

APPEAL NO. 2009-SCC-0031-CIV

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**IN THE  
SUPREME COURT  
OF THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

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**CHRISTINA-MARIE SABLAN,**  
Plaintiff-Appellee,

vs.

**BENIGNO R. FITIAL, in his official capacity as GOVERNOR of the  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,  
ELOY S. INOS, in his official capacity as SECRETARY OF FINANCE,**  
Defendants-Appellants

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**SUPREME COURT NO. 2009-SCC-0031-CIV  
SUPERIOR COURT NO. 09-0066E**

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**EXCERPTS OF RECORD  
Vol. II**

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Braddock J. Huesman  
Assistant Attorney General  
Office of the Attorney General  
Hon. Juan A. Sablan Memorial Bldg., 2nd Fl.  
Caller Box 10007, Capital Hill  
Saipan, MP 96950-8907  
Telephone: (670) 664-2341  
Fax: (670) 664-2349

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1 Braddock J. Huesman, # F0367  
Assistant Attorney General  
2 OFFICE OF THE ATTORNEY GENERAL  
Hon. Juan A. Sablan Memorial Bldg., 2nd Fl.  
3 Caller Box 10007, Capital Hill  
4 Saipan, MP 96950-8907  
Telephone: (670) 664-2341  
5 Fax: (670) 664-2349



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Dora Decena

6 Attorney for Defendants Benigno R. Fitial, Eloy S. Inos,  
7 and Gregory Baka.

8  
9 IN THE SUPERIOR COURT  
10 FOR THE NORTHERN MARIANA ISLANDS

11  
12 **CHRISTINA-MARIE E. SABLAN,**

CIVIL ACTION NO. 09-0066 (E)

13 **Plaintiff**

14 vs.

**DEFENDANTS' MOTION TO DISMISS  
AND INCORPORATED MEMORANDUM  
OF POINTS AND AUTHORITIES  
[COM. R. CIV. P. 12(6) ]**

15 **BENIGNO R. FITIAL, in his official  
16 capacity as GOVERNOR of the  
COMMONWEALTH OF THE  
17 NORTHERN MARIANA ISLANDS,  
ELOY INOS, in his official capacity as  
18 SECRETARY OF FINANCE, and  
GREGORY BAKA, in his official  
19 capacity as ACTING ATTORNEY  
20 GENERAL,**

Date: Thursday, March 26, 2009  
Time: 1:30 p.m.  
Judge: Hon. David A. Wiseman

21 **Defendants**  
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**MOTION**

Defendants Benigno R. Fitial (the “Governor” or “Defendant Fitial”), Eloy S. Inos (“Secretary” or “Defendant Inos”), and Acting Attorney General Gregory Baka (“Acting Attorney General Baka” or “Defendant Baka”) (collectively, the “Defendants”) move to dismiss portions of the Complaint by Representative Christina-Marie E. Sablan (“Plaintiff” or “Rep. Sablan”) in the above entitled action on the grounds that Plaintiff has failed to state a claim upon which relief can be granted. Defendants submit this motion pursuant to Rule 12(b)(6) of the Commonwealth Rules of Civil Procedure.

**FACTS**

On October 16, 2008, Defendant Fitial received an Open Government Act (hereinafter sometimes referred to as the “Act” or “OGA”) request, Exhibit “A” to Plaintiff’s complaint, asking for copies of: (1) all contracts related to the [lawsuit against the federal government under Covenant Section 903] (hereinafter “903 Litigation”); (2) documents detailing payments made on said contracts; (3) documents identifying the source(s) of funding for the 903 Litigation; and (4) documents identifying the department(s) or of the CNMI government that might have had funds reprogrammed due to the 903 Litigation.

On October 24, 2008, Rep. Sablan received a response from the Governor through the Acting Attorney General, Gregory Baka.<sup>1</sup> In the October 24 letter, Defendant Baka denied Plaintiff’s request citing 1 CMC § 9918(a)(8), the litigation exception to the Open Government Act. Defendant Baka identified that the funds used to pay for the suit came out of the Governor’s operating account.

On December 11, Plaintiff sent another Open Government Act request, but this request was addressed to Defendant Inos. That request asked for, substantially, the same documents

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<sup>1</sup> See Exhibit B to Plaintiff’s complaint (“I write in response to your letter to the Governor”).

1 with the addition of “all documents” with the words or phrases “Jenner” and “Block.”

2 On December 19, 2008, Plaintiff received a letter from Defendant Inos declining to  
3 produce the requested documents for substantially similar reasons as the Governor had proffered,  
4 noting that they could be disclosed once the 903 Litigation was no longer pending.  
5

6 Plaintiff filed the instant suit and requested not only mandamus relief, but costs and fees  
7 as well.

### 8 STANDARD OF REVIEW

9 Under Rule 12(b)(6), [d]ismissal is proper if it appears beyond doubt that the plaintiff can  
10 prove no set of facts in support of his claim which would entitle him to relief.”<sup>2</sup> Factual  
11 argument is inappropriate in a Rule 12(b)(6) motion because the motion only tests the legal  
12 sufficiency of the complaint. Thus, in undertaking its analysis, “the court must accept the  
13 allegations in the complaint as true and construe them in the light most favorable to the  
14 plaintiff.”<sup>3</sup> Legal conclusions, however, need not be taken as true “merely because they are cast  
15 in the form of factual allegations.”<sup>4</sup> Dismissal is warranted where the complaint lacks a  
16 cognizable legal theory or where the complaint presents a cognizable legal theory yet fails to  
17 plead essential facts under that theory.<sup>5</sup> In spite of the deference the court is bound to pay to the  
18 plaintiff’s allegations, it is not proper for the court to assume that “the [plaintiff] can prove facts  
19 which [he or she] has not alleged, or that the defendants have violated the ... laws in ways that  
20 have not been alleged.”<sup>6</sup> While only requiring a short and plain statement of the claim,  
21  
22  
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24 <sup>2</sup> See *Govendo v. Micronesian Garment Mfg., Inc.*, 2 NMI 270, 283 (1991).

25 <sup>3</sup> *Id.*

26 <sup>4</sup> *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir.1987) (quoting *Western Mining Council v. Watt*,  
643 F.2d 618, 624 (9th Cir. 1981)) (in parenthesis); see also *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55  
(9th Cir. 1994).

27 <sup>5</sup> See *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984); *Doe I v. The Gap, Inc.*,  
No. CV-01-0031, 2001 WL 1842389 \*1 (D.N.Mar. I. Nov. 26, 2001).

28 <sup>6</sup> *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519,

1 Rule 8(a)(2) is not such a liberal requirement that purely conclusory statements can survive a  
2 motion to dismiss under Rule 12(b)(6).<sup>7</sup> Finally, if facts or allegations presented by plaintiffs are  
3 contradicted by the facts set out in the exhibits attached to or incorporated in the pleadings, the  
4 court need not accept them as true.<sup>8</sup>

### 6 OVERVIEW

7 There are several problems with Plaintiff's suit as currently before the Court. Defendant  
8 Baka, as demonstrated in Plaintiff's pleading, never received any Open Government Act request.  
9 As nothing was requested of him, it is improper to name him as a defendant. Moreover, nothing  
10 in Plaintiff's complaint and none of the attachments thereto indicate that that Defendant Baka did  
11 anything other than offer advice to a client. Additionally, some of the relief requested by the  
12 petition is not available under the statute and is, therefore, improper.

### 14 ARGUMENT

15 **Acting Attorney General Baka could not have violated the Open Government Act as no**  
16 **request was made of him.**

17 Upon examination of Plaintiff's complaint, one thing is clear: she never requested  
18 anything from Acting Attorney General Baka. The complaint, and exhibits attached thereto,  
19 reveal that Plaintiff sent two letters, one to the Governor and one to Secretary Inos.<sup>9</sup> No other  
20 requests, according to the face of the complaint and its exhibits, were ever made. Importantly,  
21 the Open Government Act provides that: "[w]ithin 10 days of a *request* all public records shall  
22 be available for inspection . . ."<sup>10</sup> As no request was made of Acting Attorney General Baka, it is

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24  
25 526 (1983).

26 <sup>7</sup> *Miller v. Continental Airlines*, 260 F.Supp.2d 931, 935 (N.D. Cal. 2003).

27 <sup>8</sup> *United States ex rel. Wilkins v. N. Am. Constr. Corp.*, 173 F.Supp.2d 601, 617 (S.D. Tex. 2001) (*citing*  
*Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995)).

28 <sup>9</sup> See PLAINTIFF'S PETITION FOR MANDAMUS, DECLARATORY AND INJUNCTIVE RELIEF, AND OTHER RELIEF.

<sup>10</sup> 1 CMC § 9917(a).

1 impossible to hold him responsible for not complying with the Act.

2 In fact, there is only one factual allegation against Acting Attorney General Baka, that he  
3 wrote a letter refusing Plaintiff's OGA request made to the Governor.<sup>11</sup> As noted earlier,  
4 however, that letter was written on behalf of the Governor, the letter itself so states.<sup>12</sup> The sole  
5 basis for Plaintiff's claims against Acting Attorney General Baka, therefore, must be in his  
6 capacity as attorney and provider of legal advice. It is improper to maintain a suit against  
7 an attorney for giving legal advice (outside of the obvious malpractice suit).

8 Thus, Rep. Sablan is attempting to sue an attorney for engaging in the practice of law,  
9 nothing more. Acting Attorney General Baka, however, has no duty to Plaintiff because  
10 "the [c]reation of a duty in favor of an adversary of the attorney's client would create  
11 an unacceptable conflict of interest. Not only would the adversary's interests interfere with  
12 the client's interests, the attorney's justifiable concern with being sued for negligence would  
13 detrimentally interfere with the attorney-client relationship."<sup>13</sup>

14 Further, Plaintiff cannot and did not allege that Acting Attorney General is subject to  
15 the Act because, without making a request of the Acting Attorney General, Plaintiff has no idea  
16 whether the Office of the Attorney General has any documents responsive to her request.  
17 Generic statements that she received a letter from Defendant Baka on behalf of the Governor,  
18 Defendant Baka's client, do not constitute a request on her part or alleviate her need to actually  
19 make a request of Defendant Baka.<sup>14</sup> Moreover, as Plaintiff never requested documents, she  
20 cannot and does not allege whether or not the Office of the Attorney General is even in  
21

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25 <sup>11</sup> See PLAINTIFF'S PETITION FOR MANDAMUS, DECLARATORY AND INJUNCTIVE RELIEF, AND OTHER RELIEF.

26 <sup>12</sup> See *id.*, EXHIBIT "B."

27 <sup>13</sup> *Myers v. Cohen*, 687 P.2d 6, 16 (Haw. 1984).

28 <sup>14</sup> *Cf. Thomas v. Office of U.S. Attorney for Eastern Dist. of New York*, 171 F.R.D. 53 (E.D.N.Y. 1997)  
(in explaining FOIA remedies the court held that: "the FOIA specifies the administrative remedies which a person  
seeking to gain information within its scope must exhaust before bringing an action in federal court. **The requester  
must make a request to the appropriate agency.**").

1 possession of the documents she seeks. Thus, it is impossible for this court to grant a remedy  
2 as to Acting Attorney General Baka.

3 For example, this Court, in *Torres v. Fernandez*, has held that: “[b]ecause the part of the  
4 OGA which deals with the inspection of public records requires only that “the officer having  
5 custody” of the records produce those documents subject to inspection for the requesting party,  
6 any injunction issuing from this Court enforcing said provision could not plausibly apply to those  
7 individuals not exercising custody over the requested documents.”<sup>15</sup> In *Torres*, this Court  
8 recognized that the attorney-client relationship doesn’t indicate that the attorney is an “officer  
9 having custody” of the records sought.<sup>16</sup> Nothing in Plaintiff’s suit indicates that Acting Attorney  
10 General was acting in any capacity other than the Governor’s attorney. Absent a formal request  
11 to the Office of the Attorney General, Plaintiff cannot maintain an action, and this Court cannot  
12 issue an order, against the Office of the Attorney General or the Attorney General proper.

13  
14  
15 **Plaintiff Requested Improper Relief.**

16 In Paragraph 5 of her request for relief, Rep. Sablan asked this Court to “[h]old  
17 defendants personally liable for all costs awarded to Plaintiff in connection with this legal action,  
18 in addition to any civil penalties deemed reasonable by this court.” This is an improper request.  
19 There are only two penalty provisions contained in the Act: section 9915; and section 9917(c).  
20

21 Rep. Sablan requests that the fees she is seeking be borne solely by the defendants in their  
22 individual capacities. Although section 9918 gives Plaintiff, as a citizen, standing to seek  
23 enforcement of the requirements of the Act, she is only a “real party in interest” in so far as she is  
24 able to recoup her expenses for forcing compliance in a successful OGA action. A “real party in  
25

26  
27 <sup>15</sup> ORDER GRANTING DEFENDANTS’ MOTION TO DISMISS IN PART [AND] GRANTING PLAINTIFF’S MOTION FOR  
SUMMARY JUDGMENT IN PART, Civil Action No. 07-0039, p. 6 Ins. 3-6.

28 <sup>16</sup> *See id.*, at p. 6, Ins. 7-10.

1 interest” refers not to an interest common to the public at large, but rather to a direct interest in  
2 the subject matter in the action by one entitled to reap the benefits of successful prosecution  
3 thereof.<sup>17</sup> Thus, although, if successful in her prosecution of this suit, she is entitled to recoup  
4 her expenses, Rep. Sablan has no such direct interest in, or entitlement to, any other funds she  
5 seeks to recover from defendants personally. This is so because the interest conferred upon a  
6 citizen pursuant to section 9918 is limited to seeking judicial enforcement of the Act while  
7 section 9917(c) is limited to noncriminal infractions (penalties that cannot be brought by a  
8 citizen). Moreover, as penalties are not enforceable by the public at large and Plaintiff has not  
9 alleged a violation of the open meeting provisions, Plaintiff has no right to request said relief.  
10 This is confirmed when one looks at the Act.  
11

12  
13 Section 9915(a) of the Act is the only section that deals with personal liability. This  
14 section only deals with members of governing bodies who violate the open meeting provisions of  
15 the Act.<sup>18</sup> Thus, section 9915(a) authorizes civil penalties that are to be personally paid if a  
16 “member of the governing body who attends a meeting . . . in violation of any provision of this  
17 chapter.”  
18

19 Section 9915(b) allows for the prevailing party to recoup from a public agency any costs  
20 and fees expended in prosecuting an action, such as the case at bar, for violations of the Act.  
21 Notably, however, this section is silent on personal liability for the government defendant.  
22 Moreover, inclusion of personal liability in one subsection and the absence in another is a clear  
23 indication that the legislature thought personal liability in one instance (violating open meetings)  
24 was warranted and not in the other (losing a suit to compel compliance).  
25

26 The only other part of the Act that deals with noncriminal penalties (as opposed to civil  
27

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27 <sup>17</sup> *Janssen v. Guaranty Land Title Co.*, 571 S.W.2d 702, 706 (Mo.App.1978).

28 <sup>18</sup> See 1 CMC § 9915(a).

1 fines) is contained in section 9917(c). It is clear, however, that this section deals with  
2 noncriminal fines that are not imposed by members of the public. Thus, the statute is silent as to  
3 personal liability on the part of individual members for refusing to comply with a document  
4 request. This court has no jurisdiction to impose remedies for violations of the Act that the  
5 legislature has either deliberately or inadvertently omitted.<sup>19</sup> The individual Defendants are not  
6 personally liable for any alleged violations of the Act as it pertains to document requests.  
7

8 **To the Extent Required, Defendants are entitled to qualified immunity**

9 Qualified immunity is “an entitlement not to stand trial or face the other burdens of  
10 litigation.”<sup>20</sup> The privilege is “an *immunity from suit* rather than a mere defense to liability; and  
11 like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.”  
12 As a result, “[the U.S. Supreme Court has] repeatedly . . . stressed the importance of resolving  
13 immunity questions at the earliest possible stage in litigation.”<sup>21</sup> The Supreme Court has held  
14 that the denial of a claim of qualified immunity is immediately appealable under the collateral  
15 order doctrine.<sup>22</sup>  
16

17 Qualified immunity is available to officials “who err in their duties so long as the mistake  
18 is one that a ‘reasonable’ officer could have made.” This standard benefits the official,  
19 “protecting ‘all but the plainly incompetent or those who knowingly violate the law[.]’”<sup>23</sup> Thus, a  
20 court asked to rule on qualified immunity must consider this threshold question: “Taken in the  
21 light most favorable to the party asserting the injury, do the facts alleged show the officer's  
22  
23  
24

25 <sup>19</sup> *Hawkins v. City of Fayette*, 604 S.W.2d 716, 725 (Mo.App.1980).

26 <sup>20</sup> *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

27 <sup>21</sup> *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (*per curiam*).

28 <sup>22</sup> *Mitchell*, 472 U.S. at 526.

<sup>23</sup> *Rayhand*, 2003 MP 12 at ¶ 65(citations omitted).





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 Julia W Ilo

1 GREGORY BAKA # F0199  
 Acting Attorney General  
 2 BRADDOCK J. HUESMAN # F0367  
 Assistant Attorney General  
 3 OFFICE OF THE ATTORNEY GENERAL  
 Hon. Juan A. Sablan Memorial Bldg., 2nd Fl.  
 4 Caller Box 10007, Capital Hill  
 Saipan, MP 96950-8907  
 5 Telephone: (670) 664-2341  
 Fax: (670) 664-2349  
 6 E-mail: gbaka79@yahoo.com

7 Attorneys for Respondents Benigno R. Fitial and Eloy S. Inos

8  
 9 IN THE SUPERIOR COURT OF THE  
 10 COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS  
 11

12 CHRISTINA-MARIE SABLAN,

13 Petitioner,

14 vs.

15 BENIGNO R. FITIAL, in his official  
 capacity as GOVERNOR of the  
 16 COMMONWEALTH OF THE  
 NORTHERN MARIANA ISLANDS,  
 17 and ELOY INOS, in his official capacity  
 as SECRETARY OF FINANCE,

18 Respondents.  
 19

CIVIL CASE NO. 09-0066 E

**STATUS CONFERENCE  
 STATEMENT**

Date: Thursday, 14 May 2009  
 Time: 1:30 p.m.  
 Judge: Hon. David A. Wiseman

20  
 21  
 22 **COME NOW RESPONDENTS** Benigno R. Fitial and Eloy S. Inos,<sup>1</sup> pursuant to  
 23 an order of the Court dated 8 May 2009 that a status conference hearing will be held  
 24

25 <sup>1</sup> Acting Attorney General Gregory Baka was dismissed as a Respondent  
 by the Court on Friday, 27 March 2009 but nevertheless remains listed on the caption  
 of the Court's two most recent orders. Respondent Inos was confirmed as CNMI  
 Lieutenant Governor on 1 May 2009 and is no longer Secretary of Finance.

1 in Courtroom 223A, the courtroom of the Honorable David A. Wiseman, located  
2 at the Guma Hustisia • Imwal Aweewe • House of Justice, Susupe, Saipan, and provide  
3 the following statement concerning the items to be discussed. See Order at 2, lines 3 to 5  
4 (“The parties are ordered to appear and be prepared to discuss the enumerated items listed  
5 in the Privilege Log and to what extent the Open Government Act, specifically  
6 § 9919(a)(8) and § 9918(c), restricts the release of those documents.”).<sup>2</sup>  
7

### 8 OPEN GOVERNMENT ACT LITIGATION EXEMPTION

9 As set forth in the Respondents’ Privilege Log pleading filed Friday, 24 April 2009,  
10 including legal authority in support of its claims of exemption under the Open Government  
11 Act (OGA), each of the 34 enumerated Public Records, as defined by 1 CMC § 9902(f), is  
12 subject to the OGA *Litigation Exemption*, 1 CMC § 9918(a)(8).<sup>3</sup>

13 The Litigation Exemption applies to the Commonwealth’s lawsuit under Covenant  
14 Section 903 in the U.S. District Court for the District of Columbia, and grants the CNMI  
15 the same absolute protection from its adversaries that the federal courts in the District  
16 of Columbia provide for the litigants before them, the right to keep litigation budgets and  
17 expenses secret from the opposing party. See, e.g., *Banks v. Office of the Senate*  
18 *Sergeant-at-Arms and Doorkeeper*, 222 F.R.D. 7, 13 (D.D.C. 2004) (“assessing one’s  
19 settlement posture by knowing what one’s opponent is paying counsel is not a legitimate  
20

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21 <sup>2</sup> The undersigned became aware of the hearing this morning through a newspaper  
22 article. Ferdie de la Torre, “Sablan, parties directed to prepare for OGA dialogue,” Saipan  
23 Tribune, Wed. May, 13, 2009, available at  
<http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=90234> Lead counsel  
is off-island at a Ninth Circuit oral argument, and today moved for a continuance.

24 <sup>3</sup> Additionally, the seven billing invoices of Jenner & Block, LLP are subject to the  
25 OGA *Deliberative Process Exemption*, 1 CMC § 9918(a)(7), incorporating the attorney  
work-product privilege and attorney-client privilege.

1 use of discovery; discovery seeks relevant evidence, not ammunition for settlement  
2 discussions, as welcome as they may be”); *see also Robinson v. Duncan* 255 F.R.D. 300  
3 (D.D.C. 2009) (litigation financial records not relevant for evidence purposes), *cited in*  
4 Respondents’ Privilege Log at 3, nn. 3 & 5 (N.M.I. Super. Ct. filed Apr. 24, 2009).

5 The OGA Litigation Exemption is an absolute bar to release of the subject Public  
6 Records. Title One of the Commonwealth Code, Subsection 9918(a)(8) provides as  
7 follows:

8 **§ 9918(a)(8) Certain personal and other records exempt.**

9 (a) The following are exempt from public inspection and copying:

- 10 \* \* \* \*

11 (8) Records which are relevant to a controversy to which an agency is  
12 a party but which records would not be available to another party under the rules of  
pretrial discovery for causes pending in the courts.

13 1 CMC § 9918(a)(8). This language is almost identical to the Revised Code of  
14 Washington. In that state, the applicable provision reads:

15 **Certain personal and other records exempt.**

16 (1) The following are exempt from public inspection and copying:

- 17 \* \* \* \*

18 (j) Records which are relevant to a controversy to which an agency is a party  
19 but which records would not be available to another party under the rules of pretrial  
discovery for causes pending in the superior courts.

20 RCW 42.17.310(1)(j). As can be seen, the only change in the CNMI version from that  
21 of Washington state is the removal of the penultimate word “superior” modifying courts.  
22 As interpreted by the courts of that state, “controversy” under RCW 42.17.310(1)(j)  
23 encompasses not only present litigation, but also anticipated litigation and past litigation.  
24 *Dawson v. Daly*, 120 Wash. 2d 782, 791, 845 P.2d 995 (1993), *cited in Kleven v. King*  
25 *County Prosecutor*, 112 Wash. App. 18, 24 n.3, 53 P.3d 516 (2002).

1 Hence, under the plain language of the OGA *Litigation Exemption*, 1 CMC  
2 § 9918(a)(8), disclosure of the 34 enumerated Public Records is completely barred.

3  
4 **COURT-ORDERED DISCRETIONARY DISCLOSURE**

5 As urged by the Petitioner, the Court has inquired about court-ordered discretionary  
6 disclosure of the documents covered under the Litigation Exemption, under the provisions  
7 of Title One of the Commonwealth Code, Subsection 9918(c), which provides as follows:

8 (a) Inspection or copying of any specific records exempt under the provisions  
9 of this section may be permitted if the Commonwealth Superior Court finds, after a  
10 hearing with notice thereof to every person in interest and the agency, that the  
exemption of such records is *clearly unnecessary* [;] (sic) to protect . . . any vital  
governmental function.

11 1 CMC § 9918(c) (emphasis added).<sup>4</sup> Hence, the burden is on the Petitioner to establish  
12 that invocation of the Litigation Exemption is “clearly unnecessary” to protect the vital  
13 governmental function of litigating its cases in the courtroom, and for the Court to order  
14 disclosure of the records absent such proof would be an abuse of discretion.

15 The Petitioner cannot make such a showing while the Covenant Section 903  
16 litigation remains *sub judice* in the U.S. District Court for the District of Columbia since  
17 oral argument on 12 March 2009. Whether that court rules by July 2009 or September  
18 2009, or sooner or later, and whether the U.S. Department of Homeland Security carries on  
19 its Transition Program regulations for workers and investors until September 2009 or acts  
20 “promptly” by this summer, and whether or not the Transition Program Effective Date  
21 (TPED) is legislatively postponed beyond 28 November 2009 in light of economic realities  
22 resulting from belated promulgation of regulations, the CNMI’s Covenant Section 903  
23 Litigation remains at the forefront of the possibility of the CNMI Department of Labor

24 \_\_\_\_\_  
25 <sup>4</sup> Reference to an individual’s right of privacy has been omitted with an ellipsis  
as inapplicable to the 34 Public Records listed in the Privilege Log exhibit.

1 retaining its institutional self-government in that sphere. Accordingly, if a preliminary  
2 injunction is granted in the 903 Litigation, the likelihood of an appeal by DHS to the U.S.  
3 Court of Appeals for the District of Columbia would be high.

4 Under such circumstances, secrecy of the CNMI litigation budget remains essential  
5 and indispensable to the vital governmental function of litigating its case in the courtroom  
6 with a maximum chance of success.

7 By no means can this tactical litigating information be deemed "*clearly*  
8 *unnecessary* to protect any vital governmental function."

9 Nor does the liberal construction of open records provisions, and strict construction  
10 of disclosure exceptions, set forth in the final paragraph of 1 CMC § 9901, permit a  
11 contrary result. As set forth above, there is no ambiguity whatsoever that the Litigation  
12 Exception applies, so nothing to construe.

13 The Litigation Exception is vital to the ability of the CNMI Office of the Attorney  
14 General (OAG) or outside counsel to successfully represent the CNMI on a par with all  
15 other litigation adversaries. This case is ultimately about the power of the OAG to  
16 perform its constitutional duties to represent the people of the CNMI, against those who  
17 would run roughshod over the OAG, Commonwealth, and its people, by denying solely to  
18 the lawyers for the government the ability to preserve a confidence that is safeguarded for  
19 every other litigant that comes before this honorable court and any court.

20 The position advocated by petitioner would eviscerate the ability of the OAG and  
21 any outside lawyers to stand toe-to-toe against strong, well-financed, and aggressive  
22 litigators, of whom the U.S. Department of Justice, the largest law firm in the nation,  
23 constitutes an ultimate archetype. This is truly a David versus Goliath situation,  
24 with the Petitioner serving in the perhaps unwitting role of Goliath, allied with the forces  
25 of those who would see the OAG and the Commonwealth itself rendered inutile against

1 any and all who would plunder the Commonwealth Treasury or otherwise fight in court  
2 against the interests of the people represented by the OAG.

3 It is particularly instructive that the Petitioner herself is a legislator. If the Petitioner  
4 deems the Litigation Exemption unwise, she could introduce legislation to repeal it. If she  
5 wants to alter the balance between the Litigation Exemption and budget transparency, she  
6 may call for legislative oversight hearings — should she have the votes and care not about  
7 further slowing down an already underfunded government.

8 But what Petitioner should not do is try to get this Court to ignore the plain language  
9 of the law, or to rewrite it according to her own or the Court’s personal policy preferences.  
10 No more than the OAG, a legislator or a judge is a servant of the law.

11 An examination of the history of this case will reveal that the OAG has gone well  
12 beyond the minimum requirements of the OGA in disclosing information and records  
13 to the Petitioner. Although the OGA makes no mention of disclosing “information,”  
14 the initial 24 October 2008 response to her 16 October 2008 letter provided significantly  
15 more than the OGA required. In addition to the information on page two, that OAG  
16 response went beyond a mere denial of reprogramming and reference to the relevant office  
17 to even include the Governor’s “1011” account number.<sup>5</sup>

18 When Petitioner indicated that she considered “contracts related to the lawsuit”  
19 to include a contract that was executed for the Governor’s Special Legal Counsel years  
20 before the enactment of Pub. L. 110-229 and the need for any Section 903 Litigation, and  
21 is no more “related” to it than the OAG’s Westlaw account, it was provided as soon as  
22

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23  
24 <sup>5</sup> The suffix is not part of an account number, but rather a characterization of the  
25 category of expenditure. To promptly comply, information was provided orally from the  
Secretary of Finance to the Acting Attorney General at an in-person meeting, that sounded  
like “sixty-two fifty” but apparently is written “62050.”

1 it could be located. Indeed, it was even provided before all of it could be located.  
2 See Respondents' Privilege Log at 2, n. 2 (N.M.I. Super. Ct. filed Apr. 24, 2009).

3 Likewise, when in doubt about the applicability of a Public Record to the request,  
4 the OAG listed it. Respondents' Privilege Log Exhibit, # 24 & 25.

5 Finally and most importantly, despite the established case law in Washington  
6 interpreting the statute identical to the CNMI's Litigation Exception, that "controversy"  
7 under RCW 42.17.310(1)(j) encompasses not only present litigation, but also anticipated  
8 litigation and **past litigation**, see *supra* at 3; RCW 42.17.310(1)(j); *Dawson v. Daly*,  
9 120 Wash. 2d 782, 791, 845 P.2d 995 (1993), cited in *Kleven v. King County Prosecutor*,  
10 112 Wash. App. 18, 24 n.3, 53 P.3d 516 (2002), on the advice of the Acting Attorney  
11 General the former Secretary of Finance made the concession in writing that the applicable  
12 Public Records, subsequently listed in the Privilege Log, would be disclosed at the final  
13 conclusion of the Section 903 Litigation.<sup>6</sup> This is an extraordinary concession that  
14 demonstrates the utter willingness of the OAG to "go the extra mile" to try  
15 to accommodate the Petitioner's ever-expanding quest for litigation budget documents,  
16 which has now consumed hundreds of hours of attorney time.<sup>7</sup>

17 So the OAG has done everything possible to go above and beyond the OGA  
18 disclosure requirements, while still remaining within the bounds of the law. Yet as long as  
19

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20 <sup>6</sup> In offering this concession, the OAG does not thereby waive the applicability of  
21 the Litigation Exception to closed cases in all future circumstances. For instance,  
22 confidential settlement agreements, approved by a court, and whose confidentiality was  
23 indispensable to reaching a settlement, and whose continued confidentiality would be  
essential to inducing other adverse litigants to reach such settlements, would call for the  
continued applicability of the Washington state precedent. This is not such a case.

24 <sup>7</sup> By naming the Respondents and Acting Attorney General individually, rather than  
25 the CNMI, Petitioner has forced the Acting AG to retain a copy of the Petition and  
dismissal order for the rest of his life, in case he should ever seek admission to the bar  
of another jurisdiction or employment by the federal government.

1 the Commonwealth remains a polity governed by the rule of law, it must reject efforts to  
2 substitute personal preferences and situational ethics for the clear, bright-line, black-letter  
3 law enacted by our Eighth Commonwealth Legislature so many years ago.

4 The rule of law must be preserved!

5 The plain language of the OGA Litigation Exception must be obeyed. Discretionary  
6 court-ordered disclosure would be an abuse of discretion because Petitioner cannot show  
7 that this Litigation Exception is “*clearly unnecessary* to protect any vital governmental  
8 function.”

9 The time has come to conclude the case and close the file.

10  
11 Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL

12  
13 Dated: Wednesday, 13 May 2009.

*Gregory Baka*  
\_\_\_\_\_  
GREGORY BAKA # F0199  
Acting Attorney General

BRADDOCK J. HUESMAN # F0367  
Assistant Attorney General

Attorneys for Respondents Benigno R. Fitial  
and Eloy S. Inos