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August 20, 2013

Via Electronic Mail

Marcus A. Manos, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201

RE: Freedom of Information Act Request dated July 25, 2013 to the Office of the
Governor of South Carolina

Dear Marc:

I am in receipt of your letter dated August 13, 2013. As an initial matter, HPSLES's FOIA request is not an effort "to circumvent the prohibition on discovery in the Procurement Case" as you suggest. As you are aware, FOIA provides a recognized avenue for HPSLES to acquire the documents needed during a Procurement Case. *See, e.g., Keith C. McCook, Procurement, in S.C. ADMIN. PRACTICE & PROCEDURE 293 (Randolph R. Howell ed., 2008).* Below is HPSLES's response to the objections you raised:

First, you claim that the "threshold issue" is the breadth and vagueness of HPSLES's requests because of the phrase "relating in any way to." HPSLES maintains that this language is appropriate and does not make its requests overbroad. Rather, this language modifies a sufficiently specific type of information, document, or event. *See, e.g., Cardenas v. Dorel Juvenile Grp., Inc., 230 F.R.D. 611, 623 (D. Kan. 2005)* ("When, however, the omnibus phrase modifies a sufficiently specific type of information, document, or event, rather than large or general categories of information or documents, the request will not be deemed overly broad on its face."). By way of example, Request No. 6 seeks:

6. All records, including, but not limited to, any memoranda, reports, analyses, audits, meeting minutes, notes, photographs, videos, audio recordings, working papers, data, correspondence, and communications in any form, including, without limitation, emails, *relating in any way to* efforts to appropriate funding, lack of funding, and/or difficulty in obtaining funding in connection with Contract 07-S7279, including, but not limited to, all Forms OCSE-396A and all initial advance planning documents, advance planning

documents, and advance planning document updates completed, submitted, or provided by the State of South Carolina to the federal government.

Therefore, the phrase “relating in any way to” modifies a specific event, *i.e.*, the State’s efforts to appropriate funding, lack of funding or difficulty with funding the CFS Contract. The term does not modify a general category of things or events and the request is not overly broad on its face. In fact, without complete knowledge of what the State did to appropriate funding for the project or the Governor’s Office involvement in that funding, it is difficult to see how HPSLES could craft this request more concisely. *See Bayer AG v. Sony Elecs., Inc.*, 202 F.R.D. 404, 407 (D. Del. 2001) (request for “documents relating to the testing of the accused products and of the metal powders used in the accused products” not overbroad because without knowledge of what tests defendant performed, plaintiff could not craft the craft a more precise request). Notably, in the case cited in your letter, the Court’s comment was “of no moment, since the federal agency responded without objecting to the over breadth of the request.” *Massachusetts v. U.S. Dept. of Health & Human Servs.*, 727 F. Supp. 35, 36 n.2 (D. Mass. 1989). Without waiving its position, HPSLES agrees that you may interpret the phrase “relating in any way to” as “refers or relates to” the specific information, document, or event at issue in the request.

Second, you ask HPSLES to provide search terms to assist you in retrieving electronic mail from potential custodians. In light of the Governor’s Office knowledge of this project and the practices and procedures of the Office, it has a duty to develop its own list of search terms that are reasonably designed to capture information responsive to HPSLES’s requests. To that end, HPSLES requests that the Governor’s Office search for electronic mail that is responsive to HPSLES’s requests.¹ HPSLES also requests that the Governor’s Office: (1) provide a list of the custodians whose electronic mail was searched, (2) provide a list of search terms used (including boolean operators), and (3) confirm that searches included full text and header searches, to include the subject line, and searches of any attachments. HPSLES reserves the right to provide additional search terms or to request additional searches.

Third, your letter mentions a concern about the review and production being time-consuming. HPSLES would propose that the Governor’s Office consider producing the documents in a “Reading Room” to allow HPSLES to review the documents before they have been reviewed by the Governor’s Office.

To the extent that any records reside in databases that HPSLES has access to, such as SharePoint, HPSLES agrees that the State does not need to search those databases for responsive documents. However, to ensure that HPSLES is aware of what databases you presume are “common databases,” please identify the database(s) that fall within this category. As you know, you have objected to HPSLES reviewing certain State e-mail accounts on a server you asked that we take possession of in light of your concern about potentially privileged material in them. As we

¹ HPSLES demands that, in searching electronic mail, the Governor’s Office does not restore any backup servers containing HP’s internal emails and does not search or access any email accounts for HP users, including HP contractors, on any restored servers, which may contain emails protected by the attorney-client privilege and/or the work product doctrine.

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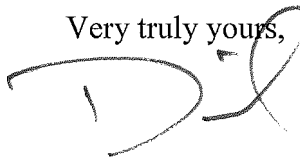
discussed on August 9, we expect your client to review those e-mail accounts for documents responsive to HPSLES's FOIA requests.

Given that a hearing on the merits in the Procurement Case is a little over two months away, I would ask that if the above does not resolve your objections and concerns, that you let me know by the end of business on Thursday, August 22. I also ask that the Governor's Office make responsive document available on a rolling basis immediately and that you kindly estimate for us when the recipients expect the productions to be complete.

If despite this reply, the Governor's Office is still not prepared to respond on a timely basis to these requests, HPSLES will have no choice but to pursue a motion to compel.

Thank you in advance for your cooperation in this matter. If you have questions or want to discuss, please feel free to call me.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'D. Dukes', with a large, stylized 'D' and a flourish at the end.

David E. Dukes

DED:ask