STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

IN THE MATTER OF:	)	
Local Government Center, Inc.;	)	
Local 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.;	)	Case No: C2011000036
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 A. Griffin; and John Andrews	)	
RESPONDENTS	)	

BUREAU OF SECURITIES REGULATION RESPONSE TO LOCAL GOVERNMENT CENTER'S MOTION TO COMPEL

NOW COMES Petitioner, the Bureau of Securities Regulation, a part of the Corporations Division within the Department of State, and submits this Response to Local Government Center's Motion to Compel, stating in support thereof the following:

I. Introduction

For the sake of clarity, the Bureau of Securities Regulation (the Bureau) feels it necessary to clarify three points made numerous times by Local Government Center (LGC). LGC repeatedly states in support of its various arguments against the Bureau's requests for information from, or onsite examination of, LGC, that the Bureau had two years to investigate LGC and thus should have obtained all relevant information in that time. Also, LGC states repeatedly that is has provided "over 11,000 pages of documents" to the Bureau, attempting to

support their compliance with the Bureau's requests for documents. Finally, LGC has taken a position that N.H. RSA § 421-B "contemplates a process" of investigation and subsequent hearing. In terms of LGC's arguments regarding the Bureau's "two-year investigation," in addition to being a flawed view of the Bureau's regulatory power and practice, this statement is simply untrue. As to LGC's "over 11,000 pages," a vast amount of these documents are utterly worthless. Finally, as to the investigation/hearing process "contemplated" by N.H. RSA § 421-B, LGC clearly misunderstands the language of the statute and to what legal processes the language LGC attempts to interpret in fact applies.

A. A Brief History of the "Two-Year Investigation" to Which LGC Refers

First, a brief history of the "two-year investigation" to which LGC refers. On July 1, 2009, Chapter 128 went into effect. On July 24, 2009, the N.H. Department of State (the Department) became aware of allegations that LGC was improperly utilizing N.H. RSA § 5-B pool funds. Four days later, on July 28, 2009, pursuant to N.H. RSA § 5-B:4, the Department requested information from LGC regarding the allegations. On August 7, 2009, LGC responded by requesting a copy of the complaint received by the Bureau. On August 13, 2009, the Department responded to LGC explaining that complaints are not released after an investigation has been opened.

On August 20, 2009, LGC responded to the Department by requesting a meeting to discuss the Department's regulatory authority under Chapter 128. The Department declined. Three days later, LGC responded to the Department's N.H. RSA § 5-B request stating, "LGC is unable to honor your request."

On September 11, 2009, the Department initiated hearings procedures requesting that a hearing officer subpoena the records initially requested. A hearing was set for September 21, 2009. On September 18, 2009, at the request of LGC's attorneys, the Department submitted an Assented-to Motion to Continue the hearing scheduled for September 21 until September 28. On September 25, 2009, LGC went to court seeking declaratory judgment to prevent the Department from pursuing the investigation while also filing a Motion to Stay the administrative process. The motion was denied.

On October 6, 2009, LGC submitted Assented-to Motion to Continue the hearing set for October 7, 2009. On October 8, 2009, LGC submitted to Merrimack Superior Court, for

expedited ruling, a motion to enjoin the Department from continuing the administrative proceeding and investigation of LGC.

The hearings officer set a hearing for October 15, 2009. On October 15, 2009, the hearing took place. No representatives for LGC appeared. The Department attorney made a Motion for Default Judgment and the hearing was adjourned. Later that day, the hearings officer issued a subpoena requiring LGC to produce the documents originally requested by October 30, 2009.

On November 6, 2009, a hearing was held at Merrimack Superior Court on LGC's motion to enjoin the Department's administrative proceeding. On December 11, 2009, the court denied LGC's motion stating that the language of N.H. RSA § 5-B gave the Department clear authority to regulate N.H. RSA § 5-B pools. Although the injunction was denied, LGC's action for declaratory judgment continued.

On December 15, 2009, the Department delivered a letter to LGC demanding compliance with the subpoena. On December 16, 2009, LGC provided documents responsive to the subpoena. From January until June of 2010, the Department, with the assistance of the Attorney General, prepared to defend against the action brought by LGC.

On June 14, 2010, HB 1393 became effective granting the secretary of state enhanced regulatory authority over N.H. RSA § 5-B pools. Further, the legislature required the secretary of state report to the legislature regarding the status of the investigation and the appropriate level of N.H. RSA § 5-B pool reserves.

On June 28, 2010, LGC voluntarily non-suited, with prejudice, the action pending in Merrimack Superior Court. The voluntary non-suit was finalized on August, 13, 2009, at which time the Bureau was finally able to truly begin the investigation of LGC and the documents produced. On October 28, 2010, only two months after the true beginning of the investigation, the Bureau of Securities Regulation submitted its first report on issues related to LGC.

Further, as outlined in a recent statement filed by the Bureau, Bureau staff was forced to halt the investigation of LGC to satisfy the Bureau's obligation to produce the December 30, 2010 report to the Legislature regarding recommendations on appropriate reserves for pooled risk programs. In addition, the investigation to which LGC refers was also halted during initial settlement discussions with LGC.

This historical account is intended to clarify the point LGC seems to forward so

emphatically. The Bureau, thanks in part to the diligent efforts of LGC, was unable to begin a true investigation for over a year after the complaint regarding LGC was received. Once a true investigation did begin, the Bureau released its first report within three months. LGC's arguments regarding the Bureau's "delay" is simply an attempt to avoid the administrative process they have tried to avoid since the summer of 2009.

B. A Brief Summary of the Documents Produced by LGC That are Useless to the Bureau

To this point in the administrative process, LGC has produced documents spanning bates numbers LGC000001 through LGC-AH011924. What is important to note about the production of LGC's financial information, is that bates numbered documents LGC000003 through LGC001941 and LGC005220 through LGC006395 (excerpts attached as Exhibit A) contain "personal health information" documents consisting of nothing more than thousands upon thousands of lines of finance entries, themselves containing nothing more than a date, either a payee or the phrase "personal health information," and a dollar amount. The only potentially useful information in this group of over 3,000 pages of documents, LGC005478 through LGC006095 (Exhibit A), is also worthless because it was produced in a format not amenable to calculation or evaluation without the assistance of the computer program from which it was generated. Although only excerpts of the bate-stamped documents referenced above have been provided, full versions of the 3,013 documents referenced above are available.

Thus, of LGC's "over 11,000 pages" produced, over a quarter of the documents are entirely worthless, not only to the Bureau's investigation, but to anyone not using the computer program from which these documents were generated. This is a primary reason for the Bureau's requests for onsite exam as much of the "financial documentation" produced by LGC is in a form insufficient to permit evaluation or calculation by anyone except LGC.

C. LGC's Incorrect Understanding of "Hearings" Under N.H. RSA § 421-B:9

Finally, LGC mistakenly construes the examination process as described in RSA 421-B:9 as steps in a larger process that leads to the hearing process under RSA 421-B:26-a. While the examination process may lead to enforcement proceedings under RSA 421-B:26-a, in the vast majority of cases it does not. Furthermore, the fact that RSA 421-B:9, V(b) allows for a hearing does not mean that this is part of the process resulting in an enforcement hearing. On the

contrary, the hearing addressed by RSA 421-B:9 is merely an opportunity for the examinee to object to the filing of the report and to seek amendment of the report. This is certainly not the hearing contemplated for enforcement proceedings under RSA 421-B:26-a, though the same hearing procedures apply to the limited-purpose examination hearing. The limited-purpose examination hearing addresses only the filing of the examination report and is required to be a closed hearing (see RSA 421-B:9, V(b)). In contrast, RSA 421-B:26-a, III requires that, except in limited circumstances, the hearing shall be open.

II. LGC's Dissatisfaction Regarding the Quantity of Documents Produced by the Bureau

LGC has repeatedly expressed dissatisfaction with the amount of documents produced by the Bureau in response to LGC's document requests. However, LGC has ignored the fact that LGC's document requests specifically excluded documents produced by LGC. Documents produced by LGC are the documents upon which this investigation and hearing are based.

A. Bureau Has Produced All Responsive Documents to LGC's Requests for Documents Supporting the October 28, 2010 Report

LGC has expressed a belief that the Bureau's production in response to various requests is extremely limited. More specifically, in Document request 2, LGC requested "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." (Exhibit B, emphasis added) The Bureau responded to this request providing, mainly, the Lewin Group Report and the transcript of the House Finance Committee for April 30, 2010. LGC believes this to be insufficient. However, what LGC has not indicated is that other than these two documents, the rest of the documents cited in the endnotes to the Bureau's October 28, 2010 Report are either public documents, documents created by LGC, or documents already in the possession of LGC.

B. It is the Practice of the Bureau to Rely on Documents Produced by the Respondent in Investigations and Administrative Proceedings

LGC has expressed general dissatisfaction with the amount of documents produced by the Bureau in response to LGC's documents requests. It is, however, the policy of the Bureau, as well as most regulatory agencies, to focus investigations and administrative proceedings on documents and evidence produced and provided by the party or parties under investigation. The

purpose of investigations and administrative hearings is to enforce regulation and thus ensure compliance with regulation and the law. The Bureau's investigation focuses on documents produced and provided by LGC because those are the documents that support compliance or non-compliance with regulation or the law.

III. Work Product Privilege Protects Communications between an Attorney and Experts

A. New Hampshire's Application of the Work-Product Doctrine

LGC has argued there are two reasons why the Bureau's communications with its experts, The Segal Company are not protected by the work-product doctrine: 1) because the Bureau's assertion of work-product does not apply to documents prepared in anticipation of litigation, and 2) because the Bureau's assertion of work-product does not apply to documents prepared by an attorney or at the direction of an attorney. These arguments are invalid. Firstly, the documents withheld by the Bureau were obtained in preparation of a reasonably anticipated case and, secondly, were initiated by Bureau counsel.

Under New Hampshire law, "[t]he work product of a lawyer consists generally of his mental impressions, conclusions, opinions or legal theories." *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 275 (1966) (citation omitted). Further, the work-product doctrine protects "correspondence, memoranda, reports, such as those of real estate appraisers, exhibits, trial briefs, drafts of proposed pleadings, plans for presentation of proof, statements, and other matters, obtained by him or at his direction in the preparation of a pending or reasonably anticipated case on behalf of a client." *Id.*

In *Bristol-Meyers Co. v. F.T.C.*, 598 F.2d 18, 29 (D.C. Cir. 1978), the U.S. Court of Appeals for the District of Columbia Circuit was faced with applying the work-product doctrine to communications between FTC staff and experts hired by the agency. The court determined that interview reports and correspondence *between* expert witnesses and FTC staff in the course of investigation and administrative enforcement proceedings were protected by the work-product doctrine as the reports and correspondence were prepared by FTC staff counsel and were prepared specifically for purposes of an administrative proceeding.

Subsequently, in *Sterling Drug Inc. v. Harris*, 488 F. Supp. 1019, 1027 (S.D.N.Y. 1980), the Federal District Court for the Southern District of New York, citing *Bristol Meyers Co. v.*

F.T.C., clarified application of the work-product doctrine to correspondence with experts holding, "[q]uestions asked of, responses given by, and correspondence with expert consultants in communicating for litigation are within the work product privilege."

Following the reasoning in *Riddle Spring Realty Co.*, the Bureau's correspondence with its experts, The Segal Company, includes mental impressions, conclusions, opinions, and legal theories related to the investigation of and reasonably anticipated administrative action against LGC. The Bureau obtained these communications in preparation of a "reasonably anticipated" administrative proceeding as any investigation the Bureau undertakes is reasonably anticipated to become part of an administrative proceeding.

Further, as in *Bristol-Meyers Co. v. F.T.C.*, correspondence between the Bureau and its experts is protected by the work-product doctrine because the correspondence and reports were prepared by Bureau staff for the purpose of administrative action against LGC. Thus, the Bureau's communications with The Segal Company are protected by the work-product doctrine.

B. Federal Rules of Civil Procedure 26(b)(4)(C) Protects Pretrial Communications Between an Attorney and His Expert

Considering LGC's erroneous view that the administrative discovery process should function more traditionally, it is important to note that the Federal Rules of Civil Procedure also support work-product protection of communications between an attorney and his expert. Recent amendments to Rule 26(b)(4)(C) of the Federal Rules of Civil Procedure outline certain trial-preparation protections for communications between an attorney and expert witnesses. The protections do not apply to communications that relate to compensation of the expert or the facts and data considered by the expert in forming the expert's testimony.

The notes to the amended Rule 26(b)(4)(C) clearly exemplify the purpose of such protections stating that such protections "do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule." Further, the notes to Rule 26(b)(4)(c) of the Federal Rules of Civil Procedure go on to say:

> Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court

> order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii) — that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony.

Thus, even civil discovery ventures to protect communications between an attorney and the attorney's experts, which supports work-product protection of the communications between the Bureau and its experts, The Segal Company.

It is also important to note that Rule 26(b)(4)(D) of the Federal Rules of Civil Procedure states "Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial." This supports work-product protection of the Bureau's communications with Mike Coutu who, although listed in the Bureau's Preliminary Non-Binding Witness List, the Bureau has no present intention to call as a witness.

C. The New Hampshire Supreme Court has Determined No Requirement of Disclosure of an Expert's File Prior to an Administrative Hearing

As administrative hearings and thus administrative due process are derived from the hearings procedures of the particular agency initiating the action, the process outlined in the agency's rules are essential to determine a party's right to certain discovery.

In May 2011, the New Hampshire Supreme Court was confronted with the question of whether disclosure of an expert's file is required under the administrative rules of the New Hampshire Department of Education. *Appeal of School Administration Unit #44*, slip op. 2010-161, *3 (N.H. May 26, 2011). The Court determined that the language of the rules permitting "an opportunity for a hearing if requested at which the following procedures shall apply: . . . [d]uring the hearing, the school board shall allow a party, or a designated representative of the party, to examine any and all witnesses" did not authorize the state board of education to require disclosure of an expert's file. *Id.* at *4.

As in *Appeal of School Administration Unit #44*, nothing in the hearings procedures of N.H. RSA 421-B:26-a require disclosure of an expert's file let alone communications between an

expert and the attorney that engages his services. Further, Section 541-A:33, VI of the New Hampshire Administrative Procedures Act, although irrelevant to this proceeding, states,

> Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's *experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.* (emphasis added).

This language again does not reference disclosure of the files of expert witnesses or, more specifically, disclosure of communications in any form, let alone communications between agency staff and the experts they commission. Even New Hampshire Department of Justice, Rule Jus 811.03 restricts discovery of the files of expert witnesses to, "a list of all witnesses to be called at the hearing with a brief summary of their testimony, *a list of all documents or exhibits to be offered as evidence at the hearing*, and a copy of each document or exhibit." (emphasis added).

LGC's arguments over disclosure of the Bureau's communications with its expert witness, The Segal Company, are unsupported by case law, by the "formal process" of discovery advocated by LGC, by the hearings procedures under N.H. RSA 421-B:26-a, and by general New Hampshire administrative process. Thus, LGC's motion to compel disclosure of the Bureau's correspondence with its experts should be denied.

IV. The Bureau has Produced All Documents Previously Withheld Relating to the Professional Fire Fighters of New Hampshire

LGC objected to the Bureau's withholding of communications between the Bureau and the Professional Fire Fighters of New Hampshire. Since LGC's objection, the Bureau has disclosed these communications in unredacted form. Thus, the issue is moot.

V. LGC's Previous Document Requests and Continued Requests for Certain Documents Ignore the Scope of Discovery and Prolong the Administrative Process Unnecessarily

LGC contends that the Bureau's correspondence with PricewaterhouseCoopers, LLP, the New Hampshire General Court, and PRIMEX and SchoolCare should be produced, contrary to the Bureau's statement that these communications are non-substantive and thus irrelevant as to the present proceeding. LGC supports this argument by arguing that documents should not only

be disclosed if they are relevant, but rather should be produced if they are reasonably calculated to lead to the discovery of *admissible* evidence. What LGC fails to recognize is that the process of discovery in this administrative process is intended to allow LGC access to the documents the Bureau used in preparation of its case or intends to use to support its arguments at hearing. N.H. RSA § 421-B:26-a, XII clearly states that parties to an administrative hearing in front of the Bureau shall have the right to: 1) appear either represented pro se or by an attorney; 2) cross-examine witnesses; and 3) present evidence and witnesses on their own behalf. The procedures outlined in N.H. RSA § 421-B:26-a do not detail a "formal process" for discovery and, in fact, do not detail what evidence shall be produced by the Bureau in a formal or informal discovery process. Although the Hearings Officer does have broad authority to "[t]ake any action in a proceeding necessary to conduct and complete the case, consistent with applicable statutes, rules, and precedents," LGC is attempting to turn the hearings procedure on its head and turn this administrative process into an investigation of the Bureau.

The Bureau has produced all documents it believes responsive to all requests received from Respondents and has gone to great lengths to comply with LGC's subsequent and informal clarifications or additions to those requests. However, the Bureau believes it time to protect this administrative process. It is clear the Constitution does not create a right to discovery in administrative proceedings. In *Golberg v. Kelly*, 397 U.S. 254 (1970), even the United States Supreme Court did not require discovery in the administrative context. Further, there is no administrative procedure in New Hampshire that grants private parties a right to formal discovery in administrative proceedings. In general, the conduct and extent of discovery is left to the sound discretion of the agency. LGC has attempted, either by formal or informal request, to obtain every document related not only to LGC but to the history of the law they are alleged to have violated. If the purpose of the discovery process in which we are now involved is to provide the named Respondents with the information used in the preparation of the case against them, the Bureau has more than complied. The Bureau has not only provided the documents, other than those produced by LGC, that it used in preparation of its case thus far, but has provided documentation requested by LGC that is irrelevant to this proceeding which has already cost unnecessary time and expense to produce. The discovery process and the documents produced by the Bureau in response to the document requests of the Respondents have been more than adequate to satisfy administrative due process and the non-existent right to formal

discovery under N.H. RSA § 421-B:26-a as all documents used in support of the Bureau's case have been either disclosed or withheld under the work-product doctrine.

CONCLUSION

The discovery process implicated in the above-referenced action is a limited one. It is defined by the hearings procedures outlined in N.H. RSA § 421-B:26-a and within the sole discretion of the Hearings Officer. LGC has attempted to turn this discovery process into an investigation of the regulatory body tasked with regulating LGC and other N.H. RSA § 5-B entities rather than the process of discovery of facts supporting the allegations against them as discovery is intended.

Dated this 4th day of December, 2011

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