



By the order of the court, Judge David A Wiseman

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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.¹ 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 ¹In 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).² However, invoice summaries

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25 ²The 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

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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.³ 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

16
17 ³The 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.⁴

23
24 ⁴Another 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.⁵ Thus, there is no threat of the U.S.

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

25 ⁵For 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

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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.

4
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:⁶

- 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)⁷

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21 ⁶If 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 ⁷ 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

1 addressed by the parties. Plaintiff shall submit her motion for costs and attorney's fees on or before July
2 1, 2009. The deadline for the Opposition and Reply shall be governed by the Commonwealth Rules of
3 Civil Procedure.

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5 **SO ORDERED this 18th day of June, 2009.**

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 / s /
DAVID A. WISEMAN, ASSOCIATE JUDGE

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