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

11

12 CHRISTINA-MARIE SABLAN,) CIVIL CASE NO. 09-0066 E

13 Petitioner,)

14 vs.)

15 BENIGNO R. FITIAL, in his official)

16 capacity as GOVERNOR of the)

17 COMMONWEALTH OF THE)

18 NORTHERN MARIANA ISLANDS,)

19 and ELOY INOS, in his official capacity)

20 as SECRETARY OF FINANCE,)

21 Respondents.)

22)

23)

24)

25)

**STATUS CONFERENCE
STATEMENT**

Date: Thursday, 14 May 2009

Time: 1:30 p.m.

Judge: Hon. David A. Wiseman

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

24 _____

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

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

8 OPEN GOVERNMENT ACT LITIGATION EXEMPTION

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

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

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

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

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

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

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

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

10 * * * *

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

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

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

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

17 * * * *

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

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

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

4 COURT-ORDERED DISCRETIONARY DISCLOSURE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 it could be located. Indeed, it was even provided before all of it could be located.

2 *See* Respondents' Privilege Log at 2, n. 2 (N.M.I. Super. Ct. filed Apr. 24, 2009).

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

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

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

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

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

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

4 The rule of law must be preserved!

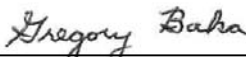
5 The plain language of the OGA Litigation Exception must be obeyed. Discretionary
6 court-ordered disclosure would be an abuse of discretion because Petitioner cannot show
7 that this Litigation Exception is “*clearly unnecessary* to protect any vital governmental
8 function.”

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

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11 Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL

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13 Dated: Wednesday, 13 May 2009.



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