

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; Paul G. Beecher;)
Peter J. Curro; April D. Whittaker; Timothy J. Ruehr;)
Julia A. Griffin; and John Andrews)

Case No: C2011000036

RESPONDENTS)

MEMORANDUM IN SUPPORT OF BSR’S MOTION TO CLARIFY

Petitioner, the Bureau of Securities Regulation (BSR), a part of the Corporations Division within the Department of State, originally intended to file this Memorandum in support of its Motion to Clarify seeking permission to withhold documents. The BSR has now reconsidered its position and is:

- producing some documents to the Respondents outright;
- producing some documents to the Presiding Officer in both redacted and unredacted form with the intent of asking the Presiding Officer to order release of the redacted versions after *in camera* review; and
- producing some documents to the Presiding Officer with the intent of asking the

Presiding Officer to allow the BSR to withhold the documents as privileged in their entirety again, after *in camera* review.

As many of the arguments concerning privilege remain applicable at this juncture, the BSR submits the following concerning the privileges asserted. The BSR will also circulate an updated Vaughn index.

Background

On December 29, 2011, the BSR filed a Motion for Clarification (Motion) seeking guidance from the Presiding Officer regarding numerous informal requests made by the LGC concerning the internal e-mail communications of BSR counsel. On January 9, 2012, LGC filed a Response to the BSR's Motion for Clarification (Response), ultimately requesting the Presiding Officer compel production or disclosure on the BSR's Vaughn Index of the internal e-mail communications of BSR counsel in addition to several other categories of documents LGC claims the BSR has improperly withheld and not indexed.

LGC Seek Informations that falls within the Attorney Client Privilege, the Work Product Doctrine and the Deliberative Privilege and is Exempt from Discovery

LGC's Response focuses on the theory that the internal e-mail communications of BSR counsel are not protected by the work product doctrine. In doing so, however, LGC attempts to divert attention from other grounds for the BSR's withholding such communications, only one of which includes the applicability of the work product doctrine. The internal communications of the BSR are not only protected by the work product doctrine but by several other types of privilege.

Deliberative Process Privilege

In contemplating LGC's requests and the different types of privileges applicable to the documents requested, the applicability of one specific privilege becomes readily apparent and

that is the privilege that protects the deliberative processes of committees, boards and prosecutors. This proceeding is an enforcement proceeding intended to determine whether LGC violated certain provisions of RSA 5-B and 421-B. As such, the internal documents and communications created by the BSR during its investigation and preparation of the above-referenced matter fall within the deliberative process privilege.

Applicability of the Deliberative Process Privilege

The deliberative process privilege is the most frequently invoked privilege in federal courts. *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). The purpose of the privilege is to protect the decision-making processes and procedures of government agencies and executive departments prior to enforcement. *Jena v. Clark*, 384 F.2d 979 (D.C. Cir. 1967) (indicating an interest in protecting “intra-governmental advisory and deliberative communications”). The privilege contains two substantive requirements: the material must be both pre-decisional and deliberative. *See in re Sealed Case*, 121 F.3d at 737. Pre-decisional material comprises communications that occur before the governmental agency makes a decision to prosecute a crime or enforce an administrative rule or a statute. Michael N. Kennedy, *Escaping the Fishbowl: A Proposal to Fortify the Deliberative Process Privilege*, 99 NW. U. L. REV. 1769, 1772-73 (2005). Deliberative communications include those communications that “reflect[] the advisory and consultative process by which decisions and policies are formulated.” *Army Times Publ’g Co. v. Dep’t of Air Force*, 998 F.2d 1067, 1070 (D.C. Cir. 1993). The internal e-mail communications of BSR’s counsel and administrators regarding the investigation of the above-

referenced matter are clearly pre-decisional and deliberative as they were generated in contemplation and preparation of the current action.¹

The New Hampshire Supreme Court has recognized the deliberative process privilege, albeit in the context of legislative deliberations. The analysis, however, is equally applicable to the administrative arena of the executive branch.

In the Speech and Debate Clause, the framers recognized that the public has an interest in permitting legislators to deliberate privately. It is “obvious ... that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front-page news.” *Department of Interior v. Klamath Water Users Protective Assn.*, 532 U.S. 1, 8-9, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001) (discussing deliberative process privilege under federal Freedom of Information Act). The public has an interest not in protecting government secrecy, but in “protecting open and frank discussion among those who make [decisions] within the Government.” *Id.* at 9, 121 S.Ct. 1060.

The ability to meet in private may be necessary, in some circumstances, for good decision-making. As one commentator has noted, it is “no more practical to require [a legislative] committee to formulate its final determination, which is often a report of several hundred pages, in the presence of public representatives than it would be to require an appellate court to prepare its opinion in the presence of counsel.” Singer, *supra* § 11:13, at 660.

Hughes v. Speaker of the New Hampshire House of Representatives, 152 N.H. 276, 292, 876 A.2d 736, 750 (2005).

There are three procedural requirements associated with the deliberative process privilege: (1) the official who has control over the requested information must assert the privilege formally; (2) the official asserting the privilege must have considered the information requested; and (3) the privilege claimed must be detailed in addition to reasons why the requested information falls within the scope of the privilege. *See in re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988). These three procedural requirements have been met in this case

¹¹ The Hearing Officer has already ruled that pre-decisional materials about the potential investigation of other pooled risks is not subject to discovery. Order of January 19, 2012 at 12.

because BSR counsel has clearly asserted the privilege after consideration of the information requested and has clearly explained in this pleading as well as prior pleadings why such information falls within the deliberative process privilege.

The importance of the deliberative process privilege and its application in this instance is evident by looking at the defined purpose of the privilege. The requirements of the deliberative process privilege are intended to ensure that candor in discussions relating to policy decisions is protected from the chilling effect brought on by the fear of disclosure of such discussions and deliberations while maintaining adequate governmental transparency. *In re Sealed Case*, 121 F.3d at 737. The disclosure of such information in the instant case would not only unnecessarily complicate the instant matter but would be detrimental to all future administrative actions taken by the BSR.

A ruling requiring disclosure of the BSR's decision making would undermine that decision making in this case and in all future cases. It would also be an aberration rendering the BSR the only agency among all other state administrative and prosecutorial agencies in the State that is required to make the kind of disclosure sought here without much more substantial showings of need and of improper purpose (e.g., selective prosecution). None of the lawyers defending in this action who were prior assistant attorneys general or federal prosecutors would have countenanced this assault on their private decision making.

This is Not a Case of Selective Prosecution, nor has the LGC even begun to Make the Showings Necessary to Justify Discovery related to this Issue.

The LGC raises a claim of selective prosecution against the BSR as both an affirmative defense and as support for its request to depose Mr. Lang and obtain information from the BSR,

the Secretary of State and the Professional Firefighters of New Hampshire (PFFNH).² LGC's reliance on the affirmative defense of selective prosecution claim is misplaced and unsupported.

LGC alleges that the BSR's decision not to prosecute other risk pools in New Hampshire at the very same time it pursues the LGC constitutes selective application of R.S.A. 5-B in violation of "the constitutional guarantee of equal protection and 'free and fair competition in the trades and industries . . .'" LGC Answer at 7 (*quoting* N.H. Const. Part I, Art. 83). The LGC has offered precious little in additional support of its affirmative defense beyond the obvious, that LGC is being pursued administratively now and other New Hampshire risk pools (e.g., Primex and School Care) are not being pursued now.

However, choosing to prosecute one party and not every party "is not, in and of itself, a constitutional violation." *In re Basani*, 149 N.H. 259, 263 (2003). In order to make a showing of selective prosecution, LGC must show that "(1) others similarly situated have not generally been prosecuted, *and* (2) the prosecution was based upon clearly impermissible discriminatory grounds such as race, religion or exercise of First Amendment rights." *Id* (emphasis supplied). The latter requirement has been interpreted to include a showing of "intentional or purposeful discrimination" *State v. Sheedy*, 125 N.H. 108, 110 (1984).

LGC's burden is an exceedingly high one and is the same protection some of the Respondents' counsel benefitted from when they were criminal prosecutors with the Attorney General's office. "Even in the criminal-law field, a selective prosecution claim is a *rara avis*. Because such claims invade a special province of the Executive-its prosecutorial discretion-[the U.S. Supreme Court has] emphasized that the standard for proving them is particularly

² The BSR understands that the LGC intends to depose Secretary of State William Gardner and has been informed of the BSR's objection to his deposition. The BSR expects the Hearing Officer will be called to rule on this issue in the near future.

demanding, requiring a criminal defendant to introduce 'clear evidence' displacing the presumption that a prosecutor has acted lawfully." *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 489 (1999). As the New Hampshire Supreme Court has put it, "[w]ithout evidence that the State has based its prosecution on an individual upon an unjust standard, we will not assume that prosecution resulted from intentional and purposeful discrimination in enforcement of the law. The bare assertion that others who violated the law in a similar manner were not prosecuted is insufficient to establish selective prosecution." *Basani*, 149 N.H. at 263.

LGC offers just such an insufficient "bare assertion" in support of its selective prosecution claim, stating only that the BSR "has ignored a similar complaint against other risk pools,"³ and that other risk pools in NH have "operating practices, which are the same as, or consistent with, many of the alleged violations raised in the Petition." LGC Answer at 7. Such conclusory and unsupported allegations fall far short of the required showing to establish even a *prima facie* selective prosecution claim sufficient to justify discovery.

LGC has offered no evidence to demonstrate that the "other risk pools" are similarly situated to LGC. At the outset, LGC's claim that the other risk pools use operating practices that are "consistent with" those employed by LGC is insufficient. LGC's answer admits to many of the allegations contained in the BSR's Complaint though it attempts to couch the violations of law as merely technical. This is particularly true regarding its corporate structure and policy of maintaining huge surpluses purportedly for purposes of rate stabilization. LGC has not demonstrated that other New Hampshire risk pools have the same corporate structure issues involving failed mergers with foreign corporations or the same policy of not returning surplus

³ Of course, one might ask what role the LGC had in encouraging a complaint against a competitor, if indeed a complaint exists.

funds to members. LGC simply cannot make the required "credible showing" that "similarly situated [entities] . . . were not prosecuted." *United States v. Armstrong*, 517 U.S. 456, 470 (1996).

Moreover, **and more importantly**, LGC faces an even more difficult hurdle in demonstrating "intentional or purposeful" discrimination based on a constitutionally protected classification. *Sheedy*, 125 N.H. at 110. As stated by the U.S. Court of Appeals for the First Circuit, "The essence of a selective prosecution claim is that a prosecutor has pursued a case for a constitutionally impermissible reason, such as the defendant's race, religion, or other characteristic cognizable under equal protection principles." *Martex Farms, S.E. v. U.S. E.P.A.*, 559 F.3d 29, 32 (1st Cir. 2009) (quotations and citations omitted). As in the *Martex Farms* case, LGC has failed "to make even an allegation that the [BSR] used such a constitutionally impermissible ground as the basis of its prosecution," rendering LGC's claim of selective prosecution "utterly without legal basis." *Id.* at 32-33. Indeed, it is difficult to imagine any constitutionally impermissible ground that could apply in a case where LGC has itself admitted to so many of the acts forming the basis for the BSR's decision to prosecute, claims of an "advice of counsel" defense notwithstanding.

In the present context, LGC seeks to use a selective prosecution claim to bootstrap its discovery request for the deposition of a non-party, Mr. Lang, and to justify discovery of documents from the organization he leads, the PFFNH. *See* LGC Motion for Issuance of a Subpoena at ¶ 8. However, the U.S. Supreme Court has made it clear that "a defendant who seeks discovery on a claim of selective prosecution must [first] show some evidence of both discriminatory effect and discriminatory intent," as well as a "credible showing" that similarly situated entities were not prosecuted. *United States v. Bass*, 536 U.S. 862, 863 (2002)

(quotations omitted). As stated above, LGC has not met this threshold showing, and, therefore, is not entitled to discovery. *Id.* at 864. *See also Armstrong*, 517 U.S. at 468, 471 ("The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.").

As a final matter, there is some doubt whether a selective prosecution claim is proper before a hearings officer in an administrative adjudicatory hearing. The Hearings Officer is empowered to hear the BSR's claims of violations of R.S.A. 5-B and R.S.A. 421-B. *See* R.S.A. 5-B:4-a, VI; R.S.A. 421-B:26-a. "A selective-prosecution claim is not a defense on the merits to the [administrative] charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *Armstrong*, 517 U.S. at 463. As such, LGC's separate claim against the BSR is not within the jurisdiction of the Hearings Officer. Just as LGC may not bring counterclaims against the BSR in this venue, LGC may not bring a selective prosecution claim; any such claims are properly the subject matter of a separate action brought in the appropriate state or federal court.

LGC Continues to Seek Documents LGC Is Aware Do Not Exist

Finally, in LGC's Response, it goes so far as to state that, "[a]mazingly," the BSR omits the fact that LGC has requested various other documents including "[e]-mail communications from Director Joseph Long, Deputy Director Jeffrey Spill, Staff Attorney Kevin Moquin, Forensic Financial Examiner Kevin Bannon, and E-mails to and from Secretary of State William Gardner" that the BSR has failed to produce or list on its Vaughn Index. *See LGC Resp. to BSR Mot. To Clarify* at ¶¶ 20-21. LGC omits the fact that the BSR responded, via e-mail, to each of these requests, clarifying for LGC that many of the documents requested, in fact, do not exist.

In a letter to LGC dated December 21, 2011, the BSR outlined many of the arguments

outlined in its prior e-mail communications with LGC as well as its Motion to Clarify. In addition, in that letter, the BSR specifically identified and addressed the documents requested by LGC in the list provided on December 6th.

Despite this letter, in its Response to the BSR's Motion, LGC implies that the BSR has ignored requests for the items referenced on the December 6th list when, in fact, the BSR has not only responded to the requests but has itemized its response to clearly and unequivocally identify whether the documents requested by LGC exist, and if so, why they are being withheld.

Conclusion

The information LGC seeks is clearly protected by various types of privileges including the deliberative process privilege. Further, apart from an apparent desire to delve into the inner workings of the governmental regulator tasked with ensuring LGC's legal and regulatory compliance, LGC has not articulated a clear reason why such documents are relevant to this proceeding let alone any defense LGC has or wishes to assert. Thus, the BSR requests that discovery sought under the guise of a selective prosecution affirmative defense not be permitted.

Dated this 6th day of February, 2012

The Bureau of Securities Regulations
State of New Hampshire
By its attorneys,
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Certificate

I hereby swear that the foregoing motion was provided to counsel of record on the below service list by hand or electronically, this 6th day of February, 2012.

/s/ Andru H. Volinsky

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