STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION

IN THE MATTER OF:	)	
Local Government Center, Inc.; et al.	)	Case Number: C-2011000036
	)	

LGC'S OBJECTION TO THE BUREAU OF SECURITIES REGULATION'S MOTION REQUESTING HEARING OFFICER TO FIND WAIVER OF THE ATTORNEY CLIENT PRIVILEGE THROUGH THE ASSERTION OF "ADVICE-OF-COUNSEL" DEFENSE

Respondents Local Government Center, Inc. and affiliated entities (hereafter, "LGC"), object to the Motion of the New Hampshire Bureau of Securities Regulation (hereafter, "BSR") requesting the Hearing Officer to find a waiver of the attorney-client privilege (the "Motion").

BSR's arguments are unsupported by the facts or relevant case law. Most importantly, forcing LGC to choose at the present time whether to preserve its privilege, or waive particular defenses, is fundamentally unfair and violates due process.

I. Factual and Procedural Background.

1. On January 24, 2012, BSR moved for a finding that LGC had waived its attorney-client privilege, because of limited historical references in LGC's Answer to the involvement of counsel in the business decisions at issue in this proceeding.

2. BSR seeks "the entire contents" of the files maintained by LGC's attorney, including but not limited to "notes, drafts, correspondence, minutes, memos, pleadings, submissions to regulators or Attorneys General, bills for services (final and proforma), legal analyses, the lawyers' work or business plans that describe the work completed, for or to be completed on behalf of any Respondent, copies of regulations, statutes, or cases, and opinions by the lawyers or considered by the lawyers for any purpose." The BSR also seeks any written or emailed

communication between a "lawyer and the firm's risk managers, management committee or general counsel if the communication occurred during the time during which Hinckley Allen represented any Respondent." See January 11, 2012 letter, Volinsky to Saturley, attached to the Motion.

3. According to the Structuring Order in this matter, BSR has until February 17 to amend the Petition.

4. BSR seeks an opportunity, now, to examine all of the files of LGC's attorney on various topics. BSR could then seek to introduce entirely new causes of action, or modify its existing causes of action, based on its discovery.

II. It is Premature, and Fundamentally Unfair, to Force LGC to Choose Between Protecting its Attorney-Client Privilege, and Waiving a Defense.

LGC should not be forced at this point in the proceeding to disclose privileged information (a) regarding charges that may be dismissed[1], or (b) which could lead to additional charges, and the Hearing Officer should deny the Motion for this reason alone.

A. The Attorney-Client Privilege is Jealously and Zealously Protected

The attorney-client privilege is a fundamental principle in the relationship between lawyer and client. It contributes to the trust that is the hallmark of that relationship. See N.H. Rules of Professional Responsibility, Rule 1.6. The privilege safeguards the communications between a client and his lawyer in order to encourage full and free discussion, thus "better enabling the client to confirm his conduct to the dictates of the law and to present legitimate claims and defenses if litigation ensues." In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16, 22 (1st Cir. 2003). The privilege protects those

[1] Respondent Andrews recently moved to dismiss Count 2, for example. LGC adopts his reasoning, and plans to file a formal joinder in the near future.

communications that are confidential and are made for the purpose of seeking or receiving legal advice. Id.

While the attorney-client privilege can be waived by an express act, the more difficult cases involve implied waivers. Conduct alone can waive the privilege by implication, but courts "should be cautious about finding implied waivers." Id. at 23. Such claims of implied waiver "must be evaluated in light of principles of logic and fairness," and such evaluation demands "a fastidious sifting of the facts and a careful weighing of the circumstances." Id. Given this "precise, fact-specific tamisage, it is not surprising that case law reveals few genuine instances of implied waiver." Id.

B. As BSR Has Yet to Commit to a Petition, LGC Need Not Yet Commit to an Answer

BSR has yet to commit to its charges. It retains until February 17 the opportunity to re-state the existing Petition, under the existing Structuring Order. Prior to filing such a Final Petition, it seeks an opportunity to explore LGC's privileged communications with its attorney. Based on this, BSR may seek to bring new claims.

Until such time as BSR has locked into its charges, LGC should not be forced to lock into an Answer. Based on its review of the Final Petition, LGC could decide to amend or withdraw parts of its Answer. Forcing LGC to waive its attorney-client privilege on the basis of an interim Answer is fundamentally unfair, and violates LGC's due process.

III. LGC Has Yet to Actually Assert an "Advice-of-Counsel" Defense, and Has Yet to Put "Advice-of-Counsel" Actually at Issue.

In its Answer, LGC provided a narrative which responded to the general claims made in the Petition, rather than rebutting each sentence of the Petition. As part of the narrative, LGC provided a history of the events which are now under investigation in this proceeding. In the

course of that explanation, LGC made references to the participation of counsel. This is entirely appropriate. It would be surprising if, in the course of the business decisions discussed in the Answer, LGC did not consult with counsel or otherwise involve counsel in the decision-making process.

LGC refers, in part VIII of its Answer, to defenses which LGC may raise, including an argument that deference to the judgment of Respondents is warranted as "the actions taken by LGC and its pools were taken pursuant to the best business judgment exercised by its Boards, at the time, given the available information, and with the advice of consultants and legal counsel, and were similar to those taken by other pools, both within and without New Hampshire." This is an argument for deference to LGC's business decisions, and not an assertion of an advice-of-counsel defense.

Further, LGC reserved in its Answer the right to both supplement its Affirmative Defenses, and to remove those that had no application to the case. (**Answer**, at page 29.) Forcing it to choose which of those to assert or not, at this stage of the proceedings, while the Bureau has yet to commit to its charges, is fundamentally unfair.

A. Waiver via the Advice-of-Counsel Defense Requires that the Attorney's Advice be "Put at Issue"

Waiver of the attorney-client privilege is a form of waiver-by-implication. As with other forms of waiver by implication, 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." In re XYZ Corp., 348 F.3d at 24 (quoting 3 Weinstein's Federal Evidence §503.41 (1997)). A party raises the advice-of-counsel defense when "the pleader puts the nature of its

lawyer's advice squarely in issue." Id. Waiver is appropriate in such cases as it prevents litigants from using the attorney-client privilege "as both a shield and a sword." Id.

A historical reference to consultation with an attorney, especially one that precedes the litigation, does not necessarily put the advice "squarely in issue." "An averment that lawyers have looked into a matter does not imply an intent to reveal the substance of the lawyers' advice. Where a defendant neither reveals substantive information, not prejudices the government's case, nor misleads a court by relying on an incomplete disclosure, fairness and consistency do not require the inference of waiver." United States v. White, 887 F.2d 267, 271 (D.C. Cir. 1989)(circuit court declined to find a waiver when defendant testified he lacked intent to commit crime because he thought his actions were lawful, following a meeting with his attorneys).[2]

Furthermore, the advice of the attorney must actually be relevant to question before the court. It is not enough that the party references the advice of their attorney; instead, the content of the attorney's communication must address the question before the court. See Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 35 F.3d 851, 863 (3rd Cir. 1994). In order to waive the privilege, the client must take "the affirmative step" of placing the advice-of-counsel at issue. Id.

B. LGC Has Not Put the Advice-of-Counsel "At Issue"

To the extent that BSR believes that LGC has sought to "limit its liability by describing [the advice-of-counsel] and by asserting that [LGC] relied on that advice," Rhone-Poulenc Rorer Inc., 35 F.3d at 863, then BSR is incorrect. LGC's limited historical references to the involvement of counsel in its business decisions do not put the advice of its attorneys at issue. LGC has not taken the "affirmative step" of putting the advice of its counsel "at issue" by asserting a claim or defense based on the advice-of-counsel. Id.

[2] This result contrasts with a defense which consists of anticipated testimony based on a "good faith reliance" on legal advice. See United States v. John Doe, 219 F.3d 175, 183 (2nd Cir. 2000).

The specific communication referenced by LGC in its Answer is a letter from Attorney Mark McCue, dated April 20, 2007. That letter was made public by LGC in October 2010, eleven months prior to the Petition, in an exchange with the Bureau during the Bureau's preliminary investigation. The letter was also part of LGC's response to a Bureau document request.

In a case cited by the Bureau, the First Circuit ruled that "the extrajudicial disclosure of attorney-client communications, not thereafter used by the client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter." In re Keeper of Records (XYZ Corp. v. United States), 348 F.3d 16, 24 (1st Cir. 2003). The First Circuit described the rationale for its decision as "self-evident," stating that there is a "qualitative difference" between "offering testimony at trial or asserting an advice-of-counsel defense in litigation" and other settings, such as business negotiations, where communications to and from counsel may be referenced. In this case, the introduction of limited references to the client consulting as attorney "does nothing to cause prejudice to the opposition or to subvert the truth seeking process." Id.

Additionally, the court noted that to allow broad subject matter waivers resulting from disclosures outside of the litigation context would "create perverse incentives: parties would leave attorneys out of commercial negotiations for fear that their inclusion would later force wholesale disclosure of confidential information," which would "strike at the heart of the attorney-client relationship." The court concluded by stating that "where a party has not thrust a partial disclosure into ongoing litigation, fairness concerns neither require not permit massive breaching of the attorney-client privilege."

C. LGC's Intent or Knowledge of the Law or Basis for Such Knowledge is Irrelevant to BSR's Allegations

In its January 11, 2012 letter, included as part of its Motion, BSR seeks attorney-client privileged documents pertaining to any and all legal advice:

- "Regarding the 2003 merger and all subsequent corporate or company reorganizational activities;"
- "Regarding the retaining of Pool member money for use in "rate stabilization" or the reduction in the future rates of Pool members;"
- "Regarding spending of Pool money, including but limited to, the use of pool monies for 'strategic support' of the workers' compensation pool."

BSR Letter, Andru Volinsky, January 11, 2012.

Any advice LGC received from counsel on the three above issues is irrelevant to either BSR's prosecution of those issues or LGC's defenses, because LGC's intent, knowledge of the law, or basis for such knowledge is irrelevant to either proving or defending against BSR's allegations. Therefore, LGC cannot waive the attorney-client privilege by implication, for the simple reason that the advice of its counsel is irrelevant to LGC's defenses to BSR's charges.

With regard to the 2003 merger and subsequent reorganizational activities, the relevant question is whether LGC, or its entities, either are or are not "legal entities" under RSA 5-B:5, I(a). What LGC believed about the requirements of RSA 5-B:5, I(a) or any advice from its attorney on that topic is not at issue. LGC cannot assert an advice-of-counsel defense to this issue, and thus it cannot impliedly waive the attorney-client protection with regard to this issue.

With regard to the return of surplus in the form of rate stabilization, the relevant question is whether LGC actions are in compliance with RSA 5-B:5, I(f). LGC argues that it acted in accordance with the law; BSR disagrees. The analysis and resolution of this question does not turn on what advice LGC received from any attorney, or what LGC believed the law required, or

how LGC came to that belief. Therefore, with regard to this issue, LGC cannot put the advice of its counsel "at issue," and it cannot waive the attorney-client privilege via an advice-of-counsel defense. The content of the communications between LGC's attorney and LGC is unrelated to either the prosecution or defense of BSR's allegations.

Finally, with regard to BSR allegations of other improper spending, the relevant question is whether RSA 5-B:5, I(f) permits LGC to maintain reserves for strategic priorities and the expected needs of the plan. Either such expenditures are permitted under the statute, or they are not. As with the two issues above, what advice LGC's attorney provided is irrelevant to LGC's defense. Either LGC's conduct was appropriate under RSA 5-B:5, I(f) or it was not. What LGC believed about the requirements of RSA 5-B:5, I(f), or its basis for those beliefs, is not at issue in this proceeding, and therefore LGC cannot raise an advice-of-counsel defense and it cannot therefore waive the privilege by implication.

IV. ***If*** **Waived, the Scope of the Attorney-Client Privilege Waiver Should be Limited to Certain Subject Matter, and Certain Periods of Time.**

Should the Hearing Officer conclude that an implied waiver has occurred, he should also conclude that the resulting waiver is limited to certain subject matter areas: LGC's state of mind, or *mens rea*, concerning (a) the 2003 reorganization (Section III, A of LGC's Answer); (b) the retaining of Pool member money for use in "rate stabilization", or the reduction in future rates (Section III, B of the Answer); or (c) the use of Pool monies for "strategic support" of the workers' compensation pool (Section IV, C of the Answer).

Subsequent communications between LGC and its counsel are irrelevant to the *mens rea* component, to the extent intent is an issue in the case at all. Construing a waiver beyond the period of time when the client was being advised by the attorney, as to the key facts, is both unnecessary and prejudicial.

V. *If* Waived, the Scope of the Waiver Only Applies to Advice Actually Given, and Does Not Waive Work Product.

Should the Hearing Officer conclude that an implied waiver has occurred, he should also conclude that the scope of the resulting waiver is limited to the materials actually given to the client.

In a case involving the purported waiver of attorney-client privilege and work-product privilege over a patent infringement fight, the Federal Circuit concluded that asserting the advice-of-counsel defense to a charge of willful infringement does not give an opponent unfettered discretion to work product material.

> The attorney-client privilege and the work-product doctrine, through related, are distinct concepts. Waiver of one does not necessarily waive the other, and in a case such as the one before the Hearing Officer, important distinctions must be made and the consequences of waiving one must be understood in the context of the other. By asserting the advice-of-counsel defense to a charge of willful infringement, the accused infringer and his/her attorney do not give their opponent unfettered discretion to rummage through all of their files and pillage all of their litigation strategies. [Citation omitted.] Work-product waiver extends only so far as to inform the court of the *infringer's* state of mind. Counsel's opinion is not important for its legal correctness… it is what the alleged infringer knew or believed, and by contradistinction not what other items counsel may have prepared but did not communicate to the client, that informs the court of an infringer's willfulness.

In re Echostar Communications Corporation, 448 F 3d 1294, 1303 (FedCir. 2006).

So-called "opinion" work product is entitled to the highest protection from disclosure, especially that work product which is never communicated to the client. "While an accused infringer may waive the immunity for work product that embodies an opinion in letters and memorandum communicated to the client, it does not waive the attorney's own analysis and debate over what advice will be given." In re Echostar, at 1303. "Thus, if a legal opinion or mental impression was never communicated to the client, than it provides little if any assistance

to the court in determining whether the accused knew it was infringing, and any relative value is outweighed by the policies supporting the work-product doctrine." Id.

Ordering access to anything beyond the specific advice and materials communicated to the client exceeds the proper scope of any implied waiver.

VI. *If* Waived, Any Order Issued Should be Strictly Limited in its Scope.

In light of the enormous importance attached to protection of the privileges, the question whether disclosure is warranted must be decided on a case-by-case basis, with specific focus on the context in which the disclosure (if any) occurred, and how the privilege is asserted. U.S. v. John Doe, 219 F 3d 175, 183 (2nd Cir. 2000). "[A] more limited form of implied waiver may be appropriate where disclosure occurred in a context that did not greatly prejudice the other party in the litigation." Id.

In this instance, the Bureau has made no case that a sweeping waiver of the privilege is necessary to protect it from prejudice, and disclosure should be strictly limited to the specific opinions given to the client, on limited topics, if any.

VII. An Advice-of-Counsel Defense Becomes Relevant Only During a Damages Portion of This Proceeding.

If, after a full and complete hearing on the merits, the Hearing Officer finds that LGC's actions violated some statutory provision, and thus moves this proceeding to an analysis of remedies and/or penalties, then the advice LGC received from counsel, and LGC's belief as to the appropriateness of its actions, could become relevant in examining its *mens rea*.

Until then, the Hearing Officer should protect the attorney-client privilege. "Proper resolution of the dilemma of an accused infringer who must choose between the lawful assertion of the attorney-client privilege and avoidance of a willfulness finding if infringement is found, is of great importance not only to the parties but to the fundamental values sought to be preserved

by the attorney-client privilege." Quantum Corporation v. Tandon Corporation, 940 F.2d 642, 643 (Fed.Cir. 1991) (accused patent infringer should not, without trial court's careful consideration, be forced to choose between waiving the privilege to protect itself from a *mens rea* finding, and maintaining the privilege, which risks a finding of intent if liability is found).

VIII. Conclusion

The Motion is premature. Forcing LGC to choose at this time between waiving the privilege, and forgoing a defense it may not need, is fundamentally unfair and violates due process. Further, LGC has yet to put the advice-of-counsel at issue, as its counsel's opinions are irrelevant to the liability issues before the Hearing Officer. Accordingly, the Motion should be denied.

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; AND
LOCAL GOVERNMENT CENTER WORKERS' COMPENSATION TRUST, LLC

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By Their Attorneys:
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Dated: February 3, 2012

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CERTIFICATE OF SERVICE

I certify that on the 3rd day of February, 2012, I forwarded copies of this pleading *via* E-mail to counsel of record.

/s/ William C. Saturley