STATE OF NEW HAMPSHIRE

DEPARTMENT OF STATE

IN THE MATTER OF:	)	
Local Government Center, Inc., *et al.*	)	Case No.: C-2011000036
RESPONDENTS	)	

ORDER FINDING LIMITED WAIVER OF ATTORNEY CLIENT PRIVILEGE AND COMPELLING PRODUCTION OF CERTAIN LEGAL DOCUMENTS

BACKGROUND

On January 24, 2012 the Bureau of Securities Regulation ("BSR") filed a motion requesting the presiding officer to find that all respondents who have filed answers in this matter have waived their attorney client privilege to the extent that they assert, in whole or in part, that the actions they are alleged to have taken in violation of the law, were taken as a consequence of relying on the advice of legal counsel. The BSR also states that because the respondents have asserted an "advice of counsel" defense in their answers, a resulting waiver of the attorney client privilege allows it to obtain otherwise protected communications with their lawyers. The BSR requests production of certain legal file contents and requests that appropriate orders issue with respect "to discovery and trial testimony."

On February 3, 2012 the LGC filed its objection asserting that the BSR's request is premature and that the LGC has not undertaken any action, including the assertions and defenses stated within its answer that constitutes a waiver of the attorney client privilege. On February 3, 2012 respondent Andrews filed his response to the BSR motion asserting, among other positions, that the motion was premature and that the information sought by the BSR was not in his control, or if in his control was subject to an attorney client privilege that could only be waived by the LGC, his former employer.

Also on January 24, 2012 the Bureau of Securities Regulation ("BSR") filed a motion, dated January 20, 2012, requesting the presiding officer to reconsider a previous production order issued January 19, 2012 for reasons described in more detail in its above motion related to LGC's alleged waiver of the attorney client privilege. On February 3, 2012 the LGC filed its objection to this motion to reconsider as well.

As both "advice of counsel" motions raise related issues, the presiding officer, consolidated them for argument at a hearing conducted on February 6, 2012 at which counsel for all parties were present and had the opportunity to be heard. Notwithstanding the earlier objections to the BSR motions filed on her behalf by LGC counsel, at this hearing Attorneys Gordon and Hillman appeared and assumed independent representation of respondent Maura Carroll. Attorney Hillman verbally reiterated that respondent Carroll objects to the BSR position that waiver of the attorney client privilege should be found. At hearing counsel for the remaining individuals named as respondents joined in respondent Andrews' response to the BSR motion.

Following a review of all relevant filings regarding the issues presented and the content of offers and oral arguments made, and reference, as appropriate, to all facts found in earlier hearings in this matter which are incorporated hereto and made a part hereof, the undersigned presiding officer determines as follows as to the remaining respondents[1]:

FINDINGS OF FACT

1. On January 19, 2012 a production order was issued that contained a prophylactic statement. Said order provided that if factual circumstances changed after the order issued because of [parties' subsequent filings], "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." (January 19,2012 Order, p.22 ¶ D).
2. On January 6, 2012 each of the respondents filed an "Answer" to the BSR staff petition in which the respondents made reference to reliance on the advice of legal counsel preceding certain actions undertaken by the respondents.
3. In their answer, the respondents LGC, Andrews and Carroll specifically assert defenses based, wholly or in part, upon a reliance on the advice of legal counsel.

[1] Following the filings that gave rise to this hearing and following its conduct, but preceding the issuance of this order, the charges of violations against several individual respondents were dismissed upon the request of the BSR and in granting its Motion for Non-Suit. As this administrative proceeding has ceased with respect to each of the dismissed respondents, any actions required of respondents as a result of this order do not apply to those who have been dismissed. They are: Beecher, Burke, Griffin, Ruehr, and Whittaker.

4. In their answer, the other individuals named as respondents also refer to their reliance on outside experts and consultants that include legal counsel and specifically assert a defense based, wholly or in part, upon a reliance on the advice of legal counsel.
5. At the time of the hearing, the BSR had not filed its anticipated amended staff petition due no later than February 17, 2012.
6. By previous order, after February 17, 2012 the BSR is not allowed to further amend its petition unless stringent criteria are met. (Revised Scheduling Order, dated December 30, 2012).
7. Respondent Andrews asserts that a ruling on the BSR motion is premature as the deadline for its submission of an amended petition has not past or because its dispositive motions have not been heard.
8. As of the date of this order, the respondents have not filed any supplemental answers to the BSR' amended petition.
9. Respondent Andrews is the former executive director of the LGC, Inc. and respondent Carroll is the present executive director of that same entity.
10. Respondent Curro is a member of the Board of Directors of the LGC, Inc.
11. At hearing, the LGC requested a period of ten days after the submission of the BSR amended petition within which to "select its defenses."
12. At hearing the respondent Andrews requested that any order on this issue be held in abeyance until February 24, 2012 or such time as an order on his motions to dismiss issues, whichever occurs later.

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).

SUMMARY

This is a decision regarding an issue related to pre-hearing discovery and not admissibility of information into evidence. The LGC has referred in its filings and answer to date that it relied on the advice of its previous legal counsel when undertaking actions that have been alleged by the BSR to be violations of law. Each of the individuals named as respondents has also done so. Each has directly asserted or implied through filings or as a specific defense that each relied on the advice of counsel before undertaking certain actions. By doing so, each has put the advice of counsel "at issue" in these proceedings. When a party expresses its intention to introduce that it undertook an action in whole or in part because it relied on the advise of its lawyer, the communications between that party and their attorneys, normally protected from disclosure by the attorney-client privilege, is deemed waived. The waiver does not, however, require the production to other parties of the contents of its own entire "legal file" nor the entire file contents of its prior

attorneys. The requirement for production is limited in light of the careful consideration that must be given to the fundamental principle that attaches to the attorney client privilege in our jurisprudence and to the fundamental protection attorneys must be granted over the separate protection provided for their work product in order to perform the difficult and demanding tasks of their profession.

The waiver also requires that the LGC redactions applied to certain documents permitted in a previously issued production order now be lifted and the appropriate documents, without redaction, be produced to the other parties.

Issuance of this order follows at least two years of investigation, six months of administrative proceedings and the filing of a petition and other pleadings that reasonably inform each of the respondents of the civil violations alleged to have been committed by them and to which they are to defend. The respondents' filings, answers and arguments offered, the final submission of the BSR amended petition having passed by the date required, and the practical necessity of continued discovery in these proceedings combine to defeat the respondents' assertion that consideration of the BSR request for discovery purposes in these proceedings at this time is premature.

DECISION AND ORDER

These parties have been in the discovery phase of this administrative proceeding for over six months. Notwithstanding the efforts of all parties, the production of documents by one party to

other parties has been marked by conflict that has arisen due to the assertion of one party or the other involving certain protections or privileges that can attach to documents generated by or for one party to the exclusion of others. The issue here is whether the BSR is entitled to discovery of information, records and communications that are generally subject to the attorney-client privilege or the protection accorded attorney work product.

Crucial to an understanding of this decision is the fact that there has been no bifurcation, or separation of any aspect or matter at issue in these proceedings. As scheduled, a single and final comprehensive evidentiary hearing will be conducted to resolve all contested matters. Admissibility into evidence of any testimony or exhibit at that hearing is a distinct determination to be made by the presiding officer at that later time when the parties present their respective cases. Many contingent and tactical twists can and may occur before the start of that final hearing. Throughout these proceedings the fairness required by application of due process to each party at each stage of the proceedings is of crucial importance. This is so that when these proceedings have concluded the truth seeking purpose of the proceeding may be said to have been served.

The issue of attorney-client privilege has been discussed in earlier orders resulting from discovery disputes among these parties. (See orders dated January 19, 2012 and February 18, 2012). The concept is quite basic to litigation.

> "The general principles of the attorney-client privilege have been stated to be as follows: Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his

> instance permanently protected from disclosure by himself or by the legal adviser unless the protection is waived by the client or his legal representatives. 8 Wigmore, Evidence, (McNaughton Rev. 1961) *ss.* 2292, 2327-2329, *pp.* 554, 634-641." *Riddle Spring Realty Co. v. State*, 107 NH 271 (citations omitted).

More recently, the court has found as follows,

> 'The common law rule that confidential communications between a client and an attorney are privileged and protected from inquiry is recognized and enforced in this jurisdiction.'" *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 273, 220 A.2d 751 (1966) (quotation omitted). The classic explication of the privilege is: 'Where legal advice ... is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure ... unless the protection is waived by the client or his legal representatives.' Id.; see *City Pages v. State*, 655 N.W.2d 839, 844 n. 5 (Minn.Ct.App.2003). *Hampton Police Association, Inc. v. Town of Hampton*, 20 A.3d 994 (N.H. 2011).

The attorney-client privilege is not absolute. See *McGranahan v. Dahar,* 119 N.H. 758, 764 (1979). The doctrine of implied waiver has been recognized in New Hampshire. See *Aranson v. Schroeder,* 140 N.H. 359, 369-70, 671 A.2d 1023, 1030 (1995). Implied waiver occurs when

the asserting party has put the otherwise privileged communications "at issue" in the present proceeding. The determination of whether the privilege is waived by the client is heavily driven by the facts and therefore is determined on a case by case basis. This is particularly true when the matter of waiver arises in the discovery phase of these administrative proceedings. A determination during the dynamic phase of discovery does not necessarily mean that information disclosed or that is compelled to be produced by a party is admissible during the hearing on the merits.

Consideration in this instance of whether or not the respondents have waived the attorney client privilege is premised on fairness concerns. Both the petitioner and the respondent LGC citing the same federal case in their pleadings, namely, *In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corp.*, 348 F.3d 16 (1st Cir 2003). That court uses the explanation, provided by what it characterizes as "one respected treatise," stating,

> [t]he courts have identified a common denominator in waiver by implication: in each case, the party asserting the privilege placed protected information in issue for personal benefit through some affirmative act, and the court found that to allow the privilege to protect against disclosure of that information would have been unfair to the opposing party. Citing 3 Weinstein § 503.41[1].

In the metaphorical manner often utilized upon by jurists, and applied to the matter here, *i.e.* the fairness at issue in cases involving the waiver of the attorney client privilege, the LGC or any respondent cannot thrust like a sword its position, that it relied the advice of legal counsel in

undertaking the alleged actions, in order to minimize or escape the consequences of being found in violation of either RSA 5-B or RSA 421-B while at the same time shielding itself by withholding from scrutiny what legal advice it relied upon.

Before disarming the LGC and the other individuals named as respondents by taking away their shield, that is, the attorney client privilege, it must first be determined whether it can be reasonably understood to have been used as a sword. One of the ways this is done by a party is if it "asserts reliance on an attorney's advice as an element of a claim or defense." (See *Sedco International, S.A. v. Cory*, 683 F 2d 1201, 1206 (8th Cir. 1982); *United States v. Bilzerian*, 926 F2d 1285, 1292 (2d Cir. 1991); *Chevron Corporation v. Penzoil Company,* 974 F 2d 1156 (9th cir. 1992); see also *United States v. Dakota*, 197 F.3d (6th Cir. 1999 821, 825 (a client may waive privilege by conduct which reasonably implies waiver of the privilege or a consent to disclosure. citing, *In re Von Bulow*, 828 F.2d 94, 104 (2d Cir. 1987); see generally *In re Keeper of Records, supra* 23-24).

In this case, a review of the answers filed by each respondent reveals that it has asserted a reliance on advice of counsel within its filings and specifically as an asserted defense. And this determination is made notwithstanding LGC's position that it has referenced it reliance on advice of counsel only as part of a "historic narrative." I find that regardless of this characterization, the LGC's repeated reference in its filings to its reliance on advice of counsel to date as well as the contents of its answer reasonably puts the advice of counsel at issue in these administrative proceedings. In addition its reference to "best business judgment" in ¶ L, page 29 of its asserted defenses also indicates to a reasonable person that this doctrine can be expected to be used as part

of its defense. After giving careful consideration of the respondents' positions as expressed through filings and argument I find that each of the respondents has undertaken an affirmative step in putting the advice of counsel at issue in these proceedings. By doing so, for purpose of discovery in these proceedings and not necessarily for admissibility as evidence at the hearing on the merits, each has waived its attorney-client privilege with respect to certain communications and records between themselves and legal counsel.

The waiver of attorney client privilege does not, however, require the disclosure by any respondent of the contents of its entire "legal file" nor the entire file contents of what has been represented to be that of its prior attorneys. New Hampshire has limited, "the extent of an at-issue waiver of the attorney-client privilege to circumstances in which the privilege-holder injects the privileged material itself into the case." *Aranson*, supra at 370. Previous orders have also addressed the protection accorded an attorney's work product. (See orders dated January 19, 2012 and February 18, 2012). Without restating that discussion in full here, it suffices to state that an attorney's work product consists generally of her or his mental impressions, conclusions, legal opinions or legal theories. The term connotes that the product sought is the result of a lawyer's activities undertaken with a view to a pending or anticipated legal proceeding. It also may be pierced in certain circumstances as its protection, like that of the attorney-client privilege, is not absolute. To pierce the attorney work product protection it is generally required that the party seeking the information, here the BSR, show a substantial need for the information in the preparation of its case. The requisite need is established by the BSR's need to prepare its case where the reliance on the advice of counsel is to be put at issue by the respondents. In New

Hampshire where discovery is liberally allowed and surprise at trial discouraged, the BSR need not wait until the final evidentiary hearing takes place to prepare to meet the respondents' defenses, including that of the reliance on advice of counsel. The circumstances of this particular case involving multiple defendants with varying degrees of alignment of interests and positions among the respondents, the competing public interests at issue and complicated subject matter involved and the numerous strategic and tactical options available to the legal representatives combine to present a unique challenge to all counsel. As a result it cannot reasonably be fully discerned and determined until the conduct of the final hearing itself whether the legal advice provided to the respondents will be necessary to the resolution of all issues to be tried, necessary to the resolution of some but not all issues, or necessary to the resolution of any issue as then presented. But to delay fair disclosure of certain information until that time would foster undue surprise and result in prejudice to the BSR and curtail unnecessarily the long tradition of liberal discovery allowed to prepare for adjudicative hearings in New Hampshire.

While I find that the "advice of counsel" is at issue in this matter, I do not believe and therefore do not find that the floodgates are to be opened to all of the respondent attorneys' file contents. Simply put, the respondents cannot waive by implication the attorney client privilege to information not provided to them by their lawyers. The BSR has not shown a substantial need for information, over which the protection of attorney work product exists, that was never provided to the LGC or the other individuals named as respondents. The BSR's reach into the files of the attorneys who provided advice to the respondents stops at the threshold established by advice actually provided to the LGC and the other respondents. The respondents cannot rely on legal

advice never provided or known to the respondents to support the "reliance" defense in these proceedings nor could the otherwise protected work product of their attorneys be found to be relevant and material to these proceedings if never shared with the respondent clients.

At this stage of these proceedings I find that each of the respondents have injected such legal advice as they, and each of them, received in any form of record, memorandum, opinion or verbal advice reduced or summarized in written form or the electronic version of same from attorneys that a reasonable person would determine to be related to three issues appearing in the BSR petition: (1) the 2003 reorganization and/or merger of the LCG and its entities; (2) the retention of risk-pool members' money for use in so-called " rate stabilization" or the reduction of future rates of risk-pool members; and (3) the use, expenditure, and transfer of risk-pool money for so-called "strategic support" of the workers compensation pool and for risk pool money paid, allocated, spent or otherwise used on executive compensation, including deferred compensation received by respondent Andrews and Carroll. . This does not include, under the circumstances presently known, legal advice provided to the respondents or attorney work product generated for or by their present legal counsel in anticipation or preparation for these administrative proceedings. Other orders specifically instructing the parties as to the production required by this decision appear in the "FURTHER ORDERS" end-section following the remaining discussion.

Having found that limited disclosure of information otherwise subject to attorney-client privilege and the protection of attorney work product is appropriate two issues raised by the respondents remain to be addressed. The first is the response of the individual respondents that even if they are in possession of records or other information requested by the BSR in the instant

motions the attorney-client privilege that may protect such records is not theirs to waive. Generally, an attorney retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. *Franklin v. Callum*, 148 N.H. 199, 202 (2002). It is now well settled that private corporations and other organizations may constitute clients for purposes of the attorney-client privilege. *Reed v. Baxter*, 134 F.3d, 351, 356 (6th Cir. 1998), citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981). However, a corporation is an inanimate entity, and this complicates application of the attorney-client privilege. *Sandburg v. Virginia Bankshares, Inc.*, 979 F.2d 332, 351 (4th Cir. 1992). The privilege legally belongs to the corporation, but the corporation can only assert it through agents, namely, its officer and directors. *Id.* The officers and directors must only exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals. *Id.* To the extent that there is no sufficient showing of bad faith execution by agents of the LGC nor sufficient showing of breach of fiduciary duty by agents of the LGC, then the privilege remains solely with LGC.

The last issue to be addressed is that raised by the respondents asserting that the respondents should not be compelled to disclose privileged information at this time because to do so would be premature. In support, the respondents generally argue that to disclose privileged information prior to the BSR amending its petition in conformance with a previous scheduling order the BSR could introduce new and additional claims of violations into these proceedings based upon records and information disclosed as a result of this decision. This argument is now moot as the deadline for the BSR to file its final amendment to its petition has passed as of February 17, 2012

and protective orders made a part of this decision make such information as may be produced in this proceeding confidential and not precedential as to any subsequent proceedings. At hearing the LGC requested ten days following the BSR supplemental submission to respond and that date has similarly passed and without the filing of its response. The second basis raised by the respondents is that some of the allegations against them may be dismissed as a result of dispositive motions filed or to be filed prior to the conduct of the hearing on the merits. I do not find that significant prejudice would be suffered by the respondents in the event any complaints of violations were to be dismissed as such narrow production that is ordered herein has been specifically related to the present petition and appropriate protective orders are also provided in the event any allegations against the respondents are dismissed. As stated at the opening of this decision, I find that the BSR will be substantially prejudiced if they are denied access to information that relates directly to positions on issues and defenses raised by the respondents to date. To prohibit the BSR from obtaining the information ordered to be disclosed by this order until some later time in these proceedings would prejudice its ability to pursue its preparation for final hearing and otherwise unnecessarily tilt the field on which the predominant issues in these proceedings are to be contested.

FURTHER ORDERS

Subject to the orders contained in the text above including the exclusion from discovery of legal advice provided to LGC or the individual respondents by their present counsel in preparation for these administrative proceedings or other anticipated or pending litigation, it is hereby further ordered that:

A. To the extent that the parties have made arrangements agreeable to all other parties regarding the production of information following the close of the record on February 6, 2012 that is subject to this order, those agreements may stand.

B. The individuals named as respondents are excluded from producing any copies of documents, records or other information generally understood to be subject to the attorney–client privilege between the LGC and its lawyers.

C. The LGC (collectively meaning all of its entities named as respondents) shall immediately disclose to the BSR, and may also provide to other parties upon request, documents, records, communications and information created prior to September 2, 2012 (the date of the BSR petition) presently memorialized in written, audio or electronic form exchanged between and among each and every past or present LGC entity and lawyers, partners, employees or agents of Hinkley, Allen and Snyder, LLP, and of Attorney Lloyd and of Attorney David Law and other individual lawyers retained by LGC or employed by LGC as in-house counsel related to:

1. the 2003 realignment, reorganization, change, and merger of legal form of any LGC entity.
2. the retention of risk pool members' money for use in "rate stabilization," as the LGC uses that term, or the reduction in the future rates of risk pool members.
3. the spending of risk pool money, including but not limited to, the use, expenditure and transfer of risk pool monies for "strategic support," as the LGC uses that term, of the workers' compensation pool and for risk pool

money paid, allocated, spent or otherwise used on executive compensation, including deferred compensation received by respondent Andrews and Carroll.

D. To the extent that the LGC or other respondent believes that a single document or record contains legal advice "at issue" in these proceedings and also contains advice from a lawyer that is not related to the issues presented in these proceedings, such documents may be presented to the presiding officer for *in camera* review in both non-redacted and suggested redaction form. Any documents selected for *in camera* submission should clearly reveal that the redacted legal counsel has absolutely no relationship to the issues raised in these proceedings.

E. Upon receipt of this order, the LGC and individual respondents shall undertake immediate production to the respondents consistent herewith.

F. As previously instructed and now reiterated, all parties shall maintain proper preservation of all files during these administrative proceedings. Any attorney who has appeared subsequent to previously ordered file protection shall maintain and preserve all files consistent with the commonly accepted so-called "litigation hold." This hold means that all parties shall preserve and maintain in viewable condition all documents, records and other writings subject to present discovery requests and all other documents that may be material or related to the allegations and defenses raised or contemplated to be raised in these proceedings that are in their custody or under their control as well as undertake necessary and precautionary acts, including but not limited to backup drives or discs, to preserve all electronic or digitalized information,

maintained on any computer or other technological device, its hardware, operating system, or software and to maintain an additional copy of all electronic or digitalized programs and data off premises throughout the duration of these proceedings and for a minimum period of twelve months after conclusion of these proceedings and any reasonable period as may be allowed for appeals.

G. 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 in any manner, written, electronic or verbal, related to communication with lawyers referred to in this order, or any 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.

H. All parties shall return all said communications with lawyers or claims analysis and claims management information obtained from LGC prior or subsequent to the filing of the BSR 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.

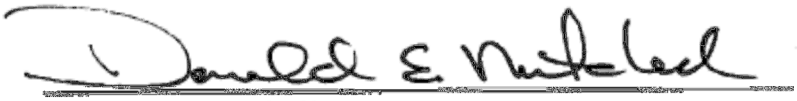
I. The disclosure in this proceeding of any of the information subject to this protective order shall not be considered as precedent for any other administrative or judicial proceeding, nor be interpreted to have eliminated or diminished any privilege,

exemption, or protection otherwise held by any party or its counsel over information made available through this order.

J. All counsel who have appeared subsequent to the earlier protective orders regarding documents and records obtained through discovery are reminded that they and their associated personnel and clients are subject to all protective orders issued in this matter.

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

So ordered, this 6th day of March, 2012



Donald E. Mitchell, Esq.
Presiding Officer

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