NEW HAMPSHIRE SUPREME COURT

Docket #2009-0215

Professional Firefighters of New Hampshire,
(APPELLEE)

v.

Local Government Center, Inc.
New Hampshire Municipal Association, LLC
Local Government Center Property-Liability Trust, LLC
Local Government Center HealthTrust, LLC
Local Government Center Workers Compensation Trust, LLC
LGC Real Estate, Inc.
(APPELLANT)



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**REPLY MEMORANDUM OF APPELLANT**

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July 27, 2009

Christopher H.M. Carter (Bar No. 12452)
Kevin E. Verge (Bar No. 18997)
Hinckley, Allen & Snyder LLP
11 South Main Street, Suite 400
Concord, NH 03301
Tel. (603) 225-4334

Appellants Local Government Center, Inc. ("LGC"), New Hampshire Municipal Association, LLC ("NHMA"), LGC Real Estate, Inc. ("LGC Real Estate"), LGC Property-Liability Trust, LLC ("LGC Property Liability Trust"), LGC HealthTrust, LLC ("LGC HealthTrust"), and LGC Workers Compensation Trust, LLC ("LGC Workers Compensation Trust") [collectively the "LGC Entities"] respectfully submit the following Reply Memorandum in connection with their appeal in this matter.

## I. NHMA and LGC Real Estate Should Not Be Held Subject to RSA 91-A

PFFNH argues that the question of whether NHMA and LGC Real Estate are subject to RSA 91-A is governed by this Court's decision in Professional Firefighters of New Hampshire v. HealthTrust, Inc., 151 N.H. 501 (2004). In fact, the central holding of the HealthTrust decision compels a conclusion that NHMA and LGC Real Estate are not "public bodies" within the meaning of RSA 91-A:1.

In HealthTrust, the Court concluded that "because HealthTrust *performs the essential government function of providing pooled insurance and pooled risk management programs* to political subdivisions, we hold that it is subject to the Right-to-Know Law." HealthTrust, 151 N.H. at 504-05 (emphasis added). Appellants do not dispute that LGC entities which provide pooled insurance and pooled risk management – namely, LGC Property Liability Trust and LGC HealthTrust[1] – would be deemed to perform essential government functions and, in accordance with the HealthTrust decision, be subject to RSA 91-A.[2] However, as the trial court found,

[1] Appellant LGC Workers Compensation Trust has merged into LGC Property Liability Trust.

[2] PFFNH implies that Appellants previously disputed that LGC Property Liability Trust, LGC HealthTrust, and LGC Workers Compensation Trust are subject to RSA 91-A. See PFFNH Memorandum of Law at 4-5. This is inaccurate. In the year before initiating the instant action, PFFNH subjected Appellants to numerous, far-reaching demands for information. Certain demands sought information from LGC Real Estate; Appellants responded that, for the same reasons argued in this appeal, LGC Real Estate is not subject to RSA 91-A. Appellants never argued that the HealthTrust decision did not apply to LGC Property Liability Trust, LGC HealthTrust, and LGC Workers Compensation Trust. It was not until PFFNH filed its Petition in this case that PFFNH argued that these entities, as well as NHMA and LGC Real Estate, are subject to RSA 91-A. In responding to the Petition, Appellants have

NHMA and LGC Real Estate do not provide pooled insurance or pooled risk management. NHMA provides lobbying and training support to LGC members, and LGC Real Estate owns and manages the real estate used by LGC. These activities have never been deemed essential government functions. Accordingly, NHMA and LGC Real Estate do not satisfy the core component of the standard set forth in HealthTrust for determining whether a quasi-public entity is subject to RSA 91-A

PFFNH tries to broaden the reach of the holding in HealthTrust by suggesting that RSA 91-A applies not only to entities that perform essential governmental functions, but also to entities that "assist in the performance" of such functions. However, nothing in HealthTrust or in any of this Court's prior decisions supports extending the reach of RSA 91-A in this manner. The HealthTrust decision is grounded in this Court's conclusion that because the political subdivision members of HealthTrust (now LGC) are individually subject to the Right-to-Know Law, it would create an "anomaly" to allow the members to avoid the law by forming an association to carry out their essential governmental functions. No such anomaly is created by holding that RSA 91-A does not apply to legal entities that are several steps removed from political subdivisions, that provide products and services routinely supplied by private entities, and that are not charged with performing essential governmental functions.

Finally, while PFFNH argues that "each" of the five factors identified in HealthTrust for gauging the application of RSA 91-A "applies with equal force" to NHMA and LGC Real Estate, this is not the case. NHMA and LGC Real Estate are not "comprised exclusively of political subdivisions," they do not manage money collected from LGC's members, and they do not, as noted, perform essential governmental functions. Although one might argue that NHMA and

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consistently maintained that NHMA and LGC Real Estate are the only LGC entities not covered by the HealthTrust decision.

LGC Real Estate operate for the sole benefit of political subdivisions that are members of LGC, and are governed by a Board comprised of public officials and employees, these factors alone do not tip the balance in favor of a finding that the entities are subject to RSA 91-A.

PFFNH argues that because NHMA and LGC Real Estate "enjoy tax exempt status (both State and Federal) reserved for government entities, it certainly cannot be the law that they are somehow shielded from the Constitutional command guaranteeing open government." PFFNH Memorandum at 6-7. This argument ignores the different purposes and background of the tax codes and RSA 91-A. As courts have recognized, due to the vastly different purposes advanced by the federal Freedom of Information Act ("FOIA"), on one hand, and tax laws, on the other, a finding that an entity constitutes a governmental agency for tax purposes does not require a finding that the entity is governmental agency within the meaning of FOIA.

For example, in United States v. City of Spokane, 918 F.2d 84 (9th Cir. 1990), the Ninth Circuit affirmed a ruling that the American National Red Cross ("Red Cross") is an instrumentality of the United States, and is thus immune from taxation by the City of Spokane ("the City"). Id. The City argued that the Red Cross could not be regarded as an instrumentality of the United States because the Ninth Circuit had previously held that the Red Cross is not an "agency" of the United States for purposes of the Freedom of Information Act. Id. at 88. In rejecting this argument, the Ninth Circuit reasoned as follows:

> [T]he City asserts that the Red Cross is not really a tax exempt instrumentality of the government, because we have said that it is not an agency for the purposes of the Freedom of Information Act. That is an astonishing proposition....We [previously held] that given the purposes and the background of the Freedom of Information Act, the Red Cross was not an agency within the meaning of that statute. To extrapolate from that holding to the area of the law which we must deal with here would be a serious logical and semantic error....It would insist upon...the fallacy that a word which has a meaning in one context must have the selfsame meaning when transplanted to an entirely different context. We must eschew that extrapolation.

Id.; accord Amoco Corp. v. Comm'r of Internal Revenue, 138 F.3d 1139, 1147 (7th Cir. 1998) (noting that Amtrak has been held to be "part of the government" for First Amendment purposes but "not an agency or instrumentality of the United States" for other purposes). As in City of Spokane, it would be a "serious logical and semantic error" to extrapolate from the mere fact that NHMA and LGC Real Estate are tax exempt entities to hold that they are, by virtue of this fact, subject to RSA 91-A. Accordingly, this Court should reject PFFNH's assertion that an entity is automatically subject to RSA 91-A simply by virtue of its status as a tax exempt organization.[3]

## II. Salary Information For Appellants' Employees Should Be Exempt From Disclosure

Regarding salary information for Appellants' employees, PFFNH argues that "LGC's self-serving characterization of its employees as 'private employees' is factually incorrect." PFFNH Memorandum at 9. Yet, the trial court concluded that Appellants' employees "are not employees of governmental entities," and that they "serve in roles that are traditionally private." App. I at 16. PFFNH ignores these findings, and fails to address how the competing public and private interests should be balanced where, as here, a demand is made for the salary information of private employees working for quasi-public entities.

Relying on Mans v. Lebanon School Board, 112 N.H. 160 (1972), PFFNH argues categorically that "salary information of employees working for an entity falling under 91-A is simply not subject to the privacy exemption." PFFNH Memorandum at 10. Mans does not

[3] For example, the following factors are taken into account to determine whether an entity is an instrumentality of one or more governmental units under 26 U.S.C. § 115: (1) whether the organization is used for a governmental purpose and performs a governmental function; (2) whether performance of its function is on behalf of one or more states or political subdivisions; (3) whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner; (4) whether control and supervision of the organization is vested in a public authority or authorities; (5) whether express or implied statutory or other authority is necessary for the creation and/or use of the organization, and whether this authority exists; and (6) the degree of financial autonomy of the entity and the source of its operating expenses. See Revenue Ruling 57-128, 1957-1 C.B. 311. This entails a separate analysis from the determination of whether an entity is subject to RSA 91-A.

support this argument. That decision focused narrowly on whether salary information for *public schoolteachers* fell within exemption in RSA 91-A:5, IV, for records pertaining to "personnel practices, confidential, commercial, or financial information, personnel, medical, welfare, and other files whose disclosure would constitute invasion of privacy." In Mans, the Court did not hold, or imply, that the exemption would not apply to salary information for employees of other entities that are subject to RSA 91-A. Indeed, in affirming the disclosure of the requested salary information, the Mans Court applied a balancing test, and held, on the specific facts of that case, that the public teachers' privacy interests in the confidentiality of their salary information was undercut by the fact that most public school districts already published salaries for individual teachers. In addition, the Court noted that the public interest in the disclosure of the salary information was enhanced by the fact that taxpayers needed access to the information in making appropriations for school purposes. Id. at 160. The Mans Court did not in any way foreclose the possibility that under different facts, the balancing of the competing interests would result in exempting employee salary information from disclosure under RSA 91-A:5, IV. This was amplified by Justice Grimes, who observed in his dissenting opinion that "[i]t would certainly be an invasion of privacy to publish the salary information of a person not a public employee." Mans v. Lebanon School Board, 112 N.H. 160, 165 (1972) (Grimes, J. dissenting).

As demonstrated in Appellants' Brief, a substantial number of decisions that were decided after Mans, and that involve facts analogous to those presented here, both identify the competing interests implicated by the PFFNH demand for salary information, and provide an appropriate framework for balancing those interests. These include News Group Boston, Inc. v. Nat'l R.R. Passenger Corp., 799 F. Supp. 1264 (D. Mass. 1992), in which the District Court concluded that the privacy interests of Amtrak employees in protecting the confidentiality of

their salary information outweighed the public interest in the disclosure of this information, and barred disclosure of the names and addresses of employees listed in Amtrak payroll records. Here, PFFNH has not identified any public interest that would be served by the wholesale disclosure of information identifying the names and salaries of Appellants' employees. Nor has PFFNH demonstrated that the public interest, if any, overrides the employees' interest in maintaining the confidentiality of this information. The information is not necessary for PFFNH, or the public generally, to understand the operations of the LGC entities. See Hopkins v. United States Dep't of Housing and Urban Development, 929 F.2d 81 (2nd Cir. 1991) (disclosure of payroll information affecting privacy interest "is permissible only if the information reveals something *directly* about the character of a government agency or official"). In this regard, it is noteworthy that LGC voluntarily disclosed the amount of its salary payments, and the number of employees to whom these payments were made. PFFNH has not made any showing that this disclosure is inadequate.

## III. PFFNH Is Not Entitled to Recover Its Attorneys Fees

Finally, the argument advanced by PFFNH in support of the trial court's fee award are not persuasive. While PFFNH filed the Petition to obtain information, PFFNH ignores that in the year prior to the Petition, Appellants made substantial efforts to respond to PFFNH's rapid-fire demands for information that varied widely in scope and content. As detailed in Appellants' Brief, no sooner had Appellants answered a demand for information issued by one PFFNH representative than a different representative would issue an entirely new demand. Both before and after PFFNH filed its Petition, Appellants tried in good faith to reach reasonable compromises with PFFNH, for example by proposing that certain materials be produced in redacted form, and that other information be produced under a confidentiality agreement.

PFFNH was generally unresponsive to Appellants' attempts at resolution and maintained an "all or nothing" posture throughout this dispute – i.e., produce everything or we will sue.

PFFNH has argued throughout that the HealthTrust decision commands Appellants to produce all of the information requested. This is not accurate, of course, as the HealthTrust decision does not address many of the issues raised by the PFFNH demands, including the two principal issues presented in this appeal: (1) whether NHMA and LGC Real Estate are subject to RSA 91-A; and (2) whether the statutory exemptions in RSA 91-A:5, IV applies to requests for employee salary information. Given the lack of clear guidance from this Court on the resolution of these issues, and the existence of cases from other jurisdictions which provide persuasive support for Appellants' position, it cannot be said that Appellants "knew or should have known" that the salary information which triggered the trial court's fee award fell outside the statutory exemption and had to be produced.

Respectfully submitted,

LOCAL GOVERNMENT CENTER, INC.

By their attorneys,

Dated: July 27, 2009

Christopher H.M. Carter (#12452)
Kevin E. Verge (#18997)
Hinckley, Allen & Snyder LLP
11 South Main Street, Suite 400
Concord, NH 03301-4810
Tel: (603) 225-4334
Fax: (603) 224-8350

## CERTIFICATE OF SERVICE

I, Christopher H.M. Carter, Esquire, hereby certify that on the date set forth above, the foregoing was mailed to all counsel of record.

Christopher H.M. Carter

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