

1 Gregory Baka # F0199
Acting Attorney General
2 Braddock J. Huesman # F00367
Assistant Attorney General
3 OFFICE OF THE ATTORNEY GENERAL
Assistant Attorney General
4 Hon. Juan A. Sablan Memorial Bldg., 2nd Fl.
5 Caller Box 10007, Capital Hill
Saipan, MP 96950-8907
6 Telephone: (670) 664-2341
7 Fax: (670) 664-2349

8 Attorney for Defendants Benigno R. Fitial and Eloy S. Inos.

9
10 IN THE SUPERIOR COURT
11 FOR THE NORTHERN MARIANA ISLANDS
12

13 **CHRISTINA-MARIE E. SABLAN, in**
14 **her personal capacity,**

15 **Plaintiff,**

16 **vs.**

17 **BENIGNO R. FITIAL, in his official**
18 **capacity as GOVERNOR of the**
19 **COMMONWEALTH OF THE**
20 **NORTHERN MARIANA ISLANDS,**
and **ELOY INOS, in his official capacity**
as **SECRETARY OF FINANACE.**

21 **Defendants**
22

CIVIL ACTION NO. 09-0066(E)

23
24 **DEFENDANTS' MOTION TO WITHHOLD**
25 **DOCUMENTS**

26 Date: April 9, 2009
27 Time: 1:30 p.m.
28 Judge: Hon. David A. Wiseman

1 **MOTION TO WITHHOLD DOCUMENTS**

2 Defendants Benigno R. Fitial (the “Governor” or “Defendant Fitial”) and Eloy S. Inos
3 (“Secretary” or “Defendant Inos”)(collectively, the “Defendants”) file this brief in support of
4 withholding documents requested under the Open Government Act.

5 **FACTS**

6
7 The CNMI has filed a lawsuit against the Federal Government (hereinafter “903
8 Litigation”)¹ in an effort to halt implementation of Federalization of immigration in the CNMI.

9 The 903 Litigation is an ongoing lawsuit taking place in the District of Columbia District
10 Courts.

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

18
19 On October 24, 2008, Plaintiff (“Plaintiff” or “Ms. Sablan”) received a response from the
20 Governor through the Acting Attorney General, Gregory Baka.² In the October 24, 2008 letter,
21 Mr. Baka denied Plaintiff’s request, citing 1 CMC § 9918(a)(8), the litigation exception to the
22 Open Government Act. Mr. Baka explained that the funds used to pay for the suit came out of
23 the Governor’s operating account.
24

25 On December 11, 2008, Plaintiff sent another Open Government Act request, but this
26

27 ¹ *Northern Mariana Islands v. United States*, No. 08-CV-01572 (D.D.C. Dec. 15, 2008).

28 ² See Exhibit B to Plaintiff’s complaint (“I write in response to your letter to the Governor”).

1 request was addressed to Defendant Inos. That request asked for, substantially, the same
2 documents with the addition of “all documents” with the words or phrases “Jenner” and “Block.”

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

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

8 OVERVIEW

9 Public records are exempt from disclosure by the plain language of the Open Government
10 Act if they are: (1) relevant to a controversy to which the Government is a party and (2) would
11 not be available to an adverse party under pretrial discovery rules.³ In the case at bar all
12 documents are exempt either due to attorney-client privilege or because they are not currently
13 discoverable in the 903 Litigation. Therefore, Defendants did not violate the Open Government
14 Act and Plaintiff should take nothing in her suit.
15

16 ARGUMENT

17 **This is an OGA request, not a legislative request.**

18 Defendants wish to address a preliminary matter and clarify that Ms. Sablan’s request for
19 documents is in her personal capacity, not her capacity as a legislator. If Ms. Sablan’s committee,
20 or any proper committee of the Legislature, wishes to examine these documents, it is not only
21 their right, but their responsibility, to do so. That this responsibility has not been exercised to
22 date, by any committee of the Legislature, does not provide an excuse to abrogate a statute.
23 While Defendants understand Ms. Sablan’s position that she believes these documents should be
24 released immediately under the Open Government Act (sometimes hereinafter the “Act” or
25
26
27

28 ³ 1 CMC § 9918(a)(8); *see also Limstrom v. Ladenburg*, 963 P.2d 869 (Wash. 1998).

1 “OGA”), Defendants, respectfully, disagree and urge the Court to allow the documents to be
2 withheld for OGA purposes⁴ until the conclusion of the related “903 Litigation.”

3 **Discovery requests and Open Government requests usually require different analysis.**

4 At the outset, it must be made clear, that the OGA disclosure procedure is distinct from
5 civil discovery.⁵ As this Court is aware, these two procedures are entirely separate. As there are
6 different considerations which determine the outcome of efforts to obtain disclosure under the
7 disparate standards of courtroom discovery and OGA requests, it is important to understand both
8 regimes.
9

10 In the case of discovery in a courtroom setting, a party is entitled to discover *all relevant*
11 *evidence*. This means that relevance, need, and applicable privileges are all important parts in
12 determining what documents must be produced in discovery.⁶ In the OGA context, however, a
13 party is only entitled to public records, and within that narrow entitlement, there are further
14 exceptions to the production of public records found in the statute.⁷ While information disclosed
15 during courtroom discovery is limited to the parties and can be subject to protective orders
16 against further disclosure, *when a document must be disclosed under the OGA, it must be*
17 *disclosed, regardless of objections, to the general public, and the identity of the requester is*
18 *irrelevant to whether disclosure is required.*⁸ The litigation exception to the OGA, therefore,
19 was enacted to avoid the serious disadvantage that the government or its agencies would suffer if
20
21
22

23 ⁴ Representative Sablan, is, of course, always able to exercise her powers and responsibilities
24 as a legislator and convince her fellow committee members to request these documents, not in an
OGA setting, but in their oversight capacity.

25 ⁵ See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 144, 95 S.Ct. 1504, 44 L.Ed.2d 29 n
10 (1975) (noting the difference between FOIA and general discovery).

26 ⁶ See Com.R.Civ.P. 26(b)(1).

27 ⁷ See *Malone v. The Northern Mariana Islands Retirement Fund*, Civil Action No. 06-
0033(e), p. 5, Ins. 1-3; see also *North v. Walsh*, 881 F.2d 1088, 1095 (D.C.Cir.1989).

28 ⁸ See *FTC v. Grolier Inc.*, 462 U.S. 19, 28, 103 S.Ct. 2209, 76 L.Ed.2d 387 (1983); *Loving*
v. Dep't of Defense, 550 F.3d 32, 39 (D.C.Cir.2008).

1 they were forced to turn over documents, which are otherwise protected from courtroom
2 disclosure, as part of an OGA request. Thus, the litigation exception does apply where an OGA
3 request is attempting to procure documents not available in courtroom discovery.⁹ Under the
4 OGA's litigation exception, documents that are not normally discoverable within a government
5 lawsuit are also not available to non-party, or party, citizens.¹⁰ This is a simple and common sense
6 approach to protecting the government and its agencies during litigation.
7

8 The litigation exception to the OGA thus protects the government from producing
9 documents, which would *not* normally be discoverable in civil litigation against an agency.¹¹ This
10 is so because documents released in an OGA action must be made available to the public as a
11 whole,¹² and, unlike in civil discovery,¹³ there is no opportunity to obtain a protective order. In
12 that respect, the stakes of disclosure for the agency are greater in the OGA context, and the Court
13 should consider the ramifications of placing the government at a disadvantage in current, ongoing
14 litigation.
15

16 **Plaintiff, by statute, is not allowed access to public records that: (1) are relevant to a**
17 **controversy to which the government is a party; and (2) not available to another party in**
18 **the litigation under the rules of discovery.**

19 The Open Government Act applies when a member of the public asks an agency for a
20 "public record." The Office of the Governor and the Department of Finance are agencies.
21 Further, a public record is "any record which a public agency is required by law to keep or which
22
23

24 ⁹ 1 CMC § 9918(a)(8).

25 ¹⁰ *Cf. Grolier*, 462 U.S. at 28 (holding that just because a document has been produced in
26 prior litigation it is not necessarily required to be produced in a FOIA request regarding different
27 litigation because if the document need not be normally produced, it is exempt under FOIA).

28 ¹¹ *Cf. Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C.Cir.1980) (addressing FOIA
litigation exception).

¹² *North*, 881 F.2d at 1096.

¹³ Com.R.Civ.P. 37.

1 it is necessary to keep in discharge of duties imposed by law.”¹⁴ The Act, therefore, requires
2 disclosure unless a specific exemption can be found.¹⁵ Make no mistake; the Defendants admit
3 that Ms. Sablan’s broad requests do, in fact, request some public records.¹⁶ The Defendants,
4 however, have claimed a legitimate exception to the disclosure requirements contained in the
5 OGA.
6

7 Most of the requested documents are either not public records or are exempt from
8 disclosure by the plain language of the Open Government Act because they are: (1) relevant to a
9 controversy to which the Government is a party and (2) would not be available to an adverse
10 party under the court’s discovery rules.¹⁷ A cursory review of Ms. Sablan’s request underscores
11 this fact. Ms. Sablan’s requested public records responsive to the following requests:
12

13 Copies of all contracts related to the lawsuit, including contracts executed between
14 the CNMI government and Jenner & Block, and any other private attorneys or law
firms involved in the lawsuit;

15 Documents detailing payments made on said contracts to date;

16 All records identifying the source(s) of funding on said contracts, whether private or
17 public;

18 All records identifying the department(s), agency(ies), and/or instrumentality(ies) of
19 the CNMI government from which public funds have been reprogrammed to the
Governor’s operating account #1011-6250; and

20 All documents subject to your control containing the words or phrases “Jenner”
21 “Block” “Jenner & Block” “Jenner & Block” “Jenner & Block LLP” “Jenner and Block
22 LLP” “Jenner & Block, LLP” or “Jenner and Block, LLP.”

23 Generally, absent the current litigation, these requests would trigger release of: (1) the
24

25 ¹⁴ 1 CMC § 9902(f).

26 ¹⁵ *Limstrom*, 963 P.2d at 869.

27 ¹⁶ Rep. Sablan’s request also snares many documents which are not “any record which a
public agency is required by law to keep or which it is necessary to keep in discharge of duties
imposed by law.”

28 ¹⁷ 1 CMC § 9918(a)(8); *see also Limstrom v. Ladenburg*, 963 P.2d 869 (Wash. 1998).

1 Engagement letter or contract between the CNMI and Jenner & Block, LLP; (2) the current
2 employment contract between the CNMI and Howard Willens; (3) ACH or other payment
3 receipts regarding payments to Jenner & Block, LLP; (4) ACH or other transaction reports
4 showing the internal transfer of funds from CNMI accounts; and (5) billing statements from
5 Jenner & Block, LLP. For the following reasons, these documents are either attorney-client
6 privileged or would be exempt from discovery.
7

8 **The Documents requested by Ms. Sablan are completely exempted by the OGA because**
9 **they are not obtainable as courtroom discovery due to the attorney-client privilege or**
10 **because they will not lead to the discovery of relevant evidence.**

11 **Portions are exempt due to the Attorney-Client Privilege**

12 Defendants admit that it is generally recognized that the communication of factual
13 information is not protected by the attorney-client privilege, and thus, fee or retainer agreements,
14 generally, are not privileged.¹⁸ Moreover, the identity of the client, the amount of the fee, the
15 identification of payment by case file name, and the general purpose of the work performed are
16 usually not protected from disclosure by the attorney-client privilege. But, the information
17 contained in such documents may still be found to be confidential.¹⁹ Moreover, if
18 correspondence, bills, ledgers, statements, and time records reveal the motive of the client in
19 seeking representation, litigation strategy, or the specific nature of the services provided, such as
20

21 ¹⁸ See, e.g., *In re January 1976 Grand Jury*, 534 F.2d 719, 727 (7th Cir.1976) (determining
22 matters regarding fees are generally not privileged); see also *In re Semel*, 411 F.2d 195, 197 (3d
23 Cir.1969) (“In the absence of unusual circumstances, the fact of a retainer, the identity of the
24 client, the conditions of employment and the amount of the fee do not come within the privilege
25 of the attorney-client relationship.”); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Aetna Cas. &*
26 *Surety Co.*, 384 F.2d 316, 317 n. 4 (D.C.Cir.1967) (fact of attorney-client relationship and reason
27 for its existence generally are not privileged); *Finol v. Finol*, 869 So.2d 666
28 (Fla.Dist.Ct.App.2004) (billing information that does not reveal mental impressions and opinions
of counsel is not privileged); *P. & B. Marina, Ltd. P'ship v. Logrande*, 136 F.R.D. 50, 55
(E.D.N.Y.1991) (request to pay fees and attached statement of fees was not privileged); *but cf.*
U.S. v. Sindel, 53 F.3d 874 (8th Cir.1995) (attorney's release of information regarding payments
would reveal substance of communication).

¹⁹ See ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, FORMAL OP. NO. 90-
358, Sept. 13, 1990 (even where the attorney-client privilege does not apply counsel has an
ethical duty not to reveal confidential information).

1 researching particular areas of law, then those documents fall within the privilege.²⁰

2 For example, in *United States v. Osborn*,²¹ the court stated that fees paid for legal work
3 and the general nature of legal work performed do not constitute a confidential communication,
4 but that specific descriptions of services, by necessity, intrude upon the area of confidential
5 communications. In other words, portions of the contracts, engagement letters, and billing
6 statements are exempt because they include specific descriptions of services, the motives of the
7 government in seeking representation, litigation strategy, or the specific nature of the services
8 provided.²² Thus, many parts of the contracts, engagement letter, and billing statements which
9 Ms. Sablan seeks, although they are public records, unquestionably fall under the litigation
10 exception because they are attorney-client privileged under the rules of courtroom discovery.
11 This is so, because parts of the documents are (1) relevant to the controversy, and (2) exempt
12 from disclosure under the rules of discovery. Thus, they are exempt, until the conclusion of the
13 903 Litigation, from being turned over to the public. Defendants are aware of the argument that
14 the edited portions of the contracts, engagement letters, and billing statements along with the
15 other public records that are not attorney-client privilege should be released. This would be an
16 acceptable argument except that there is another reason that would preclude the government from
17 having to turn the edited and remaining documents over in a discovery setting.
18
19
20
21
22
23
24

25 ²⁰ *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir.1999) (quoting *Clarke v. American*
26 *Commerce National Bank*, 974 F.2d 127, 129 (9th Cir.1992)) (internal quotations and citations
27 omitted); see also *In re Grand Jury Subpoena*, 204 F.3d 516, 520 (4th Cir.2000).

28 ²¹ 409 F.Supp. 406, 411 (D.Or.1975).

²² *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir.1999) (quoting *Clarke v. American*
Commerce National Bank, 974 F.2d 127, 129 (9th Cir.1992)) (internal quotations and citations
omitted); see also *In re Grand Jury Subpoena*, 204 F.3d 516, 520 (4th Cir.2000).

1 **Remaining Portions of the retainer agreement, contracts, and billing statements**
2 **along with any documents and all records indicating payment of attorneys' fees are**
3 **irrelevant for discovery purposes but relevant to the 903 Litigation.**

4 To the untrained eye, it might seem incongruous to claim that a document is both relevant
5 to a controversy and irrelevant for discovery purposes. The standard for courtroom discovery,
6 however, is that the items sought must be “reasonably calculated to lead to the discovery of
7 admissible evidence.”²³ Put another way, a showing of relevance can be viewed as needed for the
8 prosecution or defense of pending litigation, and one is presumed to have no need of information
9 that is not relevant to the subject matter of the pending action.²⁴ The term relevance, outside of
10 the courtroom discovery context, generally means having significant and demonstrable bearing on
11 the matter at hand. Thus, it is quite possible for public records to have a significant and
12 demonstrable bearing on the matter at hand and still not be “reasonably calculated to lead to the
13 discovery of admissible evidence.”²⁵

14 Retainer Agreements and the payment of attorneys' fees are the easiest and most obvious
15 example of public records that may be relevant to a case but the request of same is not “calculated
16 to lead to the discovery of admissible evidence.”²⁶ For example, case law is replete with examples
17 of federal litigants seeking information about the opposing party's attorneys' fees.

18 In *Robinson v. Duncan*,²⁷ defendant sought to compel production of plaintiff's retainer
19 agreement with her attorney.²⁸ In discussing the claim, the court declined to compel
20 discovery because although the retainer agreement was “not privileged and potentially relevant at
21 a later point in the proceedings, Plaintiff's fee arrangement with her attorney is not currently
22 relevant to the dispute.”

23 ²³ *Pappas v. Frank Azar & Assoc., P.C.*, 2008 WL 652236, * 2.

24 ²⁴ *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C.Cir.1984).

25 ²⁵ *Pappas.*, 2008 WL 652236, * 2.

26 ²⁶ *Id.*

27 ²⁷ 255 F.R.D. 300 (D.D.C. 2009).

28 ²⁸ *Id.*, at 303.

1 relevant.”²⁹ Thus, courts have held that while agreements as to fees are not privileged, “they
2 become relevant, at best, when Plaintiff prevails and seeks a fee.”³⁰ Further, courts are aware of
3 the problem of using discovery to inquire into sensitive areas such as litigation budgets, holding
4 that “assessing one's settlement posture by knowing what one's opponent is paying counsel is not
5 a legitimate use of discovery; discovery seeks relevant evidence, not ammunition for settlement
6 discussions, as welcome as they may be.”³¹ This conclusion is buttressed by cases where
7 attorneys’ fees are not sought by a party.
8

9 A Texas appellate court handled a similar issue to the one before this court, deciding that
10 billing records in an underlying lawsuit were irrelevant when the opposing side did not seek
11 reimbursement for its own legal expenses. In *MCI Telecomms. Corp v. Crowley*,³² MCI petitioned
12 the appellate court for a writ of mandamus to protect it from producing attorney billing records.³³
13 MCI had been sued by two former employees for sex discrimination,³⁴ and both underlying
14 Plaintiffs sought recovery of their attorney fees.³⁵ In their discovery requests, the Plaintiffs asked
15 for the production of MCI's attorneys' billing information.³⁶ The court noted that there was no
16 authority that supported the Plaintiffs' attempt to discover the defendant's attorney fees where the
17 defendant is not itself making a claim for reimbursement for expenses incurred in defending the
18 underlying lawsuit.³⁷ The court concluded by holding that “MCI's attorneys' fees in its defense of
19 this case are *‘patently irrelevant,’* “and not reasonably calculated to lead to the discovery of
20
21

22 ²⁹ *Id.*

23 ³⁰ *Banks v. Office of the Senate Sergeant-at-Arms and Doorkeeper*, 222 F.R.D. 7 (D.D.C.
24 2004)

25 ³¹ *See Banks*, 222 F.R.D. at 13.

26 ³² 899 S.W.2d 399 (Tex.App.-Fort Worth 1995, orig. proceeding [leave denied]).

27 ³³ *Id.* at 401.

28 ³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 401-02.

³⁷ *Id.* at 403.

1 admissible evidence.³⁸

2 In the case at bar, Defendants admit that Commonwealth, in the 903 Litigation, requested
3 attorneys' fees. Courts, however, do not generally become involved in matters regarding the
4 choice of counsel or the source of attorney fees, save in exceptional circumstances.³⁹ Moreover,
5 as demonstrated above, retainer agreements and attorneys' fees paid, necessarily, intrude upon
6 litigation budgets and client sensitive information, and only become relevant when a party prevails
7 in a lawsuit.⁴⁰ Forcing the government to disclose these public records, at this time, hinders and
8 disadvantages the government's litigation efforts in contradiction of 1 CMC § 9918(8).

9
10 The reason that the Government is not required, and affirmatively should not release these
11 documents under the OGA has everything to do with timing. Defendants admit that they are in
12 possession of public records and that but for two conditions, relevant litigation and the
13 unavailability of the documents under discovery rules; they would be required to disclose the
14 documents. The essential factor which makes this OGA request improper, however, is the
15 ongoing 903 Litigation. If this Court allows Ms. Sablan to open and release these documents for
16 public perusal during the current federal 903 Litigation, then parties who could not get the
17 documents otherwise will be entitled to them as well. Attempting to reach documents not
18 available by courtroom discovery is a tactic which has been tried unsuccessfully by opposing
19 parties (and their agents) to litigation in the past.

20
21
22 The Court in *Mell v. New Castle County*,⁴¹ faced exactly this problem. In *Mell*, a litigant
23 sought discovery of New Castle County's payment of invoices from lawyers or law firms known
24

25 ³⁸ *Id.*

26 ³⁹ See e.g., *Whitehouse v. U.S. District Court for the District of Rhode Island*, 53 F.3d 1349
27 (1st Cir.1995)(by grand jury investigations into non-privileged matters); *U.S. v. Reeder*, 170 F.3d
28 93 (1st Cir.1999)(showing of future or ongoing crime or fraud relating to the fee agreement).

⁴⁰ See *Banks*, 222 F.R.D. at 13.

⁴¹ 835 A.2d 141 (Del. Sup. Crt. 2003).

1 to be representing County employees in a separate federal lawsuit.⁴² Apparently, the court denied
2 the request and so the Plaintiff placed a Delaware FOIA request for the same documents. In
3 declining to force the county to produce the records, the court held that “[Mell’s FOIA requests]
4 relate directly to the matters in controversy in the Chancery litigation. And it is quite clear to the
5 Court that Mell's purpose in making these FOIA requests is to advance his cause in the Chancery
6 litigation; his request does not implicate the public's ‘right to know.’”⁴³

8 In this case, it is clear that the Federal Government has already attempted to use Ms.
9 Sablan in an effort to gain an upper hand in the 903 Litigation.⁴⁴ Forcing the CNMI to release
10 sensitive information that the Federal Government is not entitled to contravenes the stated
11 purpose of 1 CMC § 9918(8). Moreover, the court can only overturn the CNMI’s decision if the
12 Court finds that “the exemption of such records is clearly unnecessary; to protect . . . any vital
13 government function.”⁴⁵

15 CONCLUSION

16 As described in detail above, the public records requested by Ms. Sablan, by necessity, are
17 either protected by attorney-client privilege or they are not relevant for discovery purposes. For
18 these reasons Defendants ask that the public records Plaintiff seeks be denied and that Plaintiff
19 take nothing in her suit.
20
21
22
23
24

25 ⁴² *Id.*, at 149.

26 ⁴³ *Id.*, at 149 (citations omitted).

27 ⁴⁴ Exhibit “A,” Memorandum in Support of Defendants’ Motion to Dismiss, p.25, n. 12, and
Exhibit D attached thereto.

28 ⁴⁵ 1 CMC § 9918(c).

