irrelevant" and thus unresponsive to any request. The Hearing Officer should compel BSR to clarify whether the communications and documents responsive to LGC Requests # 10-15, 21, 23-31, and 41-43 have been listed in BSR's Vaughn Index.

provided where the evidence is relevant or “may lead to the discovery of admissible evidence.” *Desclos v. Southern New Hampshire Medical Center*, 153 N.H. 607, 611 (2006).

That the Professional Fire Fighters of New Hampshire, PricewaterhouseCooper, LLP, PRIMEX, and SchoolCare are not parties to this action is not a valid basis to object, nor does it make the requested documents irrelevant to the issues in dispute. Additionally, that the BSR believes that the requested information “does not pertain to any claim made by the Bureau,” is not a valid basis to object, nor does it make the requested documents irrelevant to the issues in dispute. The discovery standard, as set forth above, does not recognize the requirements that BSR has propounded. BSR should be compelled to produce documents and communications responsive to requests #10-15, 23-31, and 41-43.

**1. BSR must product any documents or communications with PricewaterhouseCopper, LLP, regardless of whether BSR considers the documents or communications “substantive” or “irrelevant.”**

With respect to document request 23, BSR has admitted that it contacted and had communications with PricewaterhouseCooper, LLP. BSR has refused to provide such communications, however, claiming they were not “substantive,” and thus, BSR argues, the communications are “irrelevant.” Regardless of the substantive nature of the communications, LGC is entitled to documents that relate to the allegations made and issues raised in BSR’s Staff Petition for Relief or related to LGC’s defenses thereto. It is hard to imagine that communications between BSR and potential experts concerning the subject matter of the instant dispute are not relevant or, at a minimum, reasonably calculated to lead to the discovery of admissible evidence. *See Verizon New England, Inc., et al*, New Hampshire Public Utilities Commission (Order No. DT07-011; Order No. 24, 789 (September 21, 2007)); *Desclos v. Southern New Hampshire Medical Center*, 153 N.H. at 611.

**2. BSR must produce documents or communications with the New Hampshire General Court, regardless of whether BSR considers the documents or communications “irrelevant.”**

LGC Requests 41 and 42 ask for documents and communications between BSR and the New Hampshire General Court concerning proposed or adopted legislation in connection with the calculation of surplus levels, and as to RSA 5-B, generally. BSR states that the requests are “irrelevant as it does not pertain to any claim made by BSR in the above-mentioned matter.” See Exhibit E, Requests #41-42, BSR 00000763-64.

BSR’s claims of irrelevancy ignore the fact, however, that the documents are highly relevant to LGC’s case and its defenses. Indeed, among the defenses concerning the allegation that LGC maintained an excessive surplus, are the vagueness of the relevant statutory provisions, their failure to specifically address the proper level of surplus, and the BSR’s failure to enact any rules addressing these issues. Correspondence to the General Court concerning proposed legislation on these topics is highly relevant to LGC’s defenses. Thus, LGC requests that the Hearing Officer compel BSR to produce all documents in its possession or control which are responsive to LGC’s Requests.

**3. BSR must produce documents concerning PRIMEX and SchoolCare, regardless of whether BSR believes the documents or communications are “irrelevant.”**

BSR has also refused to provide any documents in BSR’s possession concerning PRIMEX and SchoolCare, arguing that the documents are “irrelevant as it pertains to an entity that it is not a party to the above-mentioned action.” See Exhibit E, Requests #24-31, BSR 00000737-44. Again, relevance and whether an entity is a party to an action is not the standard for discovery. Rather, the question is whether the discovery request may lead to the discovery of

admissible evidence. *Desclos v. Southern New Hampshire Medical Center*, 153 N.H. 607, 611 (2006).

Documents concerning PRIMEX and SchoolCare are relevant (or, at a minimum, would lead to the discovery of admissible evidence) to rebut BSR's allegations in Counts Two and Three of the Staff Petition for Relief. Specifically, the documents could counter claims that LGC held unreasonable levels of surplus, had excessive and unreasonable expenses in the operation of its business, engaged in improper spending, and made improper investments. Indeed, evidence that the other two RSA 5-B entities held similar or greater surpluses, had similar or greater expenditures, engaged in similar spending, and made similar investments, would support LGC's position that its conduct was not unreasonable and, in fact, consistent within the relevant industry. Moreover, it would address the industry's interpretation of the relevant statutory requirements. As there is no guidance in the statutes or rules regarding any of these topics, documents and communications relating to these issues are discoverable as they may lead to the discovery of admissible materials.

Further, the documents, or the lack thereof, would also support LGC's defense that BSR as the regulator failed to provide notice to PRIMEX, SchoolCare, or any other entity of the alleged proper methodology to determine surplus, expenses, or investments. Therefore, LGC requests that the Hearing Officer compel BSR to produce all documents in its possession or control which are responsive to LGC's Requests.

### **III. CONCLUSION**

Based upon the responses to LGC's Requests, LGC believes that BSR is withholding documents improperly, based upon an incorrect application of the protections of the work-product doctrine. For these reasons and others, these documents are discoverable and should be

produced immediately. Failing to do so would be a violation of LGC's due process rights under the state and federal constitutions. *See Appeal of Concord Steam Corp.*, 130 N.H. 422, 428 (1988) (holding that due process protections apply to administrative proceedings). Accordingly, LGC asks that, in fairness, the Hearing Officer compel BSR to reconsider its objections, produce the documents that have been requested, and—where BSR continues to withhold documents—properly describe the documents withheld in their Vaughn Index so as to provide LGC with the necessary information to challenge the withholding.

WHEREFORE, Respondents respectfully request that:

- A. The Hearing Officer compel BSR to fully comply with LGC's requests for production.
- B. The Hearing Officer compel BSR to produce documents previously withheld under a claim of work-product protection.
- C. The Hearing Officer should compel BSR to produce documents and communications responsive to requests #10-15, 23-31, and 41-43; or clarify under what theory those documents are being withheld and whether they are properly listed on the BSR's Vaughn Index.

Respectfully submitted,

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

By Their Attorneys:  
PRETI FLAHERTY BELIVEAU &  
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Dated: November 18, 2011

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this 18<sup>th</sup> day of November 2011, forwarded copies of the within Local Government Center's Motion to Compel Document Production by the Bureau of Securities Regulation *via* E-mail to counsel of record.

/s/ Brian M. Quirk