STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

IN THE MATTER OF: Local Government Center, Inc.; Government Center Real Estate, Inc.; Local Government Center Health Trust, LLC; Local Government Center Property-Liability Trust, LLC; Health Trust, Inc.; New Hampshire Municipal Association Property-Liability Trust, Inc.; LGC – HT, LLC; Local Government Center Workers' Compensation Trust, LLC; And the following individuals: Maura Carroll; Keith R. Burke; 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	Case No: C2011000036

MOTION FOR CLARIFICATION

NOW COMES the Petitioner, the Bureau of Securities Regulation (BSR), a part of the Corporations Division within the Department of State, and submits this Motion for Clarification, stating in support thereof the following:

Background

1. Prior to November 4, 2011, all parties to the above-referenced matter exchanged document requests. Responses to these requests and the production of responsive documents were required no later than November 4, 2011. None of these document requests specifically requested production of the internal e-mail communications of BSR counsel. In fact, the word "internal" does not appear in any requests received by the BSR prior to November 4, 2011.
2. Subsequent to this November 4 deadline, the BSR, LGC, and respondent John Andrews filed

Motions to Compel the production of documents either withheld, redacted, or otherwise not produced on or before November 4. None of the Motions to Compel referenced let alone argued that the BSR should be compelled to produce internal email communications of BSR counsel.

3. On November 21, 2011, the Presiding Officer held a hearing on these Motions to Compel taking oral argument and reviewing all documents withheld or redacted, in raw form. Only once during this hearing did LGC refer to having not received "internal discussions within the Bureau" pertaining to the BSR's investigation. (Hearing Tr. 93:23-94:2, Nov. 21, 2011.) This is the first reference to the internal email communications of the BSR in the context of discovery.
4. At a November 29, 2011 "meet and confer," all counsel of record met to discuss discovery and ultimately the potential logistics of the on-site examination of LGC records previously requested by the BSR. None of the issues discussed in this "meet and confer" (despite LGC's brief comment during the November 21 hearing) pertained to the production of the internal email communications of BSR counsel.
5. On December 6, 2011, the Presiding Officer held an informal conference to discuss outstanding discovery issues between the parties. During this informal conference, LGC provided a list to the Presiding Officer detailing documents not yet produced by the BSR. None of the items listed pertain to the internal email communications of BSR counsel.
6. On December 9, 2011, LGC sent an e-mail to BSR counsel attempting to reiterate certain comments made by the Presiding Officer during the December 6 conference and subsequently requesting the e-mail communications "to and from" various parties including various attorneys at the BSR. None of these requests, however, specifically mention or request the "internal" email communications of BSR counsel.
7. On December 13, 2011, after receiving verbal clarification from LGC that they were, in fact, seeking the internal e-mail communications of BSR counsel regarding the investigation of LGC, the BSR responded to LGC's December 9 e-mail. In this e-mail communication to LGC, the BSR explained that:

> The BSR's position is that internal communications and e-mails of the BSR are not discoverable, are beyond the scope of your requests, are inadmissible, beyond the scope of discovery in an administrative proceeding, are privileged, and have not been specifically requested within the time frame set out by the Examiner's

orders. Your production request dated 10/5/11, Motion [To] Compel dated 11/18/11 and letter dated 11/9/11 do not mention internal e-mails of the BSR. Further, release of the BSR's internal communications will create an unfair advantage to LGC and potentially jeopardize the BSR's ability to receive a fair hearing.

8. On December 14, 2011, LGC responded by stating that the broad language of LGC's October 11, 2011 document request should be read to encompass the internal e-mail communications of BSR counsel. LGC specifically cites request 1 ("[c]opies of all documents and communications, excluding those produced by LGC, that concern or support the allegations in the BSR Report dated October 28, 2010." and request 2 ("[c]opies of all documents and communications, excluding those produced by LGC that concern or support the allegations in the BSR Report dated August 2, 2011.").
9. As part of this December 14, 2011 e-mail, LGC, feigning "the spirit of compromise," requests for the first time in writing, "[a]ll internal communications and E-mails of the BSR relating to LGC that were sent or received during the course of the BSR's regulatory oversight and/or investigation of LGC from July 22, 2009 through September 2, 2011 as these are public documents and not protected from disclosure under attorney-client privilege or attorney work product doctrine."
10. On December 21, 2011, the BSR sent a letter to LGC in attempts to follow-up on LGC's December 14 e-mail. In this letter, the BSR explicitly denied LGC's requests for production further explaining that the internal communications of BSR counsel also would not be listed on the BSR's Vaughn Index because the nature of such documents or communications is such that exempts disclosure both under FOIA and *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973) (explaining that "[i]n essence, the Act provides that all documents are available to the public unless specifically exempted by the Act itself.").
11. On December 27, 2011, the Presiding Officer expressed concerns that, in order to avoid brinksmanship, all parties to the above-referenced action should bring disputes forward to be resolved in a timely and just manner. Thus, the BSR feels it appropriate to bring the dispute outlined below to the Presiding Officer's attention.

LGC Seeks to Ignore the Presiding Officer's Discovery Schedule

12. On October 6, 2011, the Presiding Officer issued an order stating "[i]f following the exchange of documents there remains any disputes, the party requesting said document shall

indicate, *by motion*, that it desires production of a document stating clearly what the document is and why it is to be produced on or before November 11, 2011 not later than 7:00 p.m."

13. On October 10, 2011, the Presiding Officer issued an order stating "[i]f documents have not already been demanded and agreement is not reached, then the requesting party is to inform the presiding officer *by formal motion* of the document sought and the purpose for which it is sought." (emphasis added).
14. On November 14, 2011 the Presiding Officer issued and order stating:

> Not later than Tuesday, November 15, 2011 the BSR shall provide a so-called "Vaughn Index" or similar specific index describing the documents requested by LGC and its affiliates and Maura Carroll that it is withholding and legal basis for said withholding *pending a future decision on the parties' respective motions to produce documents or to compel production of previously requested materials to all respondents.* (emphasis added).

15. LGC has never filed a Motion to Produce or Compel production of the internal e-mail communications of the BSR. In fact, noticeably absent from and of LGC's formal filings regarding discovery are any references to the internal e-mail communications of the BSR. Noting the above-mentioned orders, the first reference to the internal communications of the BSR was during the November 21, 2011 hearing on the parties' Motions to Compel although none of the motions at issue during the hearing referenced such communications.
16. On November 18, 2011, LGC chose to file a Motion to Compel the production of specific information it sought to obtain from the BSR. Never in the LGC's November 18 motion and at no time since the filing of that motion has LGC formally requested that the BSR produce its internal communications regarding the investigation of LGC and its affiliates, despite the Presiding Officer's many orders outlining that such demands must be made by motion.
17. Further, the BSR has responded to LGC's *informal* mention of these types of communications by clearly informing LGC that the BSR believes such communications are clearly attorney work product and need not be disclosed or listed in the BSR's Vaughn Index. *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 275 (1966) (exempting from disclosure "correspondence, memoranda, reports...statements, and other matters, obtained by [an attorney] or at his direction in the preparation of a pending or reasonably anticipated case on behalf of a client.").
18. As has become clear in the Presiding Officer's orders and statements during hearings, the

intent of the Presiding Officer is to have discovery disputes, and in fact any disputes, brought to the Presiding Officer's attention. The BSR's purpose in filing this motion, in part, is to bring this potential dispute to the Presiding Officer's attention.

LGC Misunderstands the *Vaughn* Ruling and the Scope of RSA 91-A

19. Section 552(b)(7) of FOIA currently exempts:

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) *interfere with enforcement proceedings*, (B) *deprive a person of a right to a fair trial or an impartial adjudication*, (C) constitute an unwarranted invasion of privacy, (D) disclose the identity of a confidential source, and in the case of a record compiled by a law enforcement authority in the course of a criminal investigation, or by any agency conducting a lawful national security intelligence investigation, confidential information furnished only by a confidential source, (E) *disclose investigative techniques and procedures*, or (F) endanger the life or physical safety of law enforcement personnel. (emphasis added)

20. The New Hampshire Supreme Court has supported the use of these FOIA exemptions by stating that "[i]f the requested material is an 'investigatory record compiled for law enforcement purposes,' it may be withheld if the government can prove one of the six statutory adverse results. The agency, of course, must first show that the file is 1) investigatory and 2) compiled for law enforcement purposes." *Lodge v. Knowlton*, 118 N.H. 574, 576-77 (1978).

21. Since LGC has clearly requested internal e-mail communications of BSR counsel pertaining to the investigation of LGC and the preparation of BSR reports regarding LGC, LGC has partially defeated its own argument supporting production of such documents. First, it is clear that any documents or communications relating to the investigation of LGC are investigatory. Second, any investigation done by the BSR and any information generated or obtained during such an investigation are compiled for law enforcement purposes considering the BSR is a governmental regulator tasked with enforcement of N.H. RSA § 421-B and 5-B.

22. It is also clear that disclosure of the internal e-mail communications of BSR counsel implicates several of the six statutory adverse results of such disclosure, under FOIA. First, disclosure of the internal e-mail communications of BSR counsel will interfere with the proceedings as such communications are irrelevant to the allegations in the September 2,

2011 Staff Petition and would unnecessarily complicate and convolute the focus of any hearing on the matter. Second, even the Presiding Officer's review of the internal communications of BSR counsel would unfairly prejudice the BSR as the Presiding Officer would be reviewing the BSR's thoughts and impressions during its preparation of the above-referenced action. Finally, disclosure of the internal e-mail communications of the BSR would disclose the investigative techniques and procedures of the BSR and would irreparably damage the BSR's ability to investigate and prosecute future cases.

23. It must also be noted that LGC has requested that the internal e-mail communications of the BSR be listed on the BSR's Vaughn Index if the BSR is attempting to withhold them. This is contrary to the holding in *Vaughn*. 484 F.2d at 824 (D.C. Cir. 1973) (explaining documents withheld need not be indexed if the factual nature of the documents is not in dispute).
24. As LGC has sought the internal communications of the BSR relating to the BSR's investigation of LGC, the factual nature of these communications is not in dispute. Further, the BSR has clearly explained to LGC that such investigatory communications are entirely attorney work product, and further exempt under FOIA, and thus need not be listed on the BSR's Vaughn Index. *See id. Vaughn* goes on to explain that if the factual nature of the documents is undisputed and if the documents clearly fit FOIA exemptions, no further inquiry is permitted and the documents need not be revealed. LGC knows the factual nature of the documents sought and the BSR's reason for withholding such documents, which, as mentioned above, clearly meets a FOIA exemption. *Id.*

LGC Attempts to Investigate the BSR Only Waste Time and Taxpayer Money

25. It is also important to note that LGC's requests for disclosure of the internal e-mail communications of the BSR seem intended to redirect the focus of this investigation. LGC seeks disclosure of the BSR's internal communications because LGC seeks to launch a counter-attack on the BSR based on the BSR's investigative techniques and procedures. This is clearly evidenced by LGC's public statements claiming the BSR has chosen to single out and selectively prosecute LGC. This claim is not only frivolous and unsupported, but is also a claim that cannot be resolved in this forum or by this Presiding Officer.
26. LGC has also elucidated its not-so-benevolent investigatory intent by requesting information the BSR is incapable of providing not only in this forum but at all. LGC has even gone so far as to request from the BSR all e-mail communications of Secretary of State William Gardner.

As a quasi-governmental unit, LGC is well aware of the proper methods for seeking such information and the correct parties from whom it should be sought. The BSR is not the agency to which such requests should be directed and LGC should be aware that the e-mail communications of Secretary of State William Gardner are clearly irrelevant to these proceedings. The only fungible result of such requests is increased expense to taxpayers as the taxpayers ultimately fund LGC's irrelevant expeditions.

27. The investigatory and enforcement processes initiated by the BSR regarding LGC's alleged violations of N.H. RSA § 5-B and 421-B are solely intended to determine and enforce LGC's statutory and regulatory compliance. In order to effectively and efficiently complete these processes, the BSR must uncover as much information as possible, within the time and scope permitted, to determine the extent of any N.H. RSA § 5-B or 421-B violations. LGC is afforded specific statutory due process rights that allow it to defend itself in the above-referenced action.

28. Specifically, the hearings procedures outlined in N.H. RSA § 421-B:26-a, XII provide the following:

> Parties shall have the right to:
>
> (a) Appear pro se or be represented by an attorney.
>
> (b) Cross-examine witnesses, and
>
> (c) Present evidence and witnesses on their own behalf.

The enforcement hearings procedures outlined in N.H. RSA § 421-B:26-a do not permit the LGC to turn the investigatory procedure of the BSR on its head and launch a counter-investigation because LGC may be displeased with the prospect of regulatory oversight. LGC is the subject of this investigation; LGC is the subject of this enforcement action; and LGC must comply with the powers and limitations properly and appropriately granted to it.

The Disclosure or *In Camera* Review of the Internal Communications of the BSR is Antithetical to the Presiding Officer's Goal of Conducting a Fair and Impartial Hearing

29. N.H. RSA § 421-B:26-a, XI states that "[e]ach presiding officer may, at any stage of the hearing process, withdraw from a case … for any other reason that may interfere with the presiding officer's ability to remain impartial." As the goal of any enforcement action brought by the BSR is to uncover the full truth of each allegation in a fair and impartial manner, the fair and impartial manner in which the Presiding Officer conducts this hearing is

paramount.

30. The internal e-mail communications of BSR counsel, as a party to this action, are clearly work-product as defined by New Hampshire law. The New Hampshire Supreme Court has noted that "[t]he purpose for the protection accorded the work product of a lawyer is to preserve our adversary system of litigation by assuring an attorney that his private files shall, except in unusual circumstances (good cause or necessity), remain free from encroachments by his adversary." *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 275 (1966).
31. The disclosure of the internal e-mail communications of the BSR will not only amount to encroachment by LGC on the private files of its governmental regulator and adversary, the BSR, but will also irreparably taint these proceedings. If the Presiding Officer were to order the *in camera* review of the BSR's internal e-mail communications, the Presiding Officer will, in essence, be gaining a prejudicial perspective on the thoughts and impressions of BSR counsel during the preparation of the above-referenced action; the very thing the work-product doctrine was intended to prevent.
32. The disclosure or *in camera* review of the internal e-mail communications of BSR counsel would not only be contrary to New Hampshire law but would impair the Presiding Officer's ability to conduct a full and fair proceeding on the merits as required by N.H. RSA § 421-B:26-a. The internal e-mail communications of the BSR should not be disclosed or subject to *in camera* review as they are entirely irrelevant to the proceedings. Further, the disclosure or *in camera* review of the internal e-mail communications of the BSR would violate the protections afforded to such information and would irreparably impair the Presiding Officer's goals of justice and impartiality. *See Riddle Spring*, 107 N.H. at 275.

WHEREFORE, the BSR respectfully requests that the Presiding Officer:

A. Clarify the extent to which the internal communications of the BSR are subject to discovery in this proceeding;
B. Clarify his November 14, 2011 order as it pertains to the listing of the internal e-mail communications of the BSR, withheld by the BSR, that are attorney work product as well as being exempt from disclosure under FOIA;
C. Clarify the extent to which the internal communications of the BSR must be listed on the BSR's Vaughn Index; and
D. Grant such additional relief as is just.

Dated this 29th day of December, 2011

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N.H. Bureau of Securities Regulation

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