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

BENIGNO R. FITIAL and ELOY S. INOS
Defendants-Appellants
v.
CHRISTINA-MARIE E. SABLAN
Plaintiff-Appellee.

Supreme Court No. 2009-SCC-0031-CIV
Superior Court Case No. 09-0066 CV

REPLY TO APPELLANTS' OPENING BRIEF

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Pro Se

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 1. Whether the trial court erred in its finding that nondisclosure of the requested public records was clearly unnecessary to protect any vital government function, by impermissibly shifting the burden of proof onto Appellants, ignoring analogous case law presented by Appellants, and improperly relying on case law that was not analogous?

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1 **STATEMENT OF THE ISSUES**

2 Plaintiff-Appellee Ms. Christina –Marie Sablan (hereinafter, “Appellee” or “Ms. Sablan”)
3 seeks public records related to *CNMI v. USA, et al.*, No. 08-CV-01572 (D.D.C. 2008) (hereinafter,
4 “903 litigation”), that the trial court has ordered for disclosure. The trial court has found that
5 although the litigation exception provided in 1 CMC § 9918(a)(8) applied to the requested records,
6 nondisclosure was clearly unnecessary to protect any personal privacy right or vital government
7 function, pursuant to 1 CMC 9918(c). Appellants Benigno R. Fitial and Eloy S. Inos (hereinafter,
8 “Appellants”) have secured a stay on the trial court’s order pending appeal, and in their opening
9 brief on appeal have asked this court to determine whether the trial court erred in its decision by
10 impermissibly shifting the burden of proof onto Appellants, ignoring analogous case law presented
11 by Appellants, and relying on case law that was not analogous.

12 **STANDARD OF REVIEW**

13 . The issues in this appeal are all challenges to the trial court’s conclusions of law, and as
14 such they are reviewed *de novo*.

15 **STATEMENT OF JURISDICTION**

16 Pursuant to Rule 28 of the Supreme Court Rules of Appellate Procedure, Ms. Sablan does
17 not dispute the statement of jurisdiction set forth by Appellants.

18 **STATEMENT OF FACTS**

19 Pursuant to Rule 28 of the Supreme Court Rules of Appellate Procedure, Ms. Sablan does
20 not dispute the statement of facts set forth by Appellants.

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ARGUMENTS

I. The trial court did not improperly shift the burden of proof onto Appellants to establish that nondisclosure was clearly unnecessary to protect a vital government function.

Appellants argue that once the trial court had found that the litigation exemption provided in 1 CMC § 9918(a)(8) applied to the requested records, it should have imposed on Ms. Sablan the burden of proving that nondisclosure was clearly unnecessary to protect any vital government function pursuant to 1 CMC § 9918(c). Appellants' argument defies common sense and logic and misinterprets case law.

Ms. Sablan cannot reasonably be expected to prove that no vital government function would be compromised in disclosure when she has not even been allowed to see those records. Moreover, case law firmly establishes that the burden of proof in justifying nondisclosure rests with the party that stands to be harmed by disclosure or benefited by nondisclosure. In the case of *Oliver v. Harborview Medical Center*, for example, it was the Appellant-Plaintiff in *Oliver* whose own personal privacy rights stood to be harmed in disclosure who bore the burden of proving that she, a patient seeking access to her own medical records, would not in fact be harmed if the Appellee-Defendant, which was a public hospital, released her medical records to her. In *Tiberino v. Spokane County*, the burden of proof fell on the plaintiff, a government employee, whose personal privacy rights stood to be harmed in the disclosure of public records. In *Mell v. New Castle*, it was the government defendant, which stood to benefit from nondisclosure, that carried the burden of proof. 13 p.3d 1104 (2000). In *Indian Law Resource Center v. Dept of the Interior*, the burden of proof for withholding public records in the custody of the Department of Interior fell on the plaintiff, which was the Tribal Council, which claimed that its trade secrets stood to be

1 harmed in disclosure. 477 F Supp 144 (D.D.C. Dist 1979). And in *City of Farmington v. Daily*
2 *Times*, the court held that the burden of proof rested on the custodian of the records to demonstrate
3 a reason for nondisclosure, and that a duty was placed on the courts to assess the potential harm
4 from nondisclosure through the process of *in camera* review. The courts “can competently satisfy
5 this duty by weighing the explanation furnished by the custodian against the harm customarily
6 associated with secrecy in government – the impairment of the public’s ability to assess the
7 actions of public officials and to hold such public officials accountable.” Further, the court in *City*
8 *of Farmington* found that the requesting party had “no burden to make an evidentiary showing
9 regarding the harm that would result from nondisclosure.” *City of Farmington*, L 1765671, 4 -5
10 (N.M.App. 2009); see *Newsome*, 90 N.M. at 798, 568 P.2d at 1244.

11 Simply stated, the burden of proof is often placed on government officials because the
12 government defendants in those cases are the parties claiming that harm would result in the
13 disclosure of requested records. See *Vaughn v. Rosen*, 484 F.2d 820 (“In proceedings for
14 disclosure of government documents under Freedom of Information Act, mere conclusory
15 affidavit by government agency that documents sought were of nature exempted from disclosure
16 by provisions of Act was insufficient to establish exemptions claimed”); *U.S. Dept. of State v.*
17 *Ray*, 112 S.Ct. 541 U.S. Fla., 1991 (“Strong presumption in favor of disclosure of documents
18 under Freedom of Information Act (FOIA) places burden on agency to justify withholding of any
19 requested documents, and burden remains with agency when it seeks to justify redaction of
20 identifying information in particular document as well as when it seeks to withhold entire
21 document”); *National Cable Television Ass'n, Inc. v. F. C. C.*, 479 F.2d 183, C.A.D.C. 1973 (“To
22 prevail against request under Freedom of Information Act, defending agency must prove that each
23

1 document that falls within class requested either has been produced, is unidentifiable, or is wholly
2 exempt from inspection requirements”); *Mead Data Central, Inc., v. U.S. Dept. of Air Force*, 566
3 F.2d 242 (“Government agency's burden under Freedom of Information Act of justifying
4 nondisclosure cannot be shifted to courts by sweeping, generalized claims of exemption for
5 documents submitted for in camera inspection”); *State ex rel. Nat. Broadcasting Co., Inc. v. City*
6 *of Cleveland*, 526 N.E.2d 786, Ohio 1988 (“Governmental body refusing to release records has the
7 burden of proving that the records are excepted from disclosure by statute”). *John Doe Agency v.*
8 *John Doe Corp.*, 110 S.Ct. 471, U.S.N.Y., 1989 (“Exemptions from disclosure set forth in the
9 Freedom of Information Act must be narrowly construed and the burden is on the agency to
10 sustain its action”; *Rose v. Freedom of Information Com'n*, 602 A.2d 1019, Conn.,1992 (“Burden
11 of proving applicability of exception to Freedom of Information Act (FOIA) rests upon party
12 claiming it”); and *Mell v. New Castle*, 835 A.2d 141 Del. Sup. Ct. 2003 (“[W]hen a party
13 challenges the sufficiency of the response, FOIA makes clear that the burden of proof rests upon
14 the custodian of records to justify the denial of access to the records”).

15 Regardless of whether the party in question is a plaintiff, a defendant, or even a third party
16 not in possession of records, and regardless of whether the harm in question is against personal
17 privacy rights or any vital government function, case law firmly establishes that when it comes to
18 the disclosure of public records, it is the party that stands to be harmed in disclosure, or to be
19 benefited in nondisclosure, that bears the burden of proof. Furthermore, the Open Government
20 Act provisions requiring liberal construing of the Act in favor of disclosure necessarily supports a
21 finding that in seeking to prevent disclosure of records the government must bear the burden of
22 proving that exemptions apply pursuant to 1 CMC § 9918(a); that records may not be released
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1 even in redacted form without harming personal privacy rights or any vital government function
2 pursuant to 1 CMC § 9918(b); and that the disclosure of exempted records under 1 CMC §
3 9918(c) would clearly harm any individual's right to privacy or any vital government function.

4 The trial court correctly recognized that Ms. Sablan would be improperly and severely
5 disadvantaged if it were to impose on her the burden of proving that nondisclosure was clearly
6 unnecessary to protect a vital government function. In ordering several hearings, briefings, and an
7 *in camera* review of all the requested records before determining that nondisclosure of some of the
8 records was indeed clearly unnecessary, the trial court properly applied relevant case law, 1 CMC
9 § 9918(c), and the express mandate of the Open Government Act to impose the burden of proof on
10 Appellants and liberally construe the law in favor of disclosure. 1 CMC § 9901.

11
12 **II. The trial court did not erroneously ignore analogous case law cited by Appellants.**
13 **Appellants cited case law that is simply not analogous.**

14 In particular, Appellants argue that the trial court ignored *Mell v. New Castle County* in
15 ruling that the requested records should be released. A careful reading of *Mell*, however, reveals
16 that the circumstances and conclusion of that case are not truly analogous to the instant case. In
17 *Mell*, a person who was a party to another pending litigation in a court of chancery (hereinafter,
18 “Chancery litigation”) sought to obtain through the Freedom of Information Act (hereinafter,
19 “FOIA”) information that he had already been denied in discovery in that litigation. The
20 Chancery litigation related to the purported transfer of public funds in the amount of \$230,000
21 which the plaintiff, Mr. Donald Mell, alleged was for the purpose of paying legal fees incurred by
22 public officials in connection with a federal investigation. The government defendants in the
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1 Chancery litigation denied that public funds had been used, or were intended to be used, for the
2 payment of legal fees, and Mr. Mell’s discovery request was denied simply because he did not
3 show any evidence to counter the government’s claim that the public funds in question had not in
4 fact been transferred and expended for legal fees connected to the federal investigation at all, nor
5 were they intended to be, and so were not relevant for discovery purposes. After being denied
6 discovery on the grounds that no documentation had been provided to show that the transfer of
7 public funds had actually been used, or was intended to be used, for the payment of legal fees, Mr.
8 Mell then filed Freedom of Information Act requests seeking records relating to the \$230,000
9 transfer, and to the specifics regarding legal fees that may have been paid using those funds; these
10 requests were the subject of *Mell v. New Castle*.

11 The court in *Mell* observed that “[t]he pending litigation exception to FOIA addresses a
12 practical reality: when parties to pending litigation against a public body seek information from
13 that public body relating to the litigation, they are doing so not to advance ‘the public’s right to
14 know,’ but rather to advance their own personal stake in the litigation.” Parties in litigation are
15 not allowed to use FOIA as a means to obtain discovery which is not available under the court’s
16 rules of procedure, the court in *Mell* said, and when a party in litigation seeks to compel a response
17 to a FOIA request by writ of mandamus, that party bears the burden of proving, as a predicate to
18 relief, that no other legal means, such as the discovery process in pending litigation, is available
19 before the Court may consider issuing the extraordinary writ. Indeed, the court in *Mell* noted that
20 in reviewing Mr. Mell’s requests in the Chancery litigation with respect to the payment of legal
21 fees using public funds, the Chancellor had determined that the Chancery litigation was premature
22 as no decisions had apparently been made by the government defendants to expend public funds
23

1 for legal fees, and further had determined that the information sought in Mr. Mell’s FOIA requests
2 was information that “must be produced in the Chancery litigation if and when the County
3 determines to pay the invoices.” The court in *Mell* could not determine that Mr. Mell had met his
4 burden of proving that mandamus relief was his only available remedy.

5 Because the FOIA requests for these invoices related directly to the matters in controversy
6 in the Chancery litigation, and because it was “quite clear” to the court in *Mell* that Mr. Mell’s
7 purpose in making the FOIA requests was to advance his cause as a party in the pending Chancery
8 litigation, the court in *Mell* found that Mr. Mell’s requests did not implicate the public’s right to
9 know and that the pending litigation exception found in the Delaware FOIA had therefore been
10 properly invoked. The court in *Mell* cautioned that its conclusion “assumes that the Chancery
11 litigation is still ‘pending,’ an assumption based upon the absence in the record of any indication
12 to the contrary. If it is not still pending,’ the Court would be hard-pressed to conceive of a basis
13 upon which the County could invoke the “pending litigation” exception to FOIA.” Moreover, the
14 court in *Mell* stated that “assuming the complaint is amended to seek mandamus relief regarding
15 the documents identified in Mell’s FOIA request relating to the \$230,000 transfer, the Court is
16 unable to conclude on this record that the documents pertain to pending litigation or that
17 mandamus relief is not appropriate.”

18 The *Mell* case is not analogous to the case at bar in several critical ways, and therefore
19 cannot be used to support Appellants’ argument that the records requested by Ms. Sablan should
20 continue to be withheld and that the trial court’s order for disclosure should be reversed. First,
21 unlike Mr. Mell, Ms. Sablan is not a party to any other pending litigation against the public
22 officials to whom she has directed her Open Government Act requests. Second, unlike Mr. Mell,
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1 because Ms. Sablan is not a party to any other pending litigation against the public officials to
2 whom she has directed her Open Government Act requests, she bears no burden of proving that
3 mandamus relief is her only available remedy. Under the Open Government Act, mandamus relief
4 is the only remedy available for any person who believes she has wrongfully been denied access to
5 public records pursuant to a request made under the Act. 1 CMC § 9916. Third, Ms. Sablan's
6 Open Government Act requests clearly cannot be found, as the court had found in *Mell*, to merely
7 be efforts to advance her cause in another pending litigation and clearly not implicate the public's
8 right to know. Ms. Sablan has no other pending litigation with Appellants Fitial and Inos, or with
9 any other party, in the trial court or in any other court.

10 Finally, in *Mell*, the record remained unclear as to whether public funds had in fact been
11 used, or were intended to be used, for the payment of legal fees, as the government defendants had
12 denied the expenditures and Mr. Mell had not provided any evidence to the contrary. Unlike Mr.
13 Mell, Ms. Sablan seeks public records showing billings for government legal services that have
14 indisputably been procured, payments that have indisputably been made using public funds, and
15 funding sources that indisputably come from taxpayers. The public's right to know is clearly
16 implicated in the case at bar. The findings in *Mell* suggest that had Mr. Mell shown that public
17 funds had indeed been transferred and expended for the payment of legal fees, he would likely
18 have prevailed in his discovery request, which would have therefore precluded his FOIA requests.
19 Further, had Mr. Mell not already been a party in pending litigation against the public officials to
20 whom he had directed his FOIA requests, seeking through FOIA information he had already been
21 denied in discovery, he would likely have prevailed in his FOIA request.

1 **III. The trial court did not improperly rely on cases that are analogous to the instant case**
2 **and correctly determined that the requested records should be disclosed.**

3 Appellants erroneously argue that the trial court improperly relied on *Tiberino v. Spokane*
4 *County* and *Indian Law Resource Cntr. V. Dept. of the Interior* in reaching its decision to disclose
5 the requested records. Appellants misread the trial court’s application of the findings in those
6 cases.

7 As the trial court noted, *Tiberino* came from the same jurisdiction (Washington) upon
8 which Defendants have heavily relied, and the court in *Tiberino* applied a Washington statute that
9 was analogous to the CNMI’s Open Government Act. The court in *Tiberino* had exempted certain
10 public records from disclosure because it had found that the information was “highly offensive”
11 and that the public had “no legitimate concern.” Appellants exaggerate the importance of this case
12 in the trial court’s order for disclosure, claiming the trial court “buttressed its litigation exemption
13 finding with a test from a case interpreting the right to privacy exemption, when the test is not
14 transferable, in any way, to a litigation exception setting.” Appellants’ Opening Brief, at 16. In
15 fact, the trial court acknowledged that *Tiberino* was “not applicable to our [the instant] case,” and
16 merely and briefly used the case as a reference point to highlight the “unquestionable legitimate
17 concern” that the public has in being able to access the requested public records to ensure the
18 efficient administration of government. Excerpts of the Record (hereinafter, “ER”), at 14. That
19 there is legitimate public concern in disclosure of public records and government transparency is
20 indeed the heart of the Open Government Act, and a critical consideration for the courts in
21 determining whether or not exemptions apply, and whether or not disclosure should be compelled
22 even upon a finding that exemptions apply.

1 attorney-client privilege and work product exemption, not strictly under any litigation exemption,
2 as the documents could be discoverable upon a showing of substantial need. As Appellants
3 themselves have stated in their Opening Brief, the trial court’s findings with respect to the
4 attorney-client privilege or work product exemption under the Open Government Act is not the
5 subject of their appeal. Opening Brief, at 4.
6

7 **IV. The trial court correctly and properly determined that nondisclosure of the requested**
8 **records was clearly unnecessary to protect any vital government function.**

9 As previously explained, case law and the plain language of the Open Government Act
10 clearly place on Appellants the burden of proving that the disclosure of the requested records
11 would harm any government function. Appellants have completely failed to meet that burden.
12 Merely arguing and rearguing that the government would suffer significant damage or any
13 disadvantage in the 903 litigation if the requested records are disclosed does not make it so.
14 Appellants state that “[t]he reason that the Government is not required, and affirmatively should
15 not release these documents under the Act has everything to do with timing” but fail to establish
16 any timing exception under the Open Government Act, nor any evidence that the requested
17 records would create any disadvantage for the government in the 903 litigation. Appellants’
18 Opening Brief, at 10. Appellants do not and cannot articulate with any degree of persuasiveness a
19 single reason as to why or how the requested records would impair the government’s position in
20 the 903 litigation and thereby warrant a finding that nondisclosure is clearly necessary to protect a
21 vital government function. Moreover, Appellants do not and cannot dispute the fact that the
22 estimated total cost of the 903 litigation, the government’s budget generally, the salaries paid to
23

1 government attorneys are already public knowledge, nor do they dispute the fact that the trial court
2 found after *in camera* review that no litigation strategy or cap on expenditures would be revealed
3 in the disclosure of the requested records. ER, at 12-13. These facts render illogical Appellants'
4 repeated statements that the government would suffer any disadvantage in the 903 litigation if the
5 requested records are disclosed, let alone harm to any vital government function.

6 Indeed, it is worthwhile at this juncture to consider the vital government function served by
7 the court system in upholding the rule of law and protecting a fundamental tenet of any democratic
8 society – that is, the right of the people to remain informed so that they may retain control over the
9 government that serves them. Consistent with the express mandates of the Open Government Act
10 and public policy favoring the spirit of transparency, the government's ability to refuse to disclose
11 public records must be carefully weighed against the public's right to know. "The people, in
12 delegating authority, do not give their public servants the right to decide what is good for the
13 people to know and what is not good for them to know," and moreover, "[i]t is vital in a
14 democratic society that public business be performed in an open and public manner so that our
15 citizens shall have the opportunity to observe the performance of public officials and to monitor
16 the decisions that are made by such officials in formulating and executing public policy ... [and] it
17 is vital that citizens have easy access to public records in order that the society may remain free
18 and democratic." 1 CMC § 9901; *Mell v. New Castle*. In the absence of any compelling or
19 persuasive justifications for secrecy, the government's insistence on nondisclosure must be struck
20 down by this court, the judgment of the trial court must be upheld, and the requested records must
21 be released.

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CONCLUSION

Based on the foregoing, this court should AFFIRM the judgment of the trial court in ordering the release of records.

Dated this 10th day of July 2009.

Respectfully Submitted,

/s/ Christina-Marie E. Sablan
Christina-Marie E. Sablan
Appellee *Pro Se*

CERTIFICATE OF SERVICE

I certify that a copy of Appellee's Motion for Reconsideration was served on Mr. Brad Huesman, Counsel for Appellants, on July 10, 2009, by electronic mail, and by hand-delivery.

/s/ Christina-Marie E. Sablan
Christina-Marie E. Sablan
Appellee *Pro Se*