



COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

H&E. Comm. 16-120  
(HOUSE)

**Tina Sablan**

House of Representatives  
16th Commonwealth Legislature

September 8, 2009

Members of the House of Representatives  
16<sup>th</sup> Commonwealth Legislature  
PO Box 500586  
Saipan, MP 96950

**RE: Request for directive to House Ways & Means Committee to obtain certain financial records pertaining to *CNMI v. USA, et al.*, 1:08-cv-01572.**

Dear colleagues,

I respectfully request a directive from the members of the House of Representatives to the House Standing Committee on Ways & Means to exercise its legislative authority to obtain certain financial records pertaining to Governor Fitial's lawsuit against the federal government, *CNMI v. USA, et al.*, 1:08-cv-01572 (hereinafter, "903 lawsuit").

On August 28, 2009 the CNMI Supreme Court issued an opinion affirming a June 2009 Superior Court order releasing 30 financial records related to the 903 lawsuit that had been requested pursuant to the Open Government Act. The released records include invoice summaries from the private law firm Jenner & Block, LLP (hereinafter, "Jenner & Block"); voucher entries showing payments made by the CNMI; fund status reports from the Governor's office accounts; supplier payment inquiries from the Department of Finance; memoranda between the Governor and the Secretary of Finance authorizing payments to Jenner & Block; and money transfers between the Governor's Administrative Services Account and the Governor's Discretionary Account. In sum, the records released show that between August 2008 and February 2009, the CNMI has been billed \$395,971.81 by Jenner & Block; between October 2008 and April 2009, the CNMI has paid Jenner & Block \$300,000. In addition to these records, the administration had released in April 2009 the professional services contract with Mr. Howard Willens, the Governor's Special Legal Counsel who is a signatory to the 903 lawsuit.

Two types of financial records were specifically withheld by the courts as privileged records that would not be available under the Open Government Act because they would reveal litigation strategy while the 903 lawsuit is still pending. These records are the engagement letter/contract with Jenner & Block and the detailed billing invoices. Though not available under the Open Government Act at this time, these records are well within the authority of the Legislature to examine, and indeed the administration has explicitly acknowledged in its briefings before the courts that the Legislature has not only the right, but also the responsibility, to scrutinize all the records requested.

There also appear to be significant gaps in the records released thus far. For example, the Jenner & Block invoice summaries released cover the time period beginning on August 26, 2008 and ending on February 27, 2009; the Department of Finance records only show payments made to Jenner & Block between October 2008 and April 2009. The agreement between the Governor's Office and Jenner & Block was first effectuated, however, on June 6, 2008 and the 903 lawsuit continues to this day.

Moreover, although the court had *only* authorized the redaction of private and sensitive bank account numbers in the records ordered for release, the Attorney General's Office apparently took the liberty of also redacting other public expenses that may have been connected to the Governor's federalization lawsuit that were shown on the fund status reports ordered for release, and names of contact persons and other information on the records showing wire transfers between the CNMI government and Jenner & Block. In addition, although the records released show at least six separate retainer payments made to Jenner & Block between October 2008 and April 2009, the Governor's memo authorizing the first payment is missing, and at least three wire transfer authorizations made in November 2008 and January 2009 appear to also be missing. Further, although Mr. Willens' professional services contract with the Governor's Office had been released in April 2009 pursuant to the Open Government Act requests, the records released in August do not show any payments made to Mr. Willens.

I therefore request, with the consent of the members, that the Ways & Means Committee exercise its legislative authority to secure the following records from the administration:

1. All contracts, engagement letters, and fee agreements related to the *CNMI v. USA, et al.*, 1:08-cv-01572 ("lawsuit"), including contracts, engagement letters, and fee agreements executed between the CNMI government and Jenner & Block;
2. Detailed and unredacted billing invoices from Jenner and Block, complete and to date, and from Mr. Howard Willens;
3. All memoranda issued by the Governor authorizing payments made to Jenner & Block and to Mr. Howard Willens, complete and to date;
4. All wire transfer authorizations from the Department of Finance with respect to payments made to Jenner & Block, and to Mr. Howard Willens;
5. Complete and unredacted fund status reports from all accounts under the Office of the Governor, including but not limited to the Governor's office accounts #1011 and #1021, and including but not limited to the period beginning on April 1, 2008 and ending on September 30, 2009;
6. Records identifying the source(s) of funding for the CNMI's contracts with Jenner & Block and with Mr. Howard Willens;

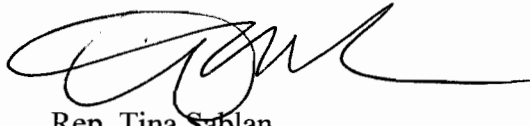
7. Records identifying the department(s), agency(ies), and/or instrumentality(ies) of the CNMI government from which any public funds have been reprogrammed in order to finance the 903 lawsuit, and in what amounts, including but not limited to the CNMI's contracts with Jenner & Block and Mr. Howard Willens; and
8. Any other records relevant to the 903 lawsuit deemed appropriate and necessary by the Ways & Means Committee for legislative review.

I would be available to assist the Ways & Means Committee in any way that I can in its efforts to identify and obtain the above-mentioned records. These records would allow the Legislature to more closely scrutinize the public expenses incurred thus far as a result of the ongoing 903 litigation, the implications of the 903 lawsuit for the FY 2010 budget, as well as other impacts of the Governor's lawsuit as a matter of policy.

Enclosed with this letter are copies of the orders issued by the Superior Court and the Supreme Court on *Sablan v. Fitial & Inos*.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to be 'Tina Sablan', written in a cursive style.

Rep. Tina Sablan

Enclosures (Superior Court & Supreme Court Orders releasing requested documents)



By the order of the court, Judge David A Wiseman

E-FILED  
CNMI SUPERIOR COURT  
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FOR PUBLICATION

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

CHRISTINA-MARIE SABLAN )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 BENIGNO R. FITIAL, in his official )  
 capacity as GOVERNOR of the )  
 COMMONWEALTH OF THE )  
 NORTHERN MARIANA ISLANDS, )  
 ELOY INOS, in his official capacity as )  
 SECRETARY OF FINANCE. )  
 )  
 Defendants. )  
 )  
 )

CIVIL ACTION NO. 09-0066E

ORDER RELEASING REQUESTED  
DOCUMENTS PURSUANT TO THE  
OPEN GOVERNMENT ACT

**THIS MATTER** came for hearing on June 4, 2009, at 1:30 p.m. for a hearing on Plaintiff's Request for Production of Documents pursuant to the Open Government Act. Ms. Christina-Maria Sablan appeared pro se (hereinafter "Plaintiff" or "Ms. Sablan"). Counsel Brad Huesman appeared on behalf of Defendants (hereinafter "Defendants" or "Government").

**I. SYNOPSIS**

In October, 2008 Plaintiff made a demand for copies of records regarding the funding sources and contracts related to the CNMI lawsuit against the United States (hereinafter "903 Lawsuit") pursuant to the Open Government Act (hereinafter "OGA"). Specifically, Plaintiff requested (1) Copies

1 of all contracts related to the 903 Lawsuit; (2) Documents detailing payments made on said contracts;  
2 (3) Documents identifying the source(s) of funding on said contracts; and (4) Documents identifying the  
3 departments, agencies and/or instrumentalities of the CNMI government from which public funds may  
4 have been reprogrammed in order to finance the lawsuit and in what amounts.<sup>1</sup> See Exhibit A of  
5 Complaint. On October 24, 2008, the request was denied based on exceptions within the OGA or  
6 because said documents did not exist.

7 On December 11, 2008, a similar but expanded request was made to Secretary of Finance Inos  
8 (hereinafter "Secretary"). Included in the request was a fifth category which requested all documents  
9 under the Secretary's control which contain varying combinations of the words "Jenner" and "Block".  
10 See Exhibit C of Complaint. The request was again denied, in its entirety, based on the exceptions  
11 contained within the OGA. See Exhibit D of Complaint.

12 On February 27, 2009 Plaintiff petitioned the Court for mandamus or injunctive relief pursuant  
13 to 1 CMC § 9916 requesting, among other things, immediate compliance with her request made under  
14 the OGA and an award of costs and fees as provided by 1 CMC § 9915 (b). The original action was also  
15 filed against Attorney General Baka. However, no request for information was ever made to Attorney  
16 General Baka and he was merely acting *on behalf of* the Governor when he responded to Ms. Sablan's  
17 requests. Thus, Defendants moved to dismiss him from the suit and on March 27, 2009 this Court  
18 dismissed Attorney General Baka from the suit.

19 The Defendants argue that denying the OGA request was a lawful invocation of the exceptions  
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21 <sup>1</sup>In her request to the Governor, Plaintiff also requested a copy of a presentation regarding the status of  
22 the lawsuit which was allegedly delivered to the Governor and his cabinet members by the Governor's Special  
23 Counsel, Howard Willens. In response, the government answered that no such documents existed and the  
24 "presentation" was merely brief remarks. The copy of the "presentation" and the minutes of that meeting have  
25 not been at issue before this Court.

1 provided within the OGA because the documents are either protected by the attorney client privilege or  
2 because they would be exempt from discovery. *See* Defendants' Motion to Withhold Documents.  
3 Further, Defendants argue that providing the requested information will disadvantage the government as  
4 a litigant in this and future litigation and, therefore, the Court should not exercise its discretion and order  
5 disclosure pursuant to 1 CMC § 9918(a)(c) which states in part that:

6 [i]nspection or copying of any specific records exempt under the provisions  
7 of this section may be permitted if the Commonwealth Superior Court finds,  
8 after a hearing . . .that the exemption of such records is clearly unnecessary;  
to protect any individual's right of privacy or any vital governmental  
function.

9 Defendant's characterize the requested information as "tactical litigating information" and argue  
10 that the "secrecy of the CNMI litigation budget" is essential and indispensable to the vital governmental  
11 function of litigating its case. *See* Defendants' Status Conference Statement at 5.

12 Plaintiff argues that the exceptions do not apply to the requested information because the  
13 litigation exception requires the documents to be relevant to the controversy and Defendants failed to  
14 show how the requested documents are relevant. *See* Plaintiff's Response to Defendants' Motion to  
15 Withhold Documents at 5 (hereinafter "Plaintiff's Response"). Plaintiff alleges further that the  
16 requested documents are discoverable and not subject to the attorney client privilege. *See* Plaintiff's  
17 Response at 6. Lastly, Plaintiff points out that the estimated litigation budget is already a matter of  
18 public record, as well as an estimation of the monthly payments to Jenner & Block, so releasing the  
19 requested documents could not possibly hinder or affect the government's tactical position in the 903  
20 Lawsuit.

21 The litigation exemption contained within the OGA serves an important function. That is, it  
22 prevents information which would otherwise be unavailable to opposing counsel from public disclosure  
23 in order to protect the integrity of litigation strategy and recognized privileges. The public's right to  
24 information does not trump the governments' right to be fairly positioned in litigation and the OGA  
25 cannot work to disadvantage the government in the 903 Lawsuit. The requested documents would not

1 be discoverable by opposing counsel in the 903 Lawsuit because the information is patently irrelevant to  
2 the issues in the case and courts agree that assessing one's financial posture is not a legitimate use of  
3 discovery. However, this Court's analysis does not end there. If the requested information would not  
4 disadvantage the government's litigation or would not otherwise reveal privileged information, then the  
5 exception will not prevent the release of the documents. In other words, if nondisclosure of the  
6 documents are clearly unnecessary to the government's right to fairly litigate in the 903 Lawsuit, then  
7 disclosure should be ordered.

8 For the reasons stated below, all requested documents except the Engagement Letter and the  
9 detailed invoices shall be immediately released because their nondisclosure is clearly unnecessary to  
10 serve a vital government function.

## 11 12 **II. DISCUSSION**

13 As Plaintiff emphasizes, the OGA must be construed liberally in favor of open records and  
14 against the nondisclosure of records. The OGA provides that "provisions requiring open meetings and  
15 records shall be liberally construed, and the provisions providing for exceptions to the Act shall be  
16 strictly construed against closed meetings and nondisclosure of records." 1 CMC § 9901. In  
17 furtherance of this intent, the trial court was given discretion to order disclosure of records that are  
18 otherwise exempt if, after a hearing, the court finds that the exemption of such records is clearly  
19 unnecessary to protect any individual's right of privacy or any vital governmental function. 1 CMC §  
20 9918 (c). Thus, if the requested documents are exempt from disclosure based on one of the enumerated  
21 exceptions in the OGA, the documents should still be released if the exemption of such records is clearly  
22 unnecessary to protect a vital government interest. Here, the governmental function is the right to bring  
23 suit, and defend against suits, without unfair disadvantages.

24 The OGA exceptions and their application to the requested documents will be discussed. Lastly,  
25 the Court will determine if nondisclosure is clearly unnecessary to protect a vital government function.

1 **A. The Billing Invoices**

2 Defendants argue that 1 CMC § 9918 (a)(7) and § 9918 (a)(8) applies to the billing invoices  
3 listed in their Privilege Log as numbers 2, 3, 7, 8, 11, 15, and 22. In actuality, the billing invoices  
4 contain two distinct parts. First, there is a detailed billing invoice which explains with specificity the  
5 work performed, the amount of time it took to perform the work, and the final page of the detailed  
6 billing lists each attorney’s hourly rate and total charge for the work performed by each attorney.  
7 Second, following the detailed billing invoices, is an invoice summary and the total amount due for that  
8 billing period.

9 Section 9918 (a)(7) of the OGA provides an exemption for “preliminary drafts, notes,  
10 recommendations, and intra-agency memoranda, including lawyer’s work product and lawyer legal  
11 opinions in which opinions are expressed or policies formulated or recommended, except that a specific  
12 record shall not be exempt when publicly cited by an agency in connection with any agency action.” 1  
13 CMC § 9918(a)(7).

14 The detailed billing invoices reveal details of research, written work, case planning, summations  
15 of attorney’s work product and legal opinions, and reveals internal correspondence. Further, it cannot  
16 be said that the protection of the documents is “clearly unnecessary”because the information contained  
17 in the detailed billing invoices reveals strategy, detailed information regarding research topics, and  
18 precise time amounts that are spent on each duty. The revelation of this information, which would  
19 ultimately be available to the opposition in the 903 Lawsuit, could seriously disadvantage the  
20 government in the 903 Lawsuit. Therefore, The detailed portions of the billing invoices are not subject  
21 to disclosure.

22 Therefore, the detailed portions of the billing invoices, described above, are protected from  
23 disclosure based on the exception contained within 1 CMC § 9918 (7).<sup>2</sup> However, invoice summaries  
24

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25 <sup>2</sup>The documents are subject to protection under § 9918 (a)(8) as well. However, further analysis under

1 contain no details and are discussed further below.

2  
3 **B. Rules Governing 1 CMC § 9918 (a)(8)**

4 Plaintiff argues that Defendants have (1) failed to establish that the requested records are  
5 relevant to the controversy and (2) that Defendants have not established that the records would not be  
6 discoverable by the opposition in the litigation. Defendants maintain that the documents would not be  
7 discoverable in the 903 Lawsuit, and therefore, the exception specifically excludes the documents from  
8 disclosure. For the reasons discussed below, the requested documents are relevant to the controversy as  
9 that term is used in the first portion of the statute and would not be discoverable by the opposition in the  
10 pending litigation, thus, the exception is applicable to the requested documents.

11 Section 9918 (a)(8) of the OGA provides that documents are exempt from disclosure if they are  
12 “[r]ecords which are relevant to a controversy to which an agency is a party but which records would  
13 not be available to another party under the rules of pretrial discovery for causes pending in the courts.” 1  
14 CMC § 9918 (a)(8). Ms. Sablan has expended a great deal of time arguing that the requested documents  
15 are not exempt by § 9918 (a)(8) because the documents are not relevant to the controversy. Relying on  
16 the Rules of Evidence, Ms. Sablan argues that the documents must be shown to make a fact of  
17 consequence more or less probable. *See* Plaintiff’s Response at 5. This, of course, is the definition of  
18 ‘relevant’ as a term of art in the Rules of Evidence. *See* Com. R. E. 401. Plaintiff’s reliance on this  
19 definition is improper.

20 The definition prescribed to the term ‘relevant’ in the Rules of Evidence is not the proper  
21 meaning of the word as used in the OGA statute. A basic and well established principle of statute

22 \_\_\_\_\_  
23 this exemption is unnecessary. The parties appeared to be in consensus that the detailed billing invoices would  
24 not be subject to disclosure, therefore, the Court finds a detailed analysis under both claimed exceptions  
25 unnecessary.

1 construction is that language must be given its plain meaning. *Estate of Faisao v. Tenorio*, 4 N.M.I. 260  
2 (1995). Therefore, the term ‘relevant’ as used in the statute shall be given its plain meaning and not the  
3 definition proscribed in the Rules of Evidence.

4 The second portion of the exception requires that the documents be undiscoverable by the  
5 opposing side in the related litigation. Plaintiff argues that “records such as those sought. . .including  
6 retainer agreements, fee agreements, engagement letters, contracts, matters involving receipts of fees,  
7 and general descriptions of legal work performed, are discoverable and not subject to attorney-client  
8 privilege.” *See* Plaintiff’s Response at 6. Plaintiff then references a long string cite of cases and argues  
9 that the cases stand for the proposition that the documents would be discoverable.<sup>3</sup> However, the  
10 espoused rule is a vague assertion that does not describe the holding or surrounding facts in the cases  
11 with any particularity. Further, it is impossible for this Court to ascertain what rule Plaintiff is alleging  
12 that the long list of cited cases establishes nor how it is applicable to the facts in this matter.

13 Generally, parties may obtain discovery regarding any matter, not privileged, which is relevant  
14 to the subject matter involved in the pending action. Com. R. Civ. P. 26(b)(1). However, in order to  
15 obtain materials prepared by the attorney in anticipation of litigation, the requesting party must show a

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16  
17 <sup>3</sup>The extensive string cite appears on page 6 of Plaintiff’s Brief. Included in the cite is multiple citations  
18 which do not comport with the Rules which provide that if a case is not available in the Commonwealth Law  
19 Library, the party should provide the court a copy of the case. Com. R. Civ. P. § 83.2(e). The Court realizes that  
20 this rule is somewhat antiquated in that does not include the availability of obtaining cases via the internet.  
21 However, the Court does not have access to Westlaw, rather, the court has electronic access to cases through  
22 Lexis only. Thus, any citation which is a “Westlaw” citation is not available to the Court. Defendants, too, have  
23 improperly cited cases using the “Westlaw” citation which appears as a ‘WL’ citation. Cases cited by the parties  
24 which cannot be obtained in the Commonwealth Law Library or via the Court’s online Lexis subscription have  
25 not been reviewed.

1 substantial need of the materials in the preparation of the their case and that the party is unable without  
2 undue hardship to obtain the substantial equivalent of the materials by other means. Com. R. Civ. P.  
3 26(b)(3). Further, information is discoverable if it is “reasonably calculated to lead to the discovery of  
4 admissible evidence.” Com. R. Civ. P. 26(b)(1). Additionally, “the court shall protect against  
5 disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other  
6 representative of a party concerning the litigation.” Com. R. Civ. P. 26(b)(3).

7 Defendants concede that fee agreements, fee amounts, identification of payments and the general  
8 purpose of the work performed are usually not protected from disclosure. Def. Mot. to Withhold at 6.;  
9 *E.g., In re January 1976 Grand Jury*, 534 F.2d 719, 727 (7th Cir. 1976) (fee agreements are generally  
10 not privileged); *Nat’l Union Fire Ins. Co. Of Pittsburgh v. Aetna Cas. & Surety Co.*, 384 F.2d 316, 317  
11 n.4 (D.C. Cir. 1967) (fact that attorney-client relationship exists and its reason for existence are not  
12 privileged). However, it is well settled that fee agreements and related information may not be used as a  
13 discovery tool to determine an opponents financial posture and gain a tactical advantage. *E.g., Banks v.*  
14 *Office of the Senate Sergeant-At-Arms & Doorkeeper*, 222 F.R.D. 7, 13 (D.D.C. 2004) (“assessing one’s  
15 settlement posture by knowing what one’s opponent is paying counsel is not a legitimate use of  
16 discovery. . . .”). Further, when assessing the relevancy of such information for discovery purposes, the  
17 timing of the discovery request becomes a key consideration. For example, in *Robinson v. Duncan*, 255  
18 F.R.D. 300 (D.D.C. 2009), the court noted that although a requested retainer agreement was not  
19 privileged, it was not relevant for discovery purposes until possibly at a later time in the proceedings  
20 when attorney’s fees were sought.

21 This is an essential distinction because the OGA exemption states that the requested documents  
22 are not available if they are not discoverable under *pretrial* discovery rules. Thus, during pretrial, a  
23 court could not conclude that the Engagement Letter, Billing Invoices, or other requested documents  
24 were discoverable because opposing counsel in the 903 Lawsuit could not show that they were relevant  
25 to the subject matter as required by the rules of discovery. *E.g., Banks*, 222 F.R.D. at 13 (holding that

1 fee agreements are not privileged and they become relevant, at best, when plaintiff prevails and seeks a  
2 fee); *Robinson*, 255 F.R.D. at 303 (holding that the litigant was not entitled to the production of the  
3 retainer agreement because, while not privileged and potentially relevant at a later point in the  
4 proceedings, the employee's fee arrangement with her attorney was not currently relevant).

5  
6 The information Plaintiff requested is 'relevant to the controversy' as that phrase is used in the  
7 statute because all the requested information relates to, or is pertinent to, the 903 Lawsuit. However,  
8 although the requested information is not privileged, the opposing party in the 903 Lawsuit would not  
9 have a right to the information because they could not show it was currently relevant (as that term is  
10 used in discovery) to the issues of the lawsuit or that requesting the information was a proper use of  
11 discovery. However, this does not mean nondisclosure of the documents is necessary to protect the  
12 government's lawsuit.

13  
14 **C. § 9918 (c): Is Nondisclosure Clearly Unnecessary?**

15 Citing the foregoing cases, Defendant argues that revealing the requested documents will create  
16 a tactical disadvantage that creates an unfair litigation environment so it cannot be concluded that  
17 applying the exemption is "clearly unnecessary" to protect a vital government function. While the  
18 aforementioned cases support the conclusion that the billing information, engagement letters, and related  
19 documents would not be discoverable, the cases do not illustrate why it is necessary to prevent the  
20 disclosure of the documents when they contain the exact type of information that the OGA was meant to  
21 make readily available to the public. Further, the cases do not illustrate or support a conclusion that the  
22 revealing the documents will disadvantage the government in the 903 Lawsuit.<sup>4</sup>

23  
24 <sup>4</sup>Another case cited by Defendant is *Limstrom v. Ladenburg*, 963 P.2d 869 (1998). See Defendant's  
25 Motion to Withhold Documents at 2. However, merely citing to a case does not help Defendant. Defendant fails

1 In response to this Court's inquiry into the court-ordered discretion permitted by § 9918 (a)(c),  
2 Defendants state that the "secrecy of the CNMI litigation budget remains essential and indispensable to  
3 the vital governmental function of litigating its case in the courtroom with a maximum chance of  
4 success." *See* Defendants' Status Conference Statement at 5. The Defendants characterize the  
5 requested information as "tactical litigating information" and argue that releasing the documents would  
6 "eviscerate the ability of the OAG and any outside lawyers to stand toe-to-toe against strong, well-  
7 financed, and aggressive litigators." *Id.* However, the argument is void of any articulated reason or  
8 explanation why releasing the documents disadvantages them and the argument is void of case law  
9 which supports the proposition that government spending for litigation is not subject to public  
10 disclosure.

11 None of the information contained in the documents reveals that there is a 'cap' or a 'maximum  
12 allowance' for the litigation budget thereby implying that when that maximum amount is spent - the  
13 litigation will be halted. This type of information could disadvantage the CNMI in the lawsuit because  
14 the opposition could simply run up the litigation expenses until the budget was spent and the U.S. could  
15 prevail in the lawsuit. However, no such threat exists. Nothing in the documents reveals the total  
16 amount for the litigation budget even if such a budget exists.

17 While the requested documents would not be discoverable partly because a party cannot be  
18 permitted to assess the financial posture of their opponents to gain tactical advantages, the reasons for  
19 preventing the information from disclosure during discovery are not applicable in the same manner  
20 when it is a government party rather than a private party and the documents are requested pursuant to  
21 the OGA because the CNMI's financial posture is not a secret. The government's estimated litigation  
22 budget, and the CNMI's general budget, are not matters of secrecy.<sup>5</sup> Thus, there is no threat of the U.S.

23 \_\_\_\_\_  
24 to tell the Court what they believe the case stands for or how the case supports their position.

25 <sup>5</sup>For example, in August, 2008, the Governor made his request for funding for the lawsuit to the

1 impermissibly assessing the CNMI's financial posture to gain tactical advantages.

2 Defendants argue that revealing how much Jenner & Block are billing the CNMI, in concert with  
3 how much the CNMI is paying to the firm, will create a disadvantage to them in the lawsuit because the  
4 U.S. will be able to ascertain if the CNMI is falling behind on their payment. However, the argument is  
5 unpersuasive. Such a conclusion by the U.S. would require a great deal of speculation. Additionally,  
6 Defendant's were unable to articulate *how* or *in what way* this would disadvantage them. Further, the  
7 projected budget expenditure is already a matter of public record and, as stated, nothing in the  
8 documents reveals how much money the CNMI is actually willing to dedicate to litigation costs. Lastly,  
9 the amount that the CNMI pays its Attorney Generals, who normally represent the government, is also a  
10 matter of public record. Thus, disclosing the invoice amounts, revealing how much taxpayer's money  
11 has been spent thus far, what the source of the money is, and the hourly rates of the attorney's will not  
12 create a disadvantage to the CNMI in the 903 Lawsuit.

13 Therefore, nondisclosure of the financial information (summarized billing invoices, vouchers,  
14 memos, and Governor's Account ledger) is clearly unnecessary to the government's litigation rights.  
15 However, the Engagement Letter contains information that is quite different in nature and will be  
16 discussed separately.

17 1. Washington and D.C. Circuit Holdings

18 In *Tiberino v. Spokane County*, (not cited by Defendant but from the same jurisdiction Defendant  
19 heavily relies on) the court applied the analogous Washington statute and held that a county employee's  
20 personal e-mails that were printed in preparation for litigation over the employee's termination were  
21 public records, however, because disclosure of the intimate details therein would be highly offensive

22 \_\_\_\_\_  
23 Legislature. Information presented included expected litigation budget, monthly payment amounts, and total  
24 estimated litigation costs. See Joint Committee Report 16-1 adopted by the Senate and House on September 18,  
25 2008 and October 3, 2008, respectively.

1 and because the public had no legitimate concern requiring their release, they were exempt from  
2 disclosure. *Tiberino v. Spokane County*, 13 P.3d 1104 (2000). The court in *Tiberino* clearly indicates  
3 that the reason for nondisclosure was because the details contained in the requested information would  
4 be “highly offensive” and because the public had “no legitimate concern.” This is not applicable to our  
5 case and, in fact, the opposite could be said about the information contained in the documents that Ms.  
6 Sablan has requested. The public has an unquestionable legitimate concern in the requested documents.

7 The Washington cases Defendants rely on, by Defendant’s own conclusions, merely stand for the  
8 proposition that the litigation exemption contained in the Washington statute (which is identical to  
9 language of the CNMI statute) encompasses not only *present* litigation, but also anticipated litigation  
10 and past litigation. *See* Defendants’ Status Conference Statement at 3; 7. This conclusion is not helpful  
11 to Defendants at this juncture. The Court agrees that the litigation exemption applies to the requested  
12 documents and further, that the application of the exemption does not cease to apply when the litigation  
13 ends. Though, once the litigation is over, keeping the documents shielded from the public becomes even  
14 more unnecessary and thus, may further implicate subsection (c).

15 Unlike the Washington state statute, the analogous Federal statute, the Freedom of Information  
16 Act (hereinafter “FOIA”), does not contain a provision which provides the Court discretion to release  
17 documents which are otherwise exempted. Thus, cases which apply the FOIA should be distinguished  
18 because, unlike the OGA, courts applying the FOIA do not have discretion to order disclosure of  
19 documents even if the documents are specifically exempted by the FOIA. *See* 5 U.S.C.S. § 552 (1976);  
20 5 U.S.C.S. § 552 (b)(5) (section which contains a comparable exemption for documents which are  
21 relevant to litigation). However, the cases are illustrative.

22 Defendant relies on *Robinson* and *Banks*, *supra*, from the District of Columbia. However, the  
23 holdings of those cases, as stated previously, merely support the proposition that litigation budgets and  
24 expenses are not proper items for discovery. The cases had nothing to do with the FOIA nor did the  
25 cases discuss the right of the public to have access to government information. The cases were speaking

1 directly to the issue of what is discoverable. Further, neither *Robinson* nor *Banks* involved litigation  
2 where the government was a party nor was the requested information related to government funding.  
3 The question remains, how will revealing such information disadvantage the government as a litigant?

4 In *Indian Law Resource Center v. Dept. of the Interior*, 477 F Supp 144 (D.D.C. Dist 1979) the  
5 court discussed whether or not certain legal bills and statements were subject to disclosure or were  
6 exempt under 5 U.S.C.S. § 552(b)(4) (1976). The exemption provides that an agency may withhold  
7 “trade secrets and commercial or financial information obtained from a person and privileged or  
8 confidential.” 5 U.S.C.S. § 552(b)(4) (1976). Although the court was not applying a litigation  
9 exemption, the documents at issue are similar so the case is illustrative.

10 The documents at issue were: (1) Tribal resolutions reflecting the names of the lawyers chosen  
11 and the fee amounts endorsed; (2) periodic law firm statements to the Tribal Council, with attached  
12 vouchers describing in detail legal services provided and travel expenses incurred; (3) one page  
13 memoranda from the Superintendent to the BIA Area Director directing transmitting the documents  
14 described in (2); and (4) one page memoranda from the BIA Area Office Finance Officer to the Area  
15 Director recommending action to be taken and reflecting action actually taken by the Area Director on  
16 the claims for payment. The documents at issue contained approved fee schedules, precise fee amounts,  
17 invoices, and vouchers with detailed monetary references. *Id.* at 146.

18 Initially, the Department of the Interior withheld all the requested documents but before the  
19 District Court made their ruling, the Department released all the documents described in category (3)  
20 and (4) which was all memoranda addressing fees paid directly from federal funds. The court  
21 determined that the law firm statements should not be disclosed because they contained “detailed  
22 itemization of persons contacted and locations visited on particular days, research memoranda prepared  
23 on specific topics, and precise amounts of attorney time spent on identified issues.” *Id.* at 148. Further,  
24 the vouchers were withheld because the court recognized that they “reveal strategies developed by Hopi  
25 counsel in anticipation of preventing or preparing for legal action to safeguard tribal interests”. *Id.* at

1 148. These conclusions are consistent with this Court's findings that the itemized billing reveals  
2 litigation strategy and would impair the government's litigation. However, the D.C. Court makes the  
3 distinction between detailed, itemized fee statements and generic fee amounts. In fact, the court plainly  
4 rejects the argument that documents other than the detailed law firm statements are confidential stating:

5           The Tribe's contention that attorney identities or actual fee amounts  
6 are privileged matters must be rejected. Tribal Council resolutions  
7 and attorney fee schedules are not prepared in anticipation of  
8 litigation. . . the attorney-client privilege, which extends to the  
substance of matters communicated to an attorney in profession  
confidence, as a rule does not cover the identity of a client or attorney  
or the payment of fees.

9 *Id.* at 149.

10           The case illustrates an important point and that is, even where it is not a government agency, the  
11 D.C. Court has found that payments to attorneys and fee schedules are not confidential matters. The  
12 only documents the D.C. Court found to be exempt from release were detailed bills similar to the  
13 itemized bills which this Court has determined shall not be disclosed.

14           With the foregoing principles and conclusion in mind, the requested documents will be  
15 specifically discussed in turn. The documents at issue and identified in the Privilege Log may be  
16 divided as follows: (1) the Engagement Letters; (2) Billing Invoices; (3) Voucher/Payments; (4) Memos  
17 and letters between the Governor, the Secretary of Finance and the Bank of Guam; (5) Journal Entry  
18 reflecting fund transfers; and (6) the Governor's Account Ledger. *See* Privilege Log and Plaintiff's  
19 Complaint Exhibit A and C.

20 Engagement Letter

21           The Court cannot conclude that the revelation of the Engagement Letter is clearly unnecessary to  
22 protect a vital government function. The Engagement Letter includes Jenner & Block's definition of the  
23 issues, general strategy statements, and estimations of success in the 903 Lawsuit. Unlike the financial  
24 information contained in the other documents, this type of information could create a tactical advantage  
25

1 for the U.S. in the 903 Lawsuit. Further, unlike the other requested information, the information  
2 contained in the Engagement Letter are matters which are secret and not normally or already available to  
3 the public.

4 The Engagement Letter is not discoverable and not subject to disclosure based on Court  
5 discretion.

6  
7 Billing Invoices

8 As discussed, the detailed billing invoices are not subject to disclosure because they are  
9 specifically exempted and it cannot be said that disclosure is clearly unnecessary. However, following  
10 each detailed bill is a separate invoice summary. These documents, although generally not privileged  
11 information, are not a proper use of discovery. Therefore, the documents would not be discoverable at  
12 this juncture in the litigation by the opposing party and thus, the exemption applies.

13 However, nothing contained within the invoice summaries is a matter which is not normally, or  
14 is not already, a matter of public records. Revealing what amount the CNMI is being billed and the  
15 hourly rates of the attorneys, in no way, disadvantages the CNMI in the 903 Lawsuit. Therefore, the  
16 nondisclosure is clearly unnecessary to protect a vital government interest.

17 Thus, the detailed billing pages shall not be disclosed. However, the summary pages are proper  
18 for disclosure. Further, one page included with the detailed bills which includes a summary of the  
19 attorney's rates and has no details on it shall be disclosed.

20  
21 Vouchers, Ledgers, Memos, Journal Entries, and Governor's Account Ledger

22 The vouchers merely show what payments have been made to Jenner & Block and the Memos,  
23 Journal Entries, and Governor's Account Ledger reflect the same payment information and add no new  
24 information. As discussed above, revealing what the CNMI is being billed and what the CNMI is  
25 paying, in no way disadvantages the CNMI in the 903 Lawsuit. This Court is unable to articulate a

1 single reason that would make nondisclosure necessary to protect a vital government function.

2 Therefore, the Vouchers, Memos, Journal Entries, and Governor's Account Ledger are proper for  
3 disclosure.

### 5 III. CONCLUSION

6 The Court is aware of the governments' concern that this ruling will forever put government  
7 litigation at risk. However, this is a dramatized overstatement of the situation. The government has  
8 failed to articulate why releasing documents – which reveal how much money the taxpayers have spent,  
9 how much the CNMI is being billed, and the source of the money– will set a dangerous precedent or  
10 disadvantage the current lawsuit in any way. Further, every decision under subsection (c), by the very  
11 language of the statute, is within the courts' discretion. So in this sense, no precedent is being  
12 conclusively fixed.

13 For the foregoing reasons, IT IS HEREBY ORDERED that Defendants immediately produce the  
14 following documents, pursuant to 1 CMC § 9916 (b)(2), which provides that the documents shall be  
15 opened to Plaintiff within 48 hours:<sup>6</sup>

- 16 1. Summary Invoice No. 9109815 dated August 26, 2008 (one page)
- 17 2. Summary Invoice No. 9112551 dated September 17, 2008 (one page)
- 18 3. Summary Invoice No. 9115379 dated October 9, 2008 (one page)
- 19 4. Summary Invoice No. 9118433 dated November 13, 2008 (one page)<sup>7</sup>

20 \_\_\_\_\_  
21 <sup>6</sup>If Defendants have any questions or uncertainties which documents are identified below, then  
22 Defendants shall inform the Court and the parties will meet with the Court to clarify which documents are  
23 included. The Court is still in possession of all described documents which were submitted for in camera review.

24 <sup>7</sup> The detailed bills, as discussed, shall not be disclosed. However, the summaries contained on the last  
25 page of the detailed bills includes the hourly rates of the attorneys. The information is duplicated on each detailed

- 1 5. Page 5 of Detailed Invoice No. 9118433 dated November 13, 2008 (one page)
- 2 6. Summary Invoice No. 9122491 dated December 11, 2008 (one page)
- 3 7. Summary Invoice No. 9125346 dated January 23, 2009 (one page)
- 4 8. Summary Invoice No. 9128117 dated February 27, 2009 (one page)
- 5 9. Voucher Entry identified with Invoice Number: "1ST INST UPON EXEC AGRMNT" dated  
6 October 1, 2008 (one page) and Corresponding Update Voucher (one page)
- 7 10. Voucher Entry identified with Invoice Number: "2ND INST UPON EXEC AGRMNT" dated  
8 November 19, 2008 (one page) and Corresponding Update Voucher (one page)
- 9 11. Voucher Entry identified with Invoice Number: "3RD INST PER GOVNR'S MEMO" dated  
10 December 22, 2008 (one page) and Corresponding Update Voucher (one page)
- 11 12. Voucher Entry identified with Invoice Number: "4TH INST PER GOVNR'S MEMO" dated  
12 January 29, 2009 (one page) and Corresponding Update Voucher (one page)
- 13 13. Voucher Entry identified with Invoice Number: "5TH INST PER GOVNR'S MEMO" dated  
14 January 29, 2009 (one page) and Corresponding Update Voucher (one page)
- 15 14. Voucher Entry identified with Invoice Number: "6TH INST PER GOVNR'S MEMO" dated  
16 April 15, 2009 (one page)
- 17 15. Document Titled "Manual Payment w/ Voucher Match" dated January 29, 2009 (one page)
- 18 16. Document Titled "Governor's Account Professional" Ledger identified as "1011 as of 4/30/09"  
19 (one page)
- 20 17. Document Titled "Commonwealth of N. Mariana Is./FUND STATUS FY 2009" reflecting  
21 Governor's Discretionary Account No. 1021 as of April 21, 2009(one page)
- 22 18. Document Titled "Commonwealth of N. Mariana Is./FUND STATUS FY 2009" reflecting  
23

24 bill. Rather than redact all the details from all the detailed bill pages, this single page, which does not contain any  
25 details and may be revealed without redaction, provides Plaintiff with the information she seeks.

- 1 Office of the Governor Account No. 1011 as of April 21, 2009 (one page)
- 2 19. Document Titled "Commonwealth of N. Mariana Is./Office of the Governor/Fund Status Report"
- 3 reflecting Office of the Governor Account No. 1011 as of September 30, 2008 (one page)
- 4 20. Document Titled "Commonwealth of N. Mariana Is./Office of the Governor/Fund Status Report"
- 5 reflecting Governor's Discretionary Account No. 1021 as of September 30, 2008 (one page)
- 6 21. Document Titled "Supplier Payment Inquiry" reflecting payments October thru April (one page)
- 7 22. Document Titled "Supplier Payment Inquiry" reflecting payments October thru January (one
- 8 page)
- 9 23. Memo To Secretary of Finance, From Governor dated November 17, 2008 (one page)
- 10 24. Memo To Secretary of Finance, From Governor dated December 17, 2008 (one page)
- 11 25. Memo To Secretary of Finance, From Governor dated January 28, 2009(one page)
- 12 26. Memo To Secretary of Finance, From Governor dated April 9, 2009(one page)
- 13 27. Letter to Bank of Guam Vice President/Manager from CNMI Treasurer dated October 2, 2008
- 14 (one page). **NOTE: ANY PRIVATE, SENSITIVE BANK OF AMERICA OR BANK OF**
- 15 **GUAM ACCOUNT NUMBERS SHALL BE REDACTED.**
- 16 28. Letter to Bank of Guam Vice President/Manager from Secretary of Finance Inos dated January 6,
- 17 2009 (one page). **HOWEVER: BANK OF AMERICA AND/OR BANK OF GUAM**
- 18 **ACCOUNT NUMBERS SHALL BE REDACTED.**
- 19 29. Letter to Bank of Guam Vice President/Manager from CNMI Treasurer dated April 17, 2009
- 20 (one page). **NOTE: ANY PRIVATE, SENSITIVE BANK OF AMERICA OR BANK OF**
- 21 **GUAM ACCOUNT NUMBERS SHALL BE REDACTED.**
- 22 30. Documents Titled "Journal Entries" with "Explanation: Transfer to Governor's" and showing
- 23 "G/L Date 09/30/08" (two pages)

24 **IT IS FURTHER ORDERED** that the Plaintiff may submit her claim for costs and attorney's

25 fees that were requested by Plaintiff pursuant to 1 CMC § 9915 (b). This issue has not yet been



*Notice: This slip opinion has not been certified by the Clerk of the Supreme Court for publication in the permanent law reports. Until certified, it is subject to revision or withdrawal. In any event of discrepancies between this slip opinion and the opinion certified for publication, the certified opinion controls. Readers are requested to bring errors to the attention of the Clerk of the Supreme Court, PO Box 502165 Saipan, MP 96950, phone (670) 236-9715, fax (670) 236-9702, e-mail SupremeCourtClerk@justice.gov.mp.*



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Lynette Camacho

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

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CHRISTINA-MARIE SABLAN,  
Plaintiff-Appellee,

v.

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

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

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**SLIP OPINION**

**Cite as: 2009 MP 11**

Decided August 28, 2009

Braddock J. Huesman, Assistant Attorney General, Saipan, Northern Mariana Islands, for  
Defendants-Appellants  
Christina-Marie Sablan, Pro Se

BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; JOHN A. MANGLONA, Associate Justice

PER CURIAM:

¶ 1 Appellants Governor Benigno R. Fitial and former Secretary of Finance Eloy S. Inos (“the government”) appeal a trial court decision ordering them to release financial documents to the appellee, Christina-Marie Sablan, pursuant to the Open Government Act, arguing that the trial court (1) incorrectly placed the burden of proof on the government to show that the disclosure exception should not apply, (2) erred in finding that the government would not be disadvantaged in its lawsuit against the federal government if the documents were disclosed, and (3) ignored relevant case law and improperly relied on case law that is not relevant to the case at hand. We find that the trial court did not improperly disregard case law that the government claims is relevant to the case at hand, and that it properly relied on case law which, while not completely analogous to the instant case, provided analytical framework for review of the documents. The trial court did, however, err in placing the burden of proving that the disclosure exemption should not apply on the government, as the Open Government Act is structured in such a way that prompts the trial court to place the burden of proof on the plaintiff once the government establishes that a disclosure exemption applies. Upon placing the burden of proof on Sablan, we find that she met her burden by demonstrating that the financial documents would not reveal any information that would disadvantage the Commonwealth in its lawsuit against the federal government. Accordingly, the trial court’s order is AFFIRMED.

## I

¶ 2 In September 2008, Governor Benigno R. Fitial filed a lawsuit against the federal government in an attempt to block the impending federalization of the Commonwealth immigration system (“federalization lawsuit”). The Governor hired private counsel, the Chicago-based firm of Jenner & Block, to represent the Commonwealth against the United States. On October 16, 2008, Christina-Marie Sablan requested access to documents containing the Commonwealth’s financial obligation to Jenner & Block, as well as the source of funding for the federalization lawsuit pursuant to the Open Government Act (“OGA”), set forth at 1 CMC §§ 9901-9918. Specifically, Sablan requested copies of “(1) all contracts related to the [federalization lawsuit]; (2) documents detailing payments made on said contracts; (3) documents identifying the source(s) of funding for the [federalization lawsuit]; and (4) documents identifying the department(s) of the CNMI government that might have had funds reprogrammed due to the [federalization lawsuit].” Appellant’s Excerpts of Record (“ER”) at 30-31. The Governor refused to produce any documents related to the case. In December 2008, Sablan sent an

additional OGA request to then Secretary of Finance Eloy S. Inos requesting essentially the same documents, but with the addition of all papers containing the specific words “Jenner” and “Block.” Secretary Inos also refused to produce any of the requested documents.

¶ 3 In February 2009, Sablan filed a petition for mandamus relief with the trial court, asking it to order Governor Fitial and Secretary Inos to produce the requested documents, again pursuant to the OGA. Shortly thereafter, the trial court ordered the government to submit all relevant invoices and correspondence for an in camera review. After an in camera review of the documents, the trial court granted Sablan’s request as to all records except the firm’s engagement letter and certain detailed billing statements that could potentially reveal litigation strategy, and ordered the government to deliver them to Sablan within forty-eight hours.<sup>1</sup>

¶ 4 In granting Sablan’s request, the trial court relied on 1 CMC § 9918(a)(8) and 1 CMC § 9918(c).<sup>2</sup> The first provision exempts records from public disclosure that “would not be available to another party under the rules of pretrial discovery for causes pending in the courts.” 1 CMC § 9918(a)(8). Since client invoices are generally not subject to pretrial discovery, the trial court found that the billing statements and related correspondence would generally fit within this exemption, thus the government would not be compelled to disclose them. However, 1 CMC § 9918(c) states that even though a document may be exempted from disclosure under the above subsection, inspection and copying of the documents “may be permitted if the Commonwealth Superior Court finds, after a hearing with notice thereof to every person in interest and the agency, that the exemption of such records is clearly unnecessary to protect any individual’s right of privacy or any vital government function.”

¶ 5 Upon applying this exception to the financial records, the trial court found that disclosing their contents would in no way disadvantage the Commonwealth in the federalization lawsuit, and additionally, that much of the information was already a matter of public record. *Sablan v. Fitial*,

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<sup>1</sup> The trial court’s forty-eight-hour time period derived from 1 CMC § 9916(b)(2), which requires an agency to open its records for inspection within forty-eight hours of a court order, unless the trial court has a reason to modify the time period. The OGA does not specify whether the forty-eight-hour period includes weekends and holidays, or if the timeframe is confined to business days. In the absence of legislative intent to the contrary, we give words and phrases their plain meaning. *See Estate of Faisao v. Tenorio*, 4 NMI 260, 265 (1995). Consequently, the forty-eight hour clock begins as soon as the order is issued, regardless of the day of the week. Here, the trial court issued the order on Thursday, June 18, 2009, at approximately 2:45 p.m., thus the timeframe for disclosure could have extended into the weekend. Because access to the judiciary and the ability to communicate with other interested parties may be limited outside of normal working hours, the timing of an order could produce inherently unfair results for the government, especially if the order came just before a weekend or an extended holiday. Under 1 CMC § 9916(b)(2), the trial court is given latitude to craft an order that avoids potential unfair results, and it should take these limitations into consideration in future OGA claims.

<sup>2</sup> For clarification purposes, we refer to 1 CMC § 9918(a)(8) as the disclosure “exemption,” and to 1 CMC § 9918(c) as the “exception” to the disclosure exemption.

Civ. No. 09-0066E (NMI Super. Ct. June 18, 2009) (Order Releasing Requested Documents Pursuant to the Open Government Act at 15). In all, the trial court ordered the government to disclose thirty invoice summaries and documents related to the payment of those debts. The following day, the government filed a motion for an emergency stay with both the trial court and this Court. The trial court denied its request, but this Court granted it in order to conduct an adequate, meaningful, and comprehensive review.

## II

¶ 6 An understanding of the history and rationale behind public disclosure legislation is important in reviewing a private citizen's claim against the government pursuant to the OGA. Prior to the existence of such legislation, the United States Supreme Court recognized the need for greater transparency and openness in government. In *Barr v. Matteo*, Justice Hugo Black stated that "[T]he effective functioning of a free government like ours depends largely on the force of an informed public opinion." 360 U.S. 564, 577 (1959). In an effort to officially sanction access to public records and meetings, thereby heightening public oversight and accountability, the United States Congress passed the federal Freedom of Information Act ("FOIA") in 1966. The act allows "any person" to access agency rules, opinions, orders, records, and proceedings, with limited exceptions to protect privacy rights and matters of national security. 5 U.S.C.S. § 522(a)(3)(A) (1966). Since that time, all fifty states have enacted individual versions of the FOIA. Many have distinctive titles for their legislation, and specific disclosure allowances vary from state to state, but all aim for greater transparency in government.

¶ 7 In 1994, the Commonwealth's OGA was enacted. The legislature commented on its motivation for introducing and passing the act in its "Legislative Declaration," stating that "[t]he people insist on remaining informed so that they may retain control over the instruments they have created." 1 CMC § 9901. The legislation was first introduced in the senate, and appears to be modeled after the State of Washington's Public Records Act, Wash. Rev. Code §§ 42.56.001-904 (2009).<sup>3</sup> Since its enactment, the trial court has considered claims brought under the OGA on

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<sup>3</sup> The available legislative history of the bill, including transcripts from the Eighth Legislature's floor debate of the bill, do not expressly reveal that the OGA was modeled after Washington's Public Records Act. However, the structure of Washington's Act as it read in 1994 corresponds to the current version of the OGA, and a great deal of the text is essentially verbatim. For example, Washington's version of 1 CMC § 9918(c) reads, ". . . if the superior court in the county in which the record is maintained finds, after a hearing with notice thereof to every person in interest and the agency, that the exemption of such records, is clearly unnecessary to protect any individual's right of privacy or any vital governmental function." Wash. Rev. Code § 42.17.310(3) (1972).

at least six different occasions,<sup>4</sup> but the case at hand is the first to come before us on appeal. In reviewing a public entity's denial of an OGA request, the judiciary is required to liberally construe provisions favoring disclosure of public records, and to strictly construe provisions providing for exceptions to the disclosure requirement. 1 CMC § 9901. It is with this statutory language in mind that we decide the issues now before us.

¶ 8 The government maintains that revealing the amount of money Jenner & Block billed the Commonwealth will disadvantage it in the federalization lawsuit, because the amount of money a party pays its attorney is "tactical litigating information." *Sablan*, Civ. No. 09-0066E (Order Releasing Requested Documents Pursuant to the Open Government Act at 10) (citing Defendants' Status Conference Statement at 5). It also argues that releasing the documents would "eviscerate the ability of the OAG and any outside lawyers to stand toe-to-toe against strong, well-financed, and aggressive litigators." *Id.* It is ultimately this narrow issue with which the Court is now faced: whether the trial court erred in determining that exemption of the billing summaries is clearly unnecessary to protect a vital government function. In other words, did the trial court mistakenly determine that the government's interest in the federalization lawsuit would not be compromised if the financial documents are released? In deciding this main issue, the government specifically requests review of the trial court's application of 1 CMC § 9918(c), including whether the trial court erroneously placed the burden of proof on the government and whether it properly gauged the precedential value of the case law it relied upon.<sup>5</sup>

¶ 9 To preface our discussion of the appellants' specific arguments, it is helpful to first review the sequence of events and analysis that lead to the application of 1 CMC § 9918(c). First, the individual or group wishing to procure the record must establish that it is indeed "public." The definition of a "public record" is set forth at 1 CMC § 9902(f), and encompasses records which an agency is required to keep by law, or that are necessary to discharge the agency's duties. These records may include documents such as reports, memoranda, maps, and official

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<sup>4</sup> *Sablan v. Tenorio*, Civ. No. 94-0500 (NMI Super. Ct. July 18, 1994); *Commonwealth v. Dowci*, 99-0072 (NMI Super. Ct. May 6, 2009); *Guerrero v. Dept. of Pub. Lands*, 06-0313(c) (NMI Super. Ct. Oct. 26, 2006); *Malone v. Northern Marianas Ret. Fund*, Civ. No. 06-0033 (NMI Super. Ct. Nov. 15, 2006); *Richardson v. Commonwealth Ports Auth.*, 03-0413B (NMI Super. Ct. Apr. 4, 2005); *Hofschneider v. Demapan-Castro*, 04-0523B (NMI Super. Ct. Aug. 19, 2005).

<sup>5</sup> In its "Statement of the Issues," the government also raises the issue of whether the trial court erred in ruling that the documents are not the work product of the attorneys and are not protected under the attorney-client privilege. However, the government does not actually discuss any aspect of this issue in its brief or cite legal authority to support any particular assertion. Accordingly, we do not speculate as to what position the government might have taken.

meeting minutes. In the instant case, neither party disputes that the documents related to the federalization lawsuit are public records.

¶ 10 Generally, if a record is public, it must be disclosed. However, the legislature recognized that certain types of documents, while public, must be exempt from the disclosure requirement to promote certain governmental objectives. At issue in this case is the “pending litigation” exemption, which exempts records from public disclosure that “would not be available to another party under the rules of pretrial discovery for causes pending in the courts.” 1 CMC § 9918(a)(8). “Agencies bear the burden to prove a particular statutory exemption applies” under 1 CMC § 9918(a). *Spokane Research and Defense Fund v. City of Spokane*, 117 P.3d 1117, 1123 (Wash. 2005). Here, the government met that burden, as it established that the federalization lawsuit is currently pending in the United States District Court for the District of Columbia, and that the billing summaries at issue would not be discoverable by the federal government.

¶ 11 After establishing that an exemption applies, the reviewing body then applies 1 CMC § 9918(c), which acts as an *exception* to the disclosure exemption. This provision states that, even though a document may be exempt from the disclosure requirement, inspection and copying of the documents “may be permitted if the Commonwealth Superior Court finds, after a hearing with notice thereof to every person in interest and the agency, that the exemption of such records is clearly unnecessary to protect any individual’s right of privacy or any vital government function.” 1 CMC § 9918(c). In implementing this exception, the legislature recognized that certain public records might be protected under one of the disclosure exemptions, even though there is no real need to protect them from disclosure. Pursuant to 1 CMC § 9918(c), documents of this nature must still be disclosed. In the case at hand, the trial court placed the burden of proving that this exception should not apply to the financial documents on the government. The government contends that this was an error.

#### *Burden of Proof*

¶ 12 In its order to release the documents at issue, the trial court stated that “[t]he government has failed to articulate why releasing the documents – which reveal how much money taxpayers have spent, how much the CNMI is being billed, and the source of the money – will set a dangerous precedent or disadvantage the lawsuit in any way.” *Sablan*, Civ. No. 09-0066E (Order Releasing Requested Documents Pursuant to the Open Government Act at 16). By stating that the government, not Sablan, failed to articulate sufficient justification for nondisclosure, the trial court signaled that it placed the 1 CMC § 9918(c) burden of proof on the government. The government asserts that this was an error. Whether the trial court incorrectly placed the burden of proof on a particular party is a legal question, which is reviewed de novo. *See e.g. Agulto v.*

*Northern Marianas Inv. Group, Ltd.*, 4 NMI 7, 9 (1993). Additionally, “[w]here the record consists of solely documentary evidence, the standard of review of a trial court’s public disclosure ruling is de novo.” *CLEAN v. City of Spokane*, 947 P.2d 1169, 1178 (Wash. 1997). Consequently, this standard of review is appropriate for each issue herein.

¶ 13 The government suggests that the plaintiff, who is generally the non-governmental party requesting the documents, has the burden of proving that the 1 CMC § 9918(c) exception applies. In support of this assertion, it relies on *Oliver v. Harborview Medical Center*, 618 P.2d 76, 82 (Wash. 1980), a Washington Supreme Court case in which a patient sued a public hospital in an attempt to gain access to her own medical records. The public hospital, who refused to disclose the relevant documents, claimed that disclosing the patient’s records would “inhibit full professional statements about patients” and therefore make future efforts to care for the patients less fruitful. *Id.* at 78. The court noted that “[1 CMC § 9918(c)] makes it clear that the patient has the burden of proof.” However, the court did not explain its reasons for placing the burden on that party, and did not identify the language in the code that would support its reasoning. Rather, its terse reference to the burden of proof seems to make its placement on the plaintiff self-evident.

¶ 14 In response to the appellant’s reliance on *Oliver*, Sablan argues that the patient’s position as the plaintiff in the case is immaterial. Rather, Sablan suggests that “case law firmly establishes that the burden of proof in justifying nondisclosure rests with the party that stands to be harmed by disclosure or benefitted by nondisclosure.” Appellee’s Reply Br. at 6. As an example, Sablan suggests that the *Oliver* patient’s privacy rights stood to be harmed by disclosing her medical records, as the threat of disclosure in the future would inhibit full professional statements about patients. *Id.* For this reason the burden fell on the private party.

¶ 15 Sablan also draws the Court’s attention to twelve other cases in which courts uniformly placed the burden of proof on the party whose interest stood to be harmed by disclosing public records, regardless of whether the party was the plaintiff or the defendant.<sup>6</sup> Courts in ten of the twelve cases cited by Sablan placed the burden of proof on the government. In those cases, as well as most public disclosure cases, the government was the custodian of the public records it attempted to keep out of public view. It follows that the government was, and usually is, the

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<sup>6</sup> *Tiberino v. Spokane County*, 13 P.3d 1104 (Wash. 2000); *Indian Law Resource Cntr. v. Dept. of Interior*, 477 F.Supp 144 (D.C.D.C. 1979); *Mell v. New Castle County*, 835 A.2d 141 (Del. Super. Ct. 2003); *City of Farmington v. Daily Times*, 2009 NMCA 57; *Newsome v. Alarid*, 568 P.2d 1236 (NM 1977); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989); *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242 (D.C.D.C. 1977); *Nat’l Cable Television Ass’n v. F.C.C.*, 479 F.2d 183 (C.A.D.C. 1973); *Rose v. Freedom of Information Comm’n*, 602 A.2d 1019 (Conn. 1992); *State ex rel. Nat’l Broadcasting Co., Inc. v. City of Cleveland*, 526 N.E.2d 786 (Ohio 1988); *U.S. Dept. of State v. Ray*, 502 U.S. 164 (1991); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

party whose interest stands to be harmed by disclosure. In the case at hand, Sablan asserts that it is the government's interest that stands to be harmed by disclosure, rather than her own. Sablan therefore claims that the trial court placed the burden of proof on the correct party. In addition to case law comparisons, Sablan also notes that she "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." *Id.*

¶ 16 Sablan correctly points out that other courts tend to place the burden of proving that a disclosure exemption applies on the party that stands to be harmed by disclosure. However, Sablan fails to recognize that these cases derive from jurisdictions with statutes that have no *exception* to the disclosure exemption similar to 1 CMC § 9918(c). In many other jurisdictions, a record is either exempt from disclosure or it is not. Of the jurisdictions cited by either party, only Washington and the Commonwealth require additional scrutiny of a public record after the court has exempted it from disclosure. As indicated earlier, the Commonwealth has a two-step process that ensures even greater transparency, whereas the other cited states except for Washington halt their analysis after the court applies a disclosure exemption. Since the trial court in this case correctly placed the burden of proving the disclosure exemption on the government, we must now determine who carries the burden for the second step of the analysis.

¶ 17 As the government notes, in *Oliver* the Supreme Court of Washington stated that the plaintiff has the burden of proving whether the exception to the disclosure exemption should apply to public records – the plaintiff's own hospital records in that case. As previously mentioned, the Commonwealth's OGA is analogous in many respects to Washington's Public Records Act, and we therefore find their courts' analysis persuasive.<sup>7</sup> Moreover, our reading of 1 CMC § 9918(c) also leads us to conclude that the plaintiff must prove that the exception applies.

¶ 18 We begin our analysis of the 1 CMC § 9918(c) burden of proof by examining the structure of the OGA as a whole. Generally, when a statutory provision is accompanied by legislatively-created exception, courts often times find that the format of the statute itself supports a burden shift.<sup>8</sup> This commonly-accepted principle of judicial review translates to claims brought under the OGA as well. When a plaintiff brings a claim under the OGA, he or she bears the

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<sup>7</sup> Although *Oliver* is factually distinguishable from the case at hand in that the court employed the "personal privacy" prong of the exception rather than the "vital government function" prong, there is no reason to believe the court's analysis would differ depending on which prong of the exception was triggered.

<sup>8</sup> For example, once a plaintiff attempting to enforce the terms of a contract establishes the existence of the agreement, the defendant then has the burden, if he or she so chooses, to show that an affirmative defense to enforcement applies.

initial burden of demonstrating that a document is a public record under 1 CMC § 9902(f). Next, “[a]gencies bear the burden to prove a particular statutory exemption applies” under 1 CMC § 9918(a). *Spokane Research and Defense Fund*, 117 P.3d at 1123. Because the initial burden of establishing that a document is public lies with the plaintiff, and the burden shifts to the government to prove that a disclosure exemption applies, it is only logical that the burden should move back onto the plaintiff to demonstrate that nondisclosure is clearly unnecessary to protect a vital government interest.

¶ 19 Sablan suggests that it is not possible for party who has never been privy to the contents of a document to prove that information contained therein is benign to the government’s interest. For the reasoning set forth below, we find that a plaintiff can indeed meet his or her 1 CMC § 9918(c) burden of proof without first having access to the documents he or she seeks to inspect. As stated above, the plaintiff must first prove that a document is a public record, even though he or she has not had access to the document. Such was the case here, as Sablan met her burden by claiming that the financial records were directly related to the government’s federalization lawsuit on behalf of the people of the Commonwealth. The government then had the burden to show that the documents were exempt from disclosure under 1 CMC § 9918(a). It was able to do so by establishing through pleadings and testimony that the federalization lawsuit was currently pending in federal court and that financial transactions between the government and Jenner & Block would not be discoverable by the federal government under the rules of pretrial discovery. Thus, the documents were exempt under 1 CMC § 9918(a)(8).

¶ 20 In most jurisdictions, the case would be finalized at this point in the proceedings, as the government would have established sufficient justification to withhold the documents from the public. However, the Commonwealth, as well as the state of Washington, allow the plaintiff one final chance to show that, even though a document is exempt from disclosure, “exemption of such records is clearly unnecessary to protect . . . any vital government interest.” 1 CMC § 9918(c). The plaintiff should, in most cases, be able to incorporate the same rationale used by the government to prove that a 1 CMC § 9918(a) exemption applied in order to articulate his or her own argument in favor of disclosure under 1 CMC § 9918(c). For example, in this case the government asserted that the “pending litigation” exemption applied because the documents at issue reflect the financial arrangement with Jenner & Block, and that such information would not normally be available to Jenner & Block in discovery. Sablan could then take this information – that the documents consist of billing invoices and other financial data – and argue that the general nature of the documents is such that exemption is clearly unnecessary to protect a vital

government interest. The Court, having access to the records via in camera review, can then consider the plaintiff's claims and rule accordingly.

¶ 21 In sum, we recognize that the legislative declaration of the OGA requires us to liberally construe each provision that favors disclosure, and to strictly construe provisions that create exceptions to the disclosure requirement. 1 CMC § 9901. However, in holding that the plaintiff bears the burden of proving that the 1 CMC § 9918(c) exception applies, we are still able to give great deference to the plaintiff's arguments in conformity with the stated policy in favor of disclosure. The exception to the disclosure exemption ensures that, although certain documents may fall under one of the 1 CMC § 9918(a) exemptions, the government may not take shelter behind the Act to hide what it may perceive to be harmful information. Nevertheless, in reviewing the statutory structure, we find that the burden is on the plaintiff to demonstrate "that the exemption of such records is clearly unnecessary to protect . . . any vital government function." 1 CMC § 9918(c).

*Public Disclosure is Required Under 1 CMC § 9918(c)*

¶ 22 Having determined that Sablan has the burden of proving that the 1 CMC § 9918(c) exception applies to the documents at issue, we now turn to whether Sablan nevertheless met her burden. Sablan asserts that disclosing the amount of money Jenner & Block has billed will in no way disadvantage the Commonwealth, as access to invoice summaries and similar financial records could not possibly convey information that is comprehensive enough to allow the federal government to accurately ascertain the amount of money the Commonwealth is willing to spend on the federalization lawsuit. Furthermore, Sablan suggests that there is no harm in disclosure because the extent of resources available to the executive branch is already a matter of public record.

¶ 23 In order to gauge the accuracy of these assertions, the Court requested and received copies of all relevant documents from the government. The documents on appeal fall within the following categories: (1) invoice summaries reflecting the amount of money the government owes Jenner & Block each payment cycle, hourly rates of the attorneys, and the number of hours billed by each attorney per payment cycle; (2) memoranda from the Governor to the Secretary of Finance instructing him to pay specific amounts to Jenner & Block; (3) voucher entries, accounting ledgers, and fund status reports related to the federalization lawsuit; (4) memoranda from the Secretary of Finance to the Bank of Guam authorizing payments to Jenner & Block; and (5) journal entries reflecting transfers from other government accounts to the Governor's discretionary fund. Although documents of this nature would not normally be available through pretrial discovery in a private civil suit, the Commonwealth taxpayer is the source of funding for

the federalization lawsuit, and the OGA is the vehicle that potentially allows the taxpayer to remain informed about how his or her money is being spent.

¶ 24 In its argument to the trial court, the government asserted that, should the documents become public, the federal government may discover the total amount of money the government has at its disposal, which would, in turn, “eviscerate the ability of the OAG and any outside lawyers to stand toe-to-toe against strong, well-financed, and aggressive litigators.” *Sablan*, Civ. No. 09-0066E (Order Releasing Requested Documents Pursuant to the Open Government Act at 10). It suggested that the federal government could, upon inspecting the documents, ascertain a limit to the government’s litigation budget and thereafter increase motions and other miscellaneous paperwork to the point of exhausting the litigation fund. The government did not raise this specific argument in its brief to this Court, but nevertheless alluded to the issue in oral arguments.

¶ 25 *Sablan*, on the other hand, argues that documents of this nature – invoice summaries, hourly rates of attorneys, vouchers showing that payment have been made, and the like – do not generally contain information that would reveal litigation strategy to the opposing party. Rather, those documents would tend to show only specific dollar amounts, account numbers, and names of attorneys. *Sablan* also draws this Court’s attention to the trial court’s finding that no cap on expenditures would be revealed if the documents are made public. This finding was substantiated by records showing that the Governor has transferred money to his discretionary fund from other accounts to support the fees paid to Jenner & Block.

¶ 26 After a review of the trial court’s findings, we similarly conclude that the limited information contained in the documents does not allow one to discern the amount of money the government is ultimately willing or able to commit to the federalization lawsuit. Journal entries dated September 30, 2008 reflect monetary transfers into the Governor’s discretionary account from other numbered accounts.<sup>9</sup> In the following months, memoranda and status reports show that the Governor periodically authorized the distribution of funds from accounts under his control to Jenner & Block.<sup>10</sup> Upon review of these documents, we find that federal government would not be able to discern the origin of the money that was transferred to the Governor’s discretionary account, how much additional money is available in those particular accounts, or whether the Governor is able to redirect money from other accounts not already noted in the

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<sup>9</sup> Document 30 of *Sablan*, Civ. No. 09-0066E (Order Releasing Requested Documents Pursuant to the Open Government Act at 18).

<sup>10</sup> Documents 16-26 of *Sablan*, Civ. No. 09-0066E (Order Releasing Requested Documents Pursuant to the Open Government Act at 18).

journal entries. It is therefore not possible to discover how much capital is ultimately available to the Governor, or the resources he is willing to commit to the federalization lawsuit.

¶ 27

In addition to suggesting that the federal government is not able to ascertain a definitive spending limit, Sablan and the trial court both noted that “[t]he government’s estimated litigation budget, and the CNMI’s general budget, are not matters of secrecy.” *Id.* The Commonwealth’s annual budget, as well as the amount of money specifically appropriated to the Governor, derives from legislative acts which are readily available to the public. Since the federal government already has access to this information, albeit in a different format than the documents Sablan requests, exemption of the documents is not necessary. In all, Sablan has presented arguments that are sufficient to support a finding that exemption is clearly unnecessary to protect a vital government interest. She established that the federal government has full access to all previous Commonwealth appropriation legislation, and reiterated the trial court’s finding that the federal government will not be able to accurately gauge the Commonwealth’s ability or willingness to fund the federalization lawsuit. Furthermore, while the government does not have the burden of proving that 1 CMC § 9918(c) is inapplicable, it has not rebutted Sablan’s assertions or the trial court’s findings in such a way that convinces us the trial court erred in deciding the ultimate issue. Therefore, we see no reason to disturb the trial court’s holding that exemption of the documents is clearly unnecessary to protect a vital government interest.

*Mell v. New Castle County*

¶ 28

Aside from raising the issue of whether the trial court erroneously ordered disclosure under 1 CMC § 9918(c), the government also argues that the trial court ignored the only case that is analogous to the case at hand in any United States jurisdiction – *Mell v. New Castle County*, 835 A.2d 141 (Del. Super. Ct. 2003). In *Mell*, the plaintiff sued the county under Delaware’s Freedom of Information Act (“Delaware FOIA”), seeking production of invoices from law firms. The firms were, at the time, representing county employees who were the target of a federal investigation relating to allegations of campaign improprieties. The plaintiff also demanded to know how much money the county had paid the attorneys, and on whose behalf the fees were paid. The court denied the plaintiff’s requests, as the invoices fell squarely within the “pending litigation” disclosure exemption of the Delaware FOIA.<sup>11</sup>

¶ 29

Like this case, *Mell* similarly implicates the “pending litigation” exemption to the Delaware FOIA. The court thoroughly examines the policy rationale behind the exemption and

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<sup>11</sup> Delaware’s “pending litigation” exception specifically states, “[f]or purposes of this chapter, the following records shall not be deemed public: Any records pertaining to pending or potential litigation which are not records of any court.” Del. Code Ann. Tit. 29 § 10002(g)(9) (1977).

brings to light the potential negative consequences of allowing litigation opponents to access financial records. However, the trial court did not err in declining to rely on *Mell*. Commonwealth courts are not bound to follow the holding of a specific state court, and particularly not a state's trial court. More importantly though, Delaware's FOIA differs from the Commonwealth's OGA in one significant respect: Delaware's FOIA has a disclosure exemption similar to the OGA's "pending litigation" exemption, but it does not have an *exception* to the exemption similar to 1 CMC § 9918(c). In Delaware, once the court finds that an exemption applies, the analysis is finished. The OGA, on the other hand, requires additional scrutiny of a public record under 1 CMC § 9918(c) after the court has exempted it from disclosure. In effect, the Commonwealth has a two-step process that warrants further analysis of a document. Since the issue we are faced with is whether the trial court applied the second step of the disclosure analysis correctly, and Delaware has no corresponding second step, *Mell* is inapposite. Furthermore, the trial court would never err in refusing to follow a case that is non-binding, even if that case was on point.

*Tiberino v. Spokane County and Indian Law Resource Center v. Department of Interior*

¶ 30

The government also argues that the trial court improperly relied upon two cases that are not analogous to the case at bar – *Tiberino v. Spokane County*, 13 P.3d 1104 (Wash. 2000) and *Indian Law Resource Center v. Department of Interior*, 477 F.Supp 144 (D.C.D.C. 1979). In *Tiberino*, a former government employee sought an injunction to block the public release of emails that were written by her, but printed by her employer, in preparation for litigation over the employee's alleged wrongful termination. The employee had been terminated, in part, for excessive use of office email for personal reasons. The media became interested in the contents of the emails, and asked the agency to release them. Not wanting the emails to become public, the former employee attempted to stop their release pursuant to the "personal privacy" exemption in Washington's Public Records Act.<sup>12</sup> The Washington Supreme Court ruled that the emails were not exempt from disclosure under that specific exemption, but rather exempt under section 42.17.255, a provision that exempts documents which contain highly offensive intimate details, and which also lack legitimate public concern. Wash. Rev. Code § 42.17.255 (1972). The government asserts that the trial court's use of *Tiberino* was misplaced, principally because it implicated an exemption other than the "pending litigation" exemption.

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<sup>12</sup> Washington's "personal privacy" exemption is set forth at Wash. Rev. Code § 42.17.310(b)(1) (1972). The Commonwealth's version of the "personal privacy" exemption is set forth at 1 CMC § 9918(a)(2), and states, "[t]he following records are exempt from public inspection and copying: Personal information in files maintained for employees, appointees, or elected officials of any public agency other than names, present and past position titles, grades, salaries and duty stations."

¶ 31 Sablan, on the other hand, correctly states that the trial court merely used the case as “a reference point to highlight the ‘unquestionable legitimate concern’ that the public has in being able to access the requested public records to ensure the efficient administration of government.” Appellee’s Reply Br. at 13 (citing *Sablan*, Civ. No. 09-0066E (Order Releasing Requested Documents Pursuant to the Open Government Act at 12)). The trial court explicitly stated that *Tiberino* “is not applicable to our case and, in fact, the opposite could be said about the information contained in the documents that Ms. Sablan has requested. The public has an unquestionable legitimate concern in the requested documents.” *Sablan*, Civ. No. 09-0066E (Order Releasing Requested Documents Pursuant to the Open Government Act at 12) (emphasis added). Accordingly, the trial court’s reliance, if any, on *Tiberino* is proper.

¶ 32 Similar to *Tiberino*, the government argues that the trial court improperly relied on *Indian Law Resource Center* because it involved the “trade secrets” exemption of the federal FOIA rather than the “pending litigation” exemption. The “trade secrets” exemption allows the government agency to withhold “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C.S. § 522(b)(4) (1976). In *Indian Law Resource Center*, the plaintiff was a non-profit organization representing Indian tribes. The group sought documentation of payments made by the federal government to private attorneys acting on behalf of the Indian tribe. The records contained detailed information which, if made public, would have violated the attorney-client privilege – specifically, the privilege that existed between the Indian tribe and their former counsel. In distinguishing *Indian Law Resource Center* from the case at hand, the government declares that “the Governor and Lt. Governor never claimed the documents at issue in this appeal were privileged under the attorney-client privilege,” and that the trial court’s reliance on *Indian Law Resource Center* was therefore misplaced. Appellant’s Opening Br. at 17.

¶ 33 In opposition, Sablan argues that the trial court’s incorporation of *Indian Law Resource Center* was proper, as the billing records at issue in that case are analogous to the documents that are the focus of this litigation. She draws the Court’s attention toward similarities in the documents: approved fee schedules, precise fee amounts, invoices, and payment vouchers. Sablan suggests that the *Indian Law Resource Center* court’s analysis of such similar documents provided guiding principles that the trial court used in finding that detailed, itemized records revealing legal strategy should actually be protected, as disclosure may harm the Commonwealth in the federalization lawsuit.

¶ 34 As Sablan points out, the trial court’s use of *Indian Law Resource Center* actually helps the government, as the trial court used the case to help justify nondisclosure of the Jenner &

Block's detailed billing statements and engagement letter. Furthermore, the trial court admits that, "[a]lthough the court was not applying a litigation exemption, the documents at issue are similar, so the case is illustrative." *Sablan*, Civ. No. 09-0066E (Order Releasing Requested Documents Pursuant to the Open Government Act at 13). Since the documents in question are essentially analogous to those in *Indian Law Resource Center*, we find no error in the trial court's decision to incorporate its analytical framework.

### III

¶ 35

In passing the 2007 amendments to the Freedom of Information Act, the United States Congress declared in its findings that "our constitutional democracy, our system of self-government, and our commitment to popular sovereignty depends on the consent of the governed, and consent is not meaningful unless it is informed consent . . . ." Likewise, in adopting the Open Government Act, the people of the Commonwealth "insist on remaining informed so that they may retain control over the [agencies and offices] they have created." Public disclosure legislation provides a vehicle for citizens to remain informed about the decisions of respective agencies and offices throughout the Commonwealth. Without such knowledge, accountability falters, and officials are at liberty to expend public funds with minimal oversight. Having followed the statutory directive to liberally construe the provisions of the Open Government Act in favor of disclosure, we find that the government must make the public records available for inspection.<sup>13</sup> Accordingly, the trial court's order is AFFIRMED.

Concurring:

Demapan, C.J., Castro, Manglona, JJ.

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<sup>13</sup> The government shall make available for copying and inspection documents numbered 1-30 on pages 16-18 of the trial court's June 18, 2009 "Order Releasing Requested Documents Pursuant to the Open Government Act" by 5:00 pm on August 31, 2009.