

APPEAL NO. 2009-SCC-0031-CIV

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

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

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

**GOVERNOR AND LT. GOVERNOR, SANTOS AND TUDELA'S ANSWERING
BRIEF**

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STATEMENT OF THE ISSUES

Representative Sablan seeks public records that the trial court ruled are exempt from public disclosure. The trial court held that the Government had not offered any proof that withholding the documents was clearly necessary to protect a vital government function. The burden of proof for proving the documents are clearly unnecessary to protect a vital government function rests solely with the plaintiff, Representative Sablan, not the Governor and Lt. Governor. Was it error for the trial court to impermissibly shift the burden of proof?

Did the trial court err in reaching its decision while ignoring the only case on point in any jurisdiction?

Did the trial court err in relying on cases that are not analogous to the case at bar?

The Governor and Lt. Governor have maintained, throughout the litigation, that the amounts of money charged by the attorneys, the name of the attorneys and the money paid to the firm is not attorney-client privileged in any way. Instead, they have argued that the documents are exempt from public records disclosure due to their unavailability in discovery. Was it error for the court to rule that the documents are not work product or attorney-client privileged and order them released?

STANDARD OF REVIEW

De novo review of the trial court's order is appropriate when the record consists only of affidavits, memoranda of law, and other documentary evidence in an Open Government Act case.¹

STATEMENT OF JURISDICTION

This Court has jurisdiction in this matter pursuant to Article IV, Section 3 of the N.M.I. Constitution and 1 CMC § 3102(a).

STATEMENT OF FACTS

The CNMI has filed a lawsuit against the Federal Government (hereinafter “903 Litigation”)² in an effort to halt implementation of the impending federalization of immigration in the CNMI.

The “903 Litigation” is an ongoing lawsuit taking place in the District of Columbia district courts and challenges the legality of Public Law 110-229, the federal takeover of the CNMI’s immigration system.

On October 16, 2008, Governor Fitial received an Open Government Act request,³ asking for copies of: “(1) all contracts related to the [lawsuit against the federal government] (also hereinafter the “903 Litigation”); (2) documents detailing payments made on said contracts; (3) documents

¹ *CLEAN v. City of Spokane*, 947 P.2d 1169, 1179 (Wash. 1997).

² *Northern Mariana Islands v. United States*, No. 08-CV-01572 (D.D.C. Dec. 15, 2008).

³ Excerpts of Record (hereinafter “ER”) at 30-31.

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, Appellee (“Appellee” or “Rep. Sablan”) received a response from the Governor through the Acting Attorney General, Gregory Baka.⁴ In the October 24, 2008 letter, Mr. Baka denied Rep. Sablan’s request, citing 1 CMC § 9918(a)(8), the litigation exception to the Open Government Act. Mr. Baka explained that the funds used to pay for the suit came out of the Governor’s operating account.

On December 11, 2008, Ms. Sablan sent another Open Government Act request, but this request was addressed to Defendant Inos. That request asked for, substantially, the same documents with the addition of “all documents” with the words or phrases “Jenner” and “Block.”

On December 19, 2008, Appellee received a letter from Defendant Inos refusing to produce the requested documents for substantially similar reasons as the Governor refused.

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

The trial court issued its final order on June 18th, 2009.

⁴ ER 32 -33.

SUMMARY OF THE ARGUMENT

Representative Tina Sablan seeks documents under the Open Government Act (the “Act”). Absent an exemption, public records must be disclosed. The Governor and Lt. Governor claimed two exemptions under the Act, the attorney-client privilege and the litigation exception. Only the litigation exemption issue is being appealed.

Under the plain language of the litigation exemption to the Open Government Act, public records are exempt from disclosure if they are: (1) relevant to a controversy to which the Government is a party and (2) would not be available to an adverse party under pretrial discovery rules.⁵ In reaching its decision, the trial court: shifted the burden of proof, improperly, to the Governor and Lt. Governor; ignored the only established case law it was presented with; and relied on case law that was not analogous to buttress its decision. Its decision must be overturned.

ARGUMENT

The Open Government Act mandates the disclosure of public records upon request. It applies when a citizen asks an agency for a “public record.” The Office of the Governor and the Department of Finance acknowledge that they are agencies within the meaning of the Act. Further,

⁵ 1 CMC § 9918(a)(8); *see generally* *Limstrom v. Ladenburg*, 963 P.2d 869 (Wash. 1998).

a public record is “any record which a public agency is required by law to keep or which it is necessary to keep in discharge of duties imposed by law.”⁶ The Act, therefore, requires disclosure unless a specific exemption can be found.⁷ The Governor and Lt. Governor admit that Rep. Sablan’s broad requests do, in fact, request some public records.⁸ The Governor and Lt. Governor argued, and the trial court agreed, however, that the documents Rep. Sablan requested fell within two exceptions contained in the Act; attorney client privilege and documents unavailable in discovery.⁹ The documents she requested, therefore, are exempt from disclosure under the Act. The trial court “used its discretion”,¹⁰ however, to rule that the Governor and Lt. Governor failed to prove that withholding the documents was “clearly necessary” to protect a vital government function. As discussed more fully below, this was in error.

This appeal, therefore, is on a fairly narrow issue, as the Governor and Lt. Governor take no issue with the trial court’s rulings regarding attorney client privilege or that the remaining documents are exempt from disclosure.

⁶ 1 CMC § 9902(f).

⁷ *Limstrom*, 963 P.2d at 869.

⁸ Rep. Sablan’s request also snares many documents which are not “any record which a public agency is required by law to keep or which it is necessary to keep in discharge of duties imposed by law.”

⁹ 1 CMC § 9918(a)(7) & 1 CMC § 9918(a)(8).

¹⁰ ER at 14, 18.

Moreover, Rep. Sablan has not filed a cross-appeal. Instead, this appeal focuses on the trial court's inappropriate use of 1 CMC § 9918(c) to find the protection of sensitive documents "clearly unnecessary" to protect a vital government function. Thus, it is helpful to review, at the outset, why these documents are exempt under 9918(a)(8).

I. Discovery requests and Open Government requests require different analyses.

Before analyzing the exemption, it is crucial to recognize that the Open Government Act disclosure procedure is distinct from regular civil discovery.¹¹ As there are different considerations which determine the outcome of efforts to obtain disclosure under the disparate standards of courtroom discovery and requests under the Act, it is important to understand both regimes.

In the case of discovery in a courtroom setting, a party is entitled to discover *all relevant evidence*. This means that relevance, need, and applicable privileges are all important parts in determining what documents must be produced in discovery.¹² Under the Act, however, a party is only entitled to public records, and within that narrow entitlement, there are

¹¹ See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 144, 95 S.Ct. 1504, 44 L.Ed.2d 29 n.10 (1975) (noting the difference between FOIA and general discovery).

¹² See Com.R.Civ.P. 26(b)(1).

further exceptions to the production of public records found in the statute.¹³

While information disclosed during courtroom discovery is limited to the parties and can be subject to protective orders against further disclosure, ***when a document must be disclosed under the Act, it must be disclosed, regardless of objections which might occur within a courtroom setting, to the general public, and the identity of the requester is irrelevant to whether disclosure is required.***¹⁴

The litigation exception to the Act, therefore, was enacted to avoid the serious disadvantage that the government or its agencies would suffer if they were forced to turn over documents, which are otherwise protected from courtroom disclosure, as part of an Open Government request.¹⁵ Thus, the litigation exception applies where a request is attempting to procure documents not available in courtroom discovery.¹⁶ Under the Act's litigation exception, documents that are not normally discoverable within a

¹³ See *Malone v. The Northern Mariana Islands Retirement Fund*, Civil Action No. 06-0033(e), p. 5, lns. 1-3; see also *North v. Walsh*, 881 F.2d 1088, 1095 (D.C.Cir.1989).

¹⁴ See *FTC v. Grolier Inc.*, 462 U.S. 19, 28, 103 S.Ct. 2209, 76 L.Ed.2d 387 (1983); *Loving v. Dep't of Defense*, 550 F.3d 32, 39 (D.C.Cir.2008).

¹⁵ *Port of Seattle v. Rio*, 559 P.2d 18, 22 (1977) (“A public agency should neither be given an advantage, nor placed at a disadvantage in litigation.”); see also *Oklahoma Assoc. of Municipal Attorneys v. State*, 577 P.2d 1310 (Okla.1978).

¹⁶ 1 CMC § 9918(a)(8).

government lawsuit are also not available to nonparty, or party, citizens.¹⁷

This is a simple and common sense approach to protecting the government and its agencies during litigation that courts at both the federal and state level recognize.¹⁸

The litigation exception to the Act thus protects the government from producing documents, which would not normally be discoverable in civil litigation against an agency.¹⁹ This is so because documents released under an Open Government Act request must be made available to the public as a whole,²⁰ and, unlike in civil discovery,²¹ there is no opportunity to obtain a protective order. In that respect, the stakes of disclosure for the agency are greater in the context of the Act, and the Court should consider the ramifications of placing the government at a disadvantage in current and future litigation.

¹⁷ *Cf. Grolier*, 462 U.S. at 28 (holding that just because a document has been produced in prior litigation it is not necessarily required to be produced in a FOIA request regarding different litigation because if the document need not be normally produced, it is exempt under FOIA).

¹⁸ *Mell v. New Castle County*, 835 A.2d 141 (Del. Sup. Ct. 2003); *Grolier*, 462 U.S. at 28 (holding that just because a document has been produced in prior litigation it is not necessarily required to be produced in a FOIA request regarding different litigation because if the document need not be normally produced, it is exempt under FOIA).

¹⁹ *Mell*, 835 A.2d at 141; *Cf. Grolier*, 462 U.S. at 28 (addressing FOIA exception).

²⁰ *North*, 881 F.2d at 1096.

²¹ Com.R.Civ.P. 37.

Although aware of this, the trial court failed in its decision for three reasons. The trial court: (1) impermissibly shifted the burden to the Governor and Lt. Governor to prove that withholding the documents was clearly necessary to protect a vital government function; (2) ignored case law provided by Appellants that gave a concrete example of a court protecting billing records; and (3) relied on case law that was not analogous to buttress its erroneous conclusion.

II. The trial court impermissibly shifted the burden of proof onto the Governor and Lt. Governor.

As noted, the trial court ruled that all the documents requested were exempt under the Act.²² The trial court then went on to state that “the government has failed to articulate why releasing documents . . . will set a dangerous precedent or disadvantage the current lawsuit in any way.”²³ Such a statement *presumes* that it was the government’s burden to prove that the documents would harm a vital government interest. This was error. Once the exemption is demonstrated, it is up to the person requesting the documents to prove that no vital government interest is at stake.²⁴

²² ER at 3-19.

²³ ER at 18.

²⁴ *Oliver v. Harborview Med. Cntr.*, 618 P.2d 76, 82 (Wash., 1980) (In such cases, however, [9918(c)] makes it clear the [plaintiff] has the burden of proof.).

For example, in *Oliver v. Harborview Med. Cntr.*,²⁵ the Washington Supreme Court, interpreting, a statute nearly identical to our own, held that once a hospital was successful in arguing that a document was exempt under the Act, it was up to the patient (plaintiff) to prove that withholding the document was unnecessary to protect privacy (or in the case at bar protect a vital government interest.)²⁶ Notwithstanding the trial court's assertion that it "can not articulate a single reason that would make nondisclosure necessary to protect a vital government function[,]” it is not the trial court's or the government's burden to do so. In fact, it is the burden of the plaintiff to demonstrate that it is objectively unreasonable to withhold the documents.²⁷ This should be a tremendously high burden, as a mistake irreparably injures the Government. It was improper for the trial court to shift the burden in this case, and therefore, the trial court's decision must be reversed.

III. The trial court ignored established case law that protects billing documents from public records disclosure.

The reason that the Government is not required, and affirmatively should not release these documents under the Act has everything to do with timing. The Governor and Lt. Governor admit that they are in possession of

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Harborview Med. Cntr.*, 618 P.2d at 82.

public records and that but for two conditions, relevant litigation and the unavailability of the documents under discovery rules; they would be required to disclose the documents to any member of the public. The essential factor which makes the current Act request improper, however, is the ongoing 903 Litigation. If this Court forces the Government to release these documents for public perusal during the current 903 Litigation, then parties who could not have access to the documents otherwise (i.e. the Federal Government defendants in the 903 Litigation) will be entitled to them. Attempting to reach documents not available by courtroom discovery is a tactic which has been tried unsuccessfully by opposing parties (and their agents) to litigation in the past. The trial court was aware of this case law and simply ignored it.

For example, the court in *Mell v. New Castle County*,²⁸ faced exactly this problem. In *Mell*, a litigant sought discovery of New Castle County's payment of invoices from lawyers or law firms known to be representing County employees in a separate federal lawsuit.²⁹ The court denied the request and so the plaintiff placed a Delaware open government request for the same documents. In declining to force the county to produce the records, the court held that "[Mell's record requests] relate directly to the matters in

²⁸ 835 A.2d 141 (Del. Sup. Ct. 2003).

²⁹ *Id.*, at 149.

controversy in the Chancery litigation. And it is quite clear to the Court that Mell's purpose in making these FOIA requests is to advance his cause in the Chancery litigation; his request does not implicate the public's 'right to know.'"³⁰

Moreover, in this case, it is clear that the Federal Government has already used documents from Rep. Sablan in an effort to gain an advantage in the 903 Litigation.³¹ The Department of Justice has already used one of Rep. Sablan's letters in an effort to dismiss the 903 Litigation.³² There is no reason to think this won't happen again. Notably, this is exactly the problem presented in *Mell* and ignored by the trial court.

Forcing the CNMI to release sensitive information that the Federal Government is not entitled to contravenes the stated purpose of 1 CMC § 9918(a)(8). Further, it guarantees that any information contained in the documents that the Federal government *even perceives* as a help in its case will be used either overtly in a pleading or covertly in informing their tactical decisions, thus placing the government's opponent at an advantage. Moreover, the trial court admits that the documents sought are sensitive and

³⁰ *Id.*, at 149 (citations omitted).

³¹ ER at 62, n. 12.

³² *Id.*

that a private party would not have to release them.³³ This is exactly what the exemption was meant to avoid.³⁴

Further, ignoring the clear mandate of the legislature by ruling that “[t]he government’s estimated litigation budget, and the CNMI’s general budget are not matters of secrecy[]”³⁵ misapprehends the government’s entire argument. It makes no sense for the legislature to create an exemption placing the government on a level playing field with all other litigants only to have a court declare the exemption is overruled because the government is not on a level playing field.³⁶ This is a judicially created “catch 22.” Moreover, the trial court’s stated reasons for ordering the release of the documents places too much emphasis on secrecy.

To be sure the government has an interest in secrecy with some documents, and the trial court recognized this. The litigation budget, amounts paid to attorneys, and the amount being charged by attorneys are not secret in any sense of the word as the trial court pointed out. They are,

³³ ER at 12.

³⁴ *Port of Seattle v. Rio*, 559 P.2d 18, 22 (1977) (“A public agency should neither be given an advantage, nor placed at a disadvantage in litigation.”); see also *Oklahoma Assoc. of Municipal Attorneys v. State*, 577 P.2d 1310 (Okla.1978).

³⁵ See ER at 12.

³⁶ *Port of Seattle v. Rio*, 559 P.2d 18, 22 (1977) (“A public agency should neither be given an advantage, nor placed at a disadvantage in litigation.”); see also *Oklahoma Assoc. of Municipal Attorneys v. State*, 577 P.2d 1310 (Okla.1978).

however, highly confidential and those documents, by necessity, contain information that any litigant would want to keep from its adversary during the course of litigation. This is true for the life of the litigation. The trial court discounted this because of press reports and other public announcements. This was error. Just because exempt records are waived in some instances does not mean they are waived for every reason.³⁷

Moreover, to imply that because some know the general details of a document somehow waives all confidentiality is not supported by the case law. The *Mell* Court recognized this fact and withheld attorney billing statements. Unfortunately, the trial court ignored the *Mell* decision in its entirety. More surprising, however, was the trial court's reliance on case law that was not analogous to support its position.

IV. The trial court relied on case law that was not analogous to the case at bar.

There are two cases the trial court relied on in reaching its decision that withholding the documents was clearly unnecessary to protect a vital

³⁷ See e.g., *United States Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 770 (holding that although "events summarized in a [F.B.I.] rap sheet have been previously disclosed to the public," there was still a shield to disclosure) (citation omitted); see also *Indian Law Resource Cntr., v. Dep. of Interior*, 477 F.Supp. 144, 148 (D.C.D.C., 1979) (limited disclosure does not waive confidential status).

government interest: *Tiberino v. Spokane County*;³⁸ and *Indian Law Resource Cntr. v. Dept. of the Interior*.³⁹ Reliance on these cases was completely misplaced.

For example, *Tiberino* deals with a former government employee, terminated for poor performance, attempting to safeguard emails via the right to privacy exemption under the state of Washington's Public Records Act.⁴⁰ In *Tiberino*, the former government employee threatened to sue her employer for her termination. The media became aware of the story and requested the emails be released. The former employee attempted to stop the release claiming that they were exempt, *not due to the litigation exception, but due to the privacy exemption*.⁴¹ The Supreme Court of Washington ruled that a public record request was exempt for purposes of the employee's *right to privacy* when the information sought was: (1) highly offensive; and (2) no legitimate concern of the public.⁴² While the case is instructive for cases involving a right of privacy exemption to the Act, it says absolutely nothing about the litigation exemption. Moreover, it is unclear why the court buttressed its litigation exemption finding with a test

³⁸ 13 P.3d 1104 (Wash. 2000).

³⁹ 477 F.Supp 144 (Dist. D.C. 1979).

⁴⁰ *Tiberino*, 13 P.3d at 1104.

⁴¹ *Id.*, at 1108.

⁴² *Id.*, at 1109.

from a case interpreting the right to privacy exemption, when the test is not transferable, in any way, to a litigation exception setting.

For example, the litigation exception **would clearly not bar the release of the disputed emails** in *Tiberino* because the former employee was terminated due, in part, to her excessive use of office email for personal reasons. As the emails would be, if not the central piece of evidence in the litigation, a significant part of the evidence, the emails would be discoverable. **If they are discoverable, the litigation exception does not apply.**⁴³ Thus, no matter how “highly offensive” documents were, they would still be discoverable. As any lawyer knows, highly offensive documents are often the star subject of discovery. Thus, because the emails would be produced in discovery, the litigation exemption would not apply in the *Tiberino* situation. Thus, it was error to suggest that an analysis for a separate exception from a case where the documents were clearly discoverable could possibly be analogous to this case. An even larger error, however, is the trial court’s reliance on *Indian Law Resource Center*.

Indian Law Resource Cntr., deals with a FOIA request and, as the trial court admitted,⁴⁴ a **trade secrets** exemption to FOIA. Notwithstanding the problem with this, the trial court found the decision instructive. In its

⁴³ 1 CMC § 9918(a)(8)

⁴⁴ ER at 15.

decision, the court in *Indian Law Resource Cntr.*, held, and the trial court cited with approval, that the “attorney-client privilege, which extends to the substance of matters communicated to an attorney in profession [sic] confidence, *as a rule does not cover the identify of a client or attorney or the payment of fees.*”⁴⁵ The trial court used this holding to then rule that “the D.C. Court found that payments to attorneys and fee schedules are not confidential matters.”⁴⁶ There is a tremendous problem with this statement: *the Governor and Lt. Governor never claimed the documents at issue in this appeal were privileged under the attorney-client doctrine.* In fact, the Governor and Lt. Governor stated and continue to state that it is generally recognized that the communication of factual information is not protected by the attorney-client privilege, and thus, fee or retainer agreements, generally, are not privileged.⁴⁷ Moreover, the identity of the client, the amount of the

⁴⁵ ER at 16 (emphasis added).

⁴⁶ *Id.*

⁴⁷ See, e.g., *In re January 1976 Grand Jury*, 534 F.2d 719, 727 (7th Cir.1976) (determining matters regarding fees are generally not privileged); see also *In re Semel*, 411 F.2d 195, 197 (3d Cir.1969) (“In the absence of unusual circumstances, the fact of a retainer, the identity of the client, the conditions of employment and the amount of the fee do not come within the privilege of the attorney-client relationship.”); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Aetna Cas. & Surety Co.*, 384 F.2d 316, 317 n. 4 (D.C.Cir.1967) (fact of attorney-client relationship and reason for its existence generally are not privileged); *Finol v. Finol*, 869 So.2d 666 (Fla.Dist.Ct.App.2004) (billing information that does not reveal mental impressions and opinions of counsel is not privileged); *P. & B. Marina, Ltd.*

fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege. The Governor and Lt. Governor are not, in fact, claiming that the documents are privileged, just that they are unavailable in discovery and, thus, unavailable as a public record *at this time*. The trial court's order, therefore, sets up a classic straw man argument; the documents are not privileged so they must be turned over. As the Governor and Lt. Governor have never argued that the documents were privileged, however, this is a nonexistent rationale on which to base a ruling.

Moreover, cases cited to and even by the trial court belie the basic problem in the trial court's order: sometimes documents can be nonprivileged and still be exempt from disclosure. Thus, the same courts in D.C. that will release billing records under a FOIA request will not release those documents in general discovery.⁴⁸ In its ruling, the trial court confused the two rubrics for disclosure.

Remember, in the case of discovery in a courtroom setting, a party is entitled to discover *all relevant evidence*. This means that relevance, need,

P'ship v. Logrande, 136 F.R.D. 50, 55 (E.D.N.Y.1991) (request to pay fees and attached statement of fees was not privileged); *but cf.* *U.S. v. Sindel*, 53 F.3d 874 (8th Cir.1995) (attorney's release of information regarding payments would reveal substance of communication).

⁴⁸ *Robinson v. Duncan*, 255 F.R.D. 300 (D.D.C. 2009); *Banks v. Office of the Senate Sergeant-at-Arms and Doorkeeper*, 222 F.R.D. 7 (D.D.C. 2004).

and applicable privileges are all important parts in determining what documents must be produced in discovery.⁴⁹ Under the Act, however, a party is only entitled to public records, and within that narrow entitlement, ***there are further exceptions to the production of public records found in the statute.***⁵⁰ Confusing these two rubrics, as the trial court did, leads to disclosing documents that the legislature intended to be exempted; and ignores the teachings of *FTC v. Grolier Inc.*⁵¹

Grolier involved a FOIA request for documents that had been previously disclosed in discovery in a separate lawsuit. The plaintiff in *Grolier* claimed that because the documents had been released in a previous cases's discovery, he was entitled to the documents under FOIA. The Supreme Court refused to grant the FOIA request. The Court, when analyzing both discovery and FOIA requests, held that a document is not necessarily required to be produced in a FOIA request regarding different litigation ***because if the document need not be normally produced in the current litigation, it is exempt under FOIA.*** In other words, the Supreme Court, when confronted with a FOIA request for documents that were

⁴⁹ See Com.R.Civ.P. 26(b)(1).

⁵⁰ See *Malone v. The Northern Mariana Islands Retirement Fund*, Civil Action No. 06-0033(e), p. 5, lns. 1-3; see also *North v. Walsh*, 881 F.2d 1088, 1095 (D.C.Cir.1989).

⁵¹ 462 U.S. 19, 28.

previously disclosed in a prior lawsuit refused to order the documents to be produced under a FOIA request because those documents would not have been discoverable in the current lawsuit. This reasoning was followed in Maryland by the *Mell* Court and ignored by the trial court.⁵²

CONCLUSION

It is important to remember that there is no case the Government knows of, and certainly no case the trial court or Rep. Sablan cited, which rebut the idea that the documents Rep. Sablan seeks are not only exempt but that disclosure would harm not only this litigation but litigation going forward. In reaching its erroneous decision, the trial court impermissibly shifted the burden of the “clearly unnecessary” test to the Governor and Lt. Governor. Moreover, there is only one case on point, and the trial court ignored it in favor of cases that are not analogous. For these reasons the Governor and Lt. Governor request that this honorable court REVERSE the trial courts ruling.

⁵² *Mell*, 835 A.2d at 141.

Respectfully submitted and dated this 2nd Day of July, 2009.

OFFICE OF THE ATTORNEY GENERAL
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

_____/s/_____
Braddock J. Huesman

STATEMENT OF RELATED CASES

There are no known related cases

CERTIFICATE OF SERVICE

I, Braddock J. Huesman, Esq., the attorney of record for the Appellants hereby certify that on Thursday, July 02, 2009:

1. I electronically filed the foregoing with the Clerk of the Court by using the Lexis/Nexis system.

_____/s/_____
Braddock J. Huesman