



By the order of the court, Judge David A Wiseman

E-FILED
CNMI SUPERIOR COURT
E-filed: Oct 07 2014 01:50PM
Clerk Review: N/A
Filing ID: 56154769
Case Number: 14-0111-CV
N/A



1 FOR PUBLICATION

2
3
4 IN THE SUPERIOR COURT
5 OF THE
6 COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

7 GLEN D. HUNTER,)
8 Plaintiff,)
9 v.)
10 RALPH DLG TORRES, JOSEPH P.)
11 DELEON GUERRERO, RAFAEL S.)
12 DEMAPAN, FELICIDAD T. OGUMORO,)
13 GOVERNOR ELOY S. INOS in his official)
14 capacity, COMMONWEALTH LOTTERY)
15 COMMISSION, AND)
16 COMMONWEALTH OF THE)
17 NORTHERN MARIANA ISLANDS,)
18 Defendants.)

CIVIL CASE No. 14-0111

ORDER:

- GRANTING Government’s Motion to Dismiss Lottery Commission
- DENYING Government’s Motion to Dismiss CNMI Government & Governor Eloy S. Inos
- DENYING CNMI Legislative Bureau’s Motion to Dismiss Joseph P. Deleon Guerrero, Rafael S. Demapan, and Felicidad T. Ogumoro
- DENYING Ralph DLG Torres’ Motion to Dismiss

17 I. INTRODUCTION

18 THIS MATTER came before the Court on July 2, 2014 at 1:30 p.m., on Defendants’ Motion for
19 Motions to Dismiss, filed on June 9 and 10, 2014. Plaintiff Glen D. Hunter was represented by Jennifer
20 Dockter, Esq. Assistant Attorney General Reena Patel appeared on behalf of the CNMI, the Commonwealth
21 Lottery Commission, and Governor Eloy S. Inos in his official capacity; John Cool, Esq. appeared on behalf
22 of the Joseph P. Deleon Guerrero, Rafael S. Demapan, and Felicidad T. Ogumoro, as counsel for the CNMI
23 Legislative Bureau; and Antonette Villagomez appeared on behalf of Ralph DLG. Torres.

24 Based upon the Court’s review of the written submissions of each party and the oral arguments heard
25 in open court, the Court hereby DENIES IN PART and GRANTS IN PART Defendants’ Motion to Dismiss.

1 **II. BACKGROUND**

2 This case necessarily revolves around the application of the Open Government Act (OGA) to the
3 activities of the Commonwealth’s Legislature, where the internal procedural rules of the House of
4 Representatives and Senate conflict with the requirements of a 2009 Popular Initiative – codified at 1 CMC
5 § 9913 – binding the OGA to the Legislature. The factual basis for the instant case encircles the passing of
6 two bills – HB 18-179 and HB 18-182 – through both houses of the Legislature, where the required public
7 notices were issued less than 72 hours before the referenced meeting in which the bills were passed, or the
8 agenda in the public notice failed to include the above-mentioned bills as a topic for discussion.

9 Defendants move to dismiss the complaint against them, claiming, among other arguments, that the
10 OGA is unconstitutional as it applies to the legislature, that the alleged violations are not justiciable, and that
11 the legislator Defendants are protected by legislative immunity. Plaintiff is seeking a declaratory judgment
12 from this Court, explicitly stating that the OGA does, in fact, apply to the Commonwealth Legislature, and
13 that the legislator Defendants are properly before this Court for violating its public notice provisions.

14 **A. OPEN GOVERNMENT ACT: 1 CMC § 9901, ET SEQ.**

15 The Open Government Act of 1992 – codified at 1 CMC § 9901, *et seq.* and based upon PL 8-41 –
16 first took effect on January 21, 1994. The Legislature unequivocally declared:

17 The people of the Commonwealth do not yield their sovereignty to the
18 agencies which serve them. . . . [and] do not give their public servants the
19 right to decide what is good for the people to know and what is not good for
them to know. The people insist on remaining informed so that they may
retain control over the instruments they created.

20 1 CMC § 9901 (PL 8-41, § 2).

21 The crux of the OGA lies in its provisions requiring open and public governing body or agency
22 meetings, complete with written notice at least 72 hours before the meeting is to take place. Specifically,
23 § 9904 states “[a]ll meetings of the governing body of a public agency shall be open and public and all
24 persons shall be permitted to attend any meeting of the governing body of a public agency.” 1 CMC § 9904
25 (PL 8-41, § 5). Most importantly, § 9910 provides that:

1 (a) The governing body of a public agency shall give *written public notice* of
2 any regular, special or rescheduled meeting. The notice *shall include an*
3 *agenda* which lists all of the items to be considered at the forthcoming
4 meeting, and the date, time and place of the meeting.

5 . . .
6 (b) The governing body of a public agency shall file a copy of the meeting
7 notice in its office *at least 72 hours before the meeting* . . . No governing
8 body shall change the agenda, once filed, by adding items thereto without a
9 recorded vote of the majority of the members to which the governing body
10 is entitled.

11 1 CMC § 9910 (PL 8-41, § 11; amended by PL 9-2, § 4) (emphasis added). Furthermore, the Legislature
12 made abundantly clear that “[t]he provisions requiring open meetings and open records shall be liberally
13 construed, and the provisions providing for exceptions to the open meeting requirements . . . shall be strictly
14 construed against closed meetings.” 1 CMC § 9901 (PL 8-41, § 2).

15 The Legislature also saw fit to provide the remedy for a violation of any of the above provisions,
16 specifically stating that “[a]ny action taken at meetings failing to comply with the provisions of this chapter
17 shall be null and void.” 1 CMC § 9907 (PL 8-41, § 8). Moreover, “[e]ach member of the governing body
18 who attends a meeting of such governing body where action is taken in violation of this chapter . . . shall be
19 subject to personal liability in the form of a civil penalty in the amount of \$100 for the first offense and
20 \$1,000 for subsequent offenses.” 1 CMC § 9901 (PL 8-41, § 16). Lastly, “[a]ny person may commence
21 an act either by mandamus or injunction for the purpose of stopping violations or preventing threatened
22 violations of this chapter by members of a governing body.” 1 CMC § 9901 (PL 8-41, § 17).

23 The most vital development in the evolution of the OGA in the CNMI was the passing of the Popular
24 Initiative 2009 regarding the application of the OGA to the Legislature, which became effective on
25 November 9, 2009. The people of the CNMI voted to hold members of the Legislative Branch to the same
standards as the public agencies referenced in the above statutes, requiring their compliance with the
provisions of the OGA, including those requiring open and public meetings and 72-hour advance notice.
1 CMC § 9913 (PL 9-2, § 5 (repealing PL 8-41, § 14); PL 15-19, § 2; Popular Initiative (2009)).

///

1 **B. HOUSE BILL 18-179: THE “CASINO BILL”**

2 The first legislative action Plaintiff challenges as violating the OGA is House Bill 18-179 —the
3 “Casino Bill.” The Casino Bill purported to legalize casino operations on Saipan for the first time.

4 The Casino Bill first came to the floor of the Commonwealth’s House of Representatives on March
5 3, 2014 at 1:30 p.m., after notice of the meeting was issued to the public on February 28, 2014 at around
6 3:05 p.m. The Casino Bill was not sent to committee, was passed by the House by a majority of votes after
7 its first and final reading during the meeting held on March 3, 2014, and was subsequently sent to the Senate.

8 The Senate issued a notice to the public on February 28, 2014 detailing a meeting that was scheduled
9 to take place on March 4, 2014, but failed to mention the Casino Bill or the impending vote on its passage.
10 The Casino Bill passed the Senate after its first and final reading during the meeting held on March 4, 2014,
11 and was sent to Governor Inos to be signed into law.

12 Governor Inos signed HB 18-179 into law on March 21, 2014, and the Casino Bill became PL 18-38.

13 **C. HOUSE BILL 18-182: “AMENDMENT” TO THE “CASINO BILL”**

14 The second legislative action Plaintiff challenges as violating the OGA is House Bill 18-182—the
15 “Amendment Bill,” which served to address several shortcomings identified in the original Casino Bill.

16 The Amendment Bill was first sent to the floor of the House on March 26, 2014 at 1:30 p.m., after
17 notice of the meeting was issued to the public the previous day, on March 25, 2014 at around 10:52 a.m.
18 The Amendment Bill was not sent to committee, was passed by the House by a majority of votes after its
19 first and final reading during the meeting held on March 26, 2014, and was subsequently sent to the Senate.

20 The Senate issued a notice to the public on March 21, 2014 detailing a meeting that was scheduled
21 to take place on March 26, 2014. Subsequently, however, the Amendment Bill passed the House on March
22 26, 2014, and the date of the Senate’s meeting was moved to the following day, March 27, 2014. The Senate
23 issued a notice to the public regarding this change on March 25, 2014, but failed to mention the Amendment
24 Bill in the meeting’s agenda or the impending vote on its passage. The Amendment Bill passed the Senate
25 after its first and final reading during the meeting held on March 27, 2014, and was sent to Governor Inos

1 to be signed into law.

2 Gov. Inos signed HB 18-182 into law on April 1, 2014, and the Amendment Bill became PL 18-43.

3 **D. MOTIONS TO DISMISS**

4 On June 9, 2014, Defendants CNMI Government, Governor Inos in his official capacity, and
5 Commonwealth Lottery Commission filed a Motion to Dismiss the underlying suit, arguing that: (1) the
6 CNMI Lottery Commission is not a proper party and should be dismissed from all counts; (2) the Popular
7 Initiative applying the OGA to the Legislature is unconstitutional; (3) the aforementioned bills cannot be
8 challenged due to the enrolled bill doctrine; and (4) Governor Inos should be dismissed because his signature
9 did not violate the OGA or any other law.

10 On June 10, 2014, Defendants Joseph P Deleon Guerrero, Rafael S. Demapan, and Felicidad T.
11 Ogunoro followed up with their own Motion to Dismiss the underlying suit, alleging that this Court lacks
12 jurisdiction over the defendants and, in the alternative, they are entitled to legislative immunity. On the
13 same day, Defendant Ralph DLG. Torres filed a contemporaneous Motion to Dismiss, arguing that: (1) this
14 Court does not have jurisdiction; (2) the legislators are entitled to legislative immunity; (3) Plaintiff's claims
15 are barred by the enrolled bill doctrine; (4) the internal procedural rules adopted by the Legislature supersede
16 the application of the OGA; and (5) in the alternative, there was no violation of the Open Government Act.

17 Lastly, on June 23, 2014, Plaintiff filed his opposition to the Defendants' Motion to Dismiss,
18 claiming that: (1) the Office of the Attorney General (OAG) lacks constitutional authority to seek
19 unconstitutionality of laws or defend violations of them; (2) the Lottery Commission is a proper party; (3)
20 the OGA is constitutional as applied to the CNMI Legislature; (4) Plaintiff's claim is justiciable because the
21 actions of the Legislature constitute violations of CNMI law and legislative rules; (5) CNMI written law
22 controls, and thus the enrolled bill doctrine does not apply in these circumstances; and (6) legislative
23 immunity does not apply because the actions of the Legislature were incidental and not part of the legislative
24 process.

25 ///

1 **III. LEGAL STANDARD**

2 A motion to dismiss a complaint pursuant to NMI R. Civ. P 12(b)(6) tests the legal sufficiency of
3 the claims within the complaint. *Camacho v. Micronesian Dev. Co.*, 2008 MP 8 ¶ 10. Generally, a
4 complaint must satisfy the notice pleading requirements of NMI R. Civ. P. 8(a) in order to avoid dismissal
5 under Rule 12(b)(6). *Cepeda v. Hefner*, 3 NMI 121, 126 (1992). NMI R. Civ. P. 8(a)(2) requires only “a
6 short and plain statement of the claim showing that the pleader is entitled to relief,” so that “fair notice of
7 the nature of the action is provided.” *Govendo v. Marianas Pub. Land Corp.*, 2 NMI 482, 506 (1992)
8 (quoting *In re Adoption of Magofna*, 1 NMI 449 (1990)). A complaint fails to satisfy the pleading
9 requirements of Rule 8(a) where it lacks a cognizable legal theory or fails to allege facts constituting a
10 cognizable legal theory. *Bolalin v. Guam Publications, Inc.*, 4 NMI 176 (1994).

11 A complaint requires “more than a blanket assertion of entitlement to relief.” *Sayed v. Mobil Oil*
12 *Marianas, Inc.*, 2012 MP 20 ¶ 20. To be sufficient, a claim must contain “either direct allegations on every
13 material point necessary to sustain a recovery on any legal theory . . . or contain allegations from which an
14 inference fairly may be drawn.” *In re Adoption of Magofna*, 1 NMI 449, 454 (1990). Essentially, dismissal
15 is improper unless the claimant can prove no set of facts in support of his claim which entitle him to relief.
16 *Camacho*, 2008 MP ¶ 10 (quoting *Govendo*, 2 NMI at 283).

17 Further, in considering a motion to dismiss, a court must “review the contents of a complaint by
18 construing it in the light most favorable to the plaintiff and accepting all well-pleaded facts as true.” *Zhang*
19 *Gui Juan v. Commonwealth of the N. Mariana Islands*, 2001 MP 18 ¶ 11 (citation omitted); *Cepeda v.*
20 *Hefner*, 3 NMI 121, 127-28 (1992); *Govendo v. Marianas Pub. Land Corp.*, 2 NMI 482, 490 (1992).
21 However, a court “has no duty to strain to find inferences favorable to the non-moving party.” *Cepeda*, 3
22 NMI at 127 (citing *In re Magofna*, 1 NMI at 454).

23 **IV. DISCUSSION**

24 Having reviewed the filings of the parties in the instant matter and reviewing the applicable legal
25 standards, the Court now evaluates each argument addressed by the parties as it pertains to this motion.

1 **A. SUBJECT MATTER JURISDICTION**

2 First and foremost, the Court notes that it retains subject matter jurisdiction over this matter pursuant
3 to 1 CMC § 3202 (general jurisdiction). *See Mafnas v. Inos*, Civ. No. 90-031 (Memorandum Decision on
4 Order to Show Cause for Declaratory Relief) (NMI Super. Ct. January 22, 1990), at 8, (*aff'd* 1 NMI 101
5 (1990) (“The Superior Court has original jurisdiction over all civil actions, in law and equity and may issue
6 writs and orders necessary and appropriate to the full exercise of its jurisdiction.”). Moreover, the Court has
7 subject matter jurisdiction to hear the case pursuant to 7 CMC § 1102 (acts submitting to jurisdiction), 7
8 CMC § 2421 (authority to render declaratory judgment), and 1 CMC § 9915(a) (establishing personal
9 liability for violations of OGA).

10 Accordingly, this Court has subject matter jurisdiction over the present case.

11 **B. JUSTICIABILITY**

12 Second, the Court will determine whether Plaintiff’s claims are justiciable.

13 Defendants argue that the present matter is not justiciable because it necessarily involves the
14 legislature's internal procedural rules – an area they claim is outside the province of the Court's review.
15 However, this Court takes issue with that premise due to the constitutional implications created by the
16 actions of the Legislature, as well as any possible violation of the OGA via operation of the 2009 Popular
17 Initiative.

18 “The very essence of civil liberty certainly consists in the right of every individual to claim the
19 protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that
20 protection.” *Marbury v. Madison*, 5 U.S. 137, 163 (1801). “[I]t is a general and indisputable rule, that where
21 there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.”
22 *Id.*

23 Specifically, a determination of whether a claim is justiciable turns on “whether ‘the duty asserted
24 can be judicially identified and its breach judicially determined, and whether protection for the right asserted
25 can be judicially molded.’” *Mafnas*, Civ No. 90-031, at 8-9 (quoting *Baker v. Carr*, 369 U.S. 186, 198

1 (1962)). The question of whether a claim is justiciable is to be decided on a “case-by-case” basis. *Id.* at
2 11.

3 Here, Article II, § 14(c) of the Constitution of the CNMI provides the basis for guaranteeing
4 legislative meetings are open to the public, whereas the OGA expands upon the foundation the Constitution
5 provides by defining and clarifying the meaning of “open and public” to include 72-hour notice and written
6 agenda provisions. This is not simply a matter of the legislature violating their own internal rules, but rather
7 potential violations of the CNMI’s Constitution and a statute adopted by a popular initiative five years ago.

8 “The powers of the legislature are defined, and limited; and that those limits may not be mistaken,
9 or forgotten, the constitution is written.” *Marbury*, 5 U.S. at 176. “Certainly all those who have framed
10 written constitutions contemplate them as forming the fundamental and paramount law of the nation, and
11 consequently the theory of every such government must be, that an act of the legislature, repugnant to the
12 constitution, is void.” *Id.* at 177.

13 Therefore, in the spirit of the justiciability analysis, the Court will address each element in turn:

14 First, the duties of the legislature can be judicially identified because they are made abundantly clear
15 by operation of the Constitution's public meeting requirement, and the OGA’s public notice and agenda
16 provisions, through application of the popular initiative codified at 1 CMC § 9913. Second, breach of such
17 provisions may be judicially determined by applying the present facts of the case to the above-mentioned
18 provisions; in this case, it is clear that in certain instances, the notice and agenda provisions may have been
19 breached. Third, protection for the right of those allegedly injured by the actions of the Defendants is
20 predetermined by the statute in operation, as 1 CMC §§ 9916 and 9907 provide that any person injured by
21 the violations of the OGA may seek to enjoin execution of the illegal law, as well as a declaration that the
22 law is null and void, respectively.

23 Defendants rely heavily on an Alaska case in support of their justiciability argument, which stands
24 for the premise that “[t]he question whether legislative business should be conducted in open or closed
25 sessions is a procedural question which has traditionally been the subject of legislative rules.” *Abood v.*

1 *League of Women Voters*, 743 P. 2d 333, 336 (Alaska 1987) (citing *Society of Professional Journalists v.*
2 *Secretary of Labor*, 616 F. Supp. 569, 577 (D. Utah 1985)). In that case, the court held that the question of
3 whether the legislature violated the Alaska Open Meetings Act was nonjusticiable, holding that “because
4 the constitution commits to the legislature the authority to provide for its own rules of procedure, and
5 because the question of whether a legislative committee meeting or caucus meeting shall be open or closed
6 falls within this grant of authority . . .” *Id.*

7 Defendants make an identical argument, directing the Court to a provisions of the Commonwealth
8 Constitution which provides that “[e]ach House of the Legislature shall choose the presiding officer from
9 among its members, establish the committees necessary for the conduct of its business, and promulgate rules
10 of procedure.” N.M.I. art. II, § 14(b). Defendants also argue that the 2009 Popular Initiative applying the
11 OGA to the Legislature conflicts with the Constitutional grant of the Legislature's authority to create its own
12 rules and procedures, and thus “[a] provision of law that conflicts with a Commonwealth Constitution
13 provision must fall.” *See CNMI v. Tinian Casino Gaming Control Commission*, 3 NMI 134, 148 (1992).

14 However, this case is easily distinguishable, as Plaintiff points out in his Opposition brief, because
15 Alaska's constitution did not contain an open meetings provision, but rather granted the legislature
16 constitutional authority to craft its own rules of procedure. Here, however, the CNMI Constitution does,
17 in fact, contain an open meetings provision, and thus the Court holds that the Legislature was bound by its
18 requirements when it crafted its own procedural rules four years later in 2013.

19 Accordingly, the Court finds that Plaintiff's claims are justiciable because the Legislature's authority
20 to craft its own procedural rules is not absolute, and its actions may be examined under the lens of the CNMI
21 Constitution and applicable statutes.

22 **C. OAG AUTHORITY TO DEFEND VIOLATIONS OF LAW & SEEK DECLARATION OF**
23 **UNCONSTITUTIONALITY**

24 Third, the Court evaluates the Office of the Attorney General's challenge to the constitutionality of
25 the OGA by and through its representation of the government Defendants.

1 The CNMI Constitution grants the Attorney General its powers, stating:

2 The Attorney General shall be the Chief Legal Officer of the Commonwealth
3 government and shall be responsible for providing legal advice to the
4 governor and executive departments (including public corporations and
autonomous agencies), representing the Commonwealth in all legal matters,
and prosecuting violations of Commonwealth law.

5 NMI Const. art. III, § 11 (emphasis added).

6 While the Court declines to consider disqualification of the Office of the Attorney General in
7 representing the government Defendants - which this Court deems proper in light of the civil charges
8 imposed by Plaintiff's complaint - it does recognize the appearance of potential impropriety created by the
9 Attorney General defending alleged violations of and bringing constitutional challenges to the laws it is
10 charged with upholding. However, as Plaintiff noted in his Opposition brief, there would be no practical
11 effect of even striking the portions of the government Defendants' motion which exceed its constitutional
12 authority because the other Defendants have joined with the government Defendants' motion or made similar
13 arguments. Thus, the Court merely points out the procedural irregularity, but does not make any findings
14 in the instant order.

15 **D. 1 CMC § 9913 & ART. II, § 14(C) ARE HARMONIOUS**

16 Fourth, the Court addresses the Defendants' challenge to the constitutionality of the statute applying
17 the OGA to the Legislature due to an alleged conflict with the Legislature's authority to promulgate its own
18 procedural rules.

19 It is important to note that statutes are presumed to be constitutionally valid in the Commonwealth.
20 *Tenorio v. Superior Ct.*, 1 N.M.I. 1 (1989). Unless a clear constitutional violation is shown, there is a
21 presumption of validity. *Northern Marianas Housing Corp v. Marianas Pub. Land Trust*, 1998 MP 1 ¶ 9.
22 Further, a statute should not be construed to be unconstitutional where it is open to a constitutional
23 interpretation. *Estate of Faisao v. Tenorio*, 4 N.M.I. 260 (1995). Lastly, in testing the constitutionality of
24 a statute, the language must receive a construction that will conform it to a constitutional limitation,
25 comports with the strong judicial policy in favor of preserving statutes in the face of constitutional

1 challenges whenever possible. *See In re Seman*, 2 N.M.I. 57 (1992).

2 Courts have upheld laws borne by way of popular initiative in the face of constitutionality challenges
3 on the principle of strict protection of the people's right to do so. *See, e.g., Legislature v. Eu*, 816 P.2d 1309
4 (Cal. 1991) (“[i]ndeed it is [this Court's] solemn duty to jealously guard the precious initiative power, and
5 to resolve all reasonable doubts in favor of its exercise. . . . [A]ll presumptions favor the validity of initiative
6 measures and mere doubts as to validity are insufficient.”) As such, “such measures must be upheld unless
7 their unconstitutionality clearly, positively, and unmistakably appears.” *Id.*

8 In interpreting constitutional provisions, the “starting point is the constitutional text itself, and if
9 possible the text must be given its plain meaning.” *Dept. of Public Lands v. Commonwealth*, 2010 MP 14
10 ¶ 17. “When presented with a question of constitutional interpretation [the Court is] duty-bound to give
11 effect to the intention of the framers of the NMI Constitution.” *Id.* (internal quotations and citations
12 removed). “Furthermore, the intent of the framers may be determined through an examination of the
13 relevant legislative history.” *Id.* Additionally, “[w]hen there is no dispositive Commonwealth authority on
14 an issue, we may look to persuasive authority from other jurisdictions.” *Commonwealth v. Lot 353 New G*,
15 2012 MP 6 ¶ 16.

16 Section 14(c) of the Article II of the Commonwealth Constitution states: “The meetings of the
17 legislature and its committees shall be public except that each house of the legislature or a legislative
18 committee may meet in executive session . . . Final action on any legislative matter may not be taken in
19 executive session.” N.M.I. art. II, § 14(c) (emphasis added). Thus, the text of the provision itself provides
20 minimal guidance on what public means in this context. Black's Law Dictionary provides little help, as well,
21 defining “public” as “open or available for all to use, share, enjoy.” BLACK’S LAW DICTIONARY 995 (7th
22 ed. abrg. 2000). In fact, no guidance exists in CNMI law which provides an unequivocal definition of what
23 constitutes "public," and the subject has been a polarizing topic of great debate in other jurisdictions.

24 However, the framers of the CNMI Constitution, the drafters of the OGA, and the drafters of the
25 2009 Popular Initiative demanding transparency of the Legislature are all one in the same. Moreover, the

1 applicable provision of the Constitution and the particular statute applying the OGA to the Legislature
2 purport to achieve the exact same goal – transparency, accountability, and an opportunity to be heard on
3 hot-button issues – as evidenced by the text of the Constitution itself and the complementary language of
4 the statute, which merely defines the constitutional mandate for “public meetings” for both the Legislature
5 and any governing bodies in the CNMI.

6 Thus, the Court finds that the statute created by the 2009 Popular Initiative does not conflict with
7 the requirements of the CNMI Constitution, as it merely augmented the open meeting provision, and serves
8 to operate alongside the Legislature's grant of authority to create their own procedural rules. The Legislature,
9 in crafting its own procedural rules, is endowed with the authority to expand the scope of the Constitution
10 – as its provisions merely provide the bedrock upon which to expand the broad strokes of democracy, and
11 by its nature cannot provide for every particular procedure – but is prohibited to contravene the operation
12 of certain constitutional provisions by delimiting the very constraints its drafters specifically composed to
13 prevent such an attempt to subvert its supreme authority.

14 Accordingly, the Court finds the statute to be open to a constitutional interpretation in which it is
15 harmonious with this Court’s reading of the CNMI Constitution, and thus finds the statute applying the OGA
16 to the Legislature to be both valid and ideologically aligned with the related open meeting provision within
17 the CNMI’s Constitution.

18 **E. LOTTERY COMMISSION IS NOT A PROPER PARTY**

19 Next, the Court evaluates whether the Lottery Commission is a properly named party.

20 Defendant claims that the Lottery Commission, as a line agency of the executive branch of the CNMI
21 government, does not have the capacity to sue and/or be sued. Instead, potential litigants institute a cause
22 of action against the Commonwealth, which may be considered the real party in interest for the purposes of
23 jurisdiction. Other government agencies – which are mostly public corporations such as the Retirement
24 Fund, the Marianas Visitor Authority, the Commonwealth Ports Authority, the Commonwealth Healthcare
25 Corporation, and the Commonwealth Utilities Corporation – have been endowed with the capacity to sue

1 and/or be sued. However, the Lottery Commission has not been given this authority or capacity and is thus
2 an improper party to the instant case, as the Commonwealth government is already named as a party.

3 Plaintiff argues that it is the Government's burden to cite legal authority for the conclusion that the
4 Lottery Commission does not have the capacity to sue and/or be sued, and that nothing in the enabling
5 statute of the Lottery Commission purports to grant it immunity from being enjoined or named in a lawsuit.
6 Thus, Plaintiff claims this particular argument is unsupported, obviating the need for Plaintiff to defend
7 against the Government's arguments.

8 However, the Court here finds that while no legal authority was cited to support the principle that
9 a litigant bringing a cause of action against a government agency is necessarily suing the government itself,
10 the Court finds dismissal to be appropriate in this case due to the nature of the Lottery Commission being
11 completely removed from the legislative process and the OGA simply being inapplicable against it, as it
12 neither played any part in nor had any responsibility to control or monitor the Legislature's compliance with
13 the applicable provisions of the OGA. Further, an injunction or declaratory judgment against the Lottery
14 Commission would be redundant and unnecessary in the event this Court does hold the legislator Defendants
15 to the standards the OGA imposes upon them, since the laws enabling and requiring their operation may be
16 rendered null and void.

17 Accordingly, the Court finds that retaining the Lottery Commission as a party in the present case
18 would serve no purpose, as it has not itself violated the provisions of the OGA, and hereby dismisses the
19 Lottery Commission from the action captioned above.

20 Furthermore, Defendant Governor Eloy Inos moved this Court for dismissal from the underlying suit
21 for substantially the same reasons as the Lottery Commission's Motion, as they were put forth in the same
22 motion. However, while the Court dismissed the Lottery Commission as an improper party due to its lack
23 of involvement or control over the Legislature, the Court cannot, in good conscience, dismiss Governor Inos
24 in these circumstances, as he became an indispensable party after involving himself in the legislative process
25 by signing the bills into law. Thus, the Court denies Governor Inos' motion to dismiss.

1 **F. OGA STATUTES SUPERCEDE COMMON LAW ENROLLED BILL DOCTRINE**

2 The Court now addresses Defendants’ attempts to utilize the enrolled bill doctrine as a defense.

3 Defendants cite the enrolled bill doctrine in an attempt to prevent any challenge to laws enacted by
4 the Legislature. Defendant states “[o]nce a bill has been passed and signed by the appropriate members of
5 the legislature, it is an ‘enrolled bill’”, which, under English and American common law, “are not subject
6 to challenge for procedural irregularities.” (Gov’t’s Mot. to Dismiss, at 8.) Essentially, “cases under the
7 common law uniformly held that an enrolled bill was conclusive evidence of statutory enactment and that
8 no other evidence was admissible to establish that a bill was not lawfully enacted.” *Sutherland*, § 15:3 (and
9 cases collected therein).

10 Plaintiff rebuts Defendants’ arguments by reminding the Court that the application of common law
11 in the Commonwealth is limited and strictly governed by statute which provides the hierarchy the Court
12 must follow in determining which law controls.

13 Here, 7 CMC § 3401 provides:

14 In all proceedings, the rules of the common law, as expressed in the
15 restatements of the law approved by the American Law Institute and, to the
16 extent not so expressed as generally understood and applied in the United
17 States, shall be the rules of decision in the courts of the Commonwealth, in
the absence of written law or local customary law to the contrary; provided,
that no person shall be subject to criminal prosecution except under the
written law of the Commonwealth.

18 7 CMC § 3401 (1 TTC § 103). Furthermore, this Court has addressed this particular issue many times,
19 holding that “Commonwealth courts are only bound by the common law of the fifty states when there is an
20 absence of controlling written or customary law to the contrary.” *Commonwealth v. Ayuyu*, Crim No.
21 13-0024 (Order Denying Commonwealth’s Motion) (NMI Super. Ct. Aug. 9, 2013) (citing *Mundo v.*
22 *Superior Court*, 4 NMI 392, 396 (1996) and *In re Buckingham*, 2012 MP 15 ¶ 12). Specifically, this Court
23 is bound to follow written laws to “include[] the NMI Constitution and NMI statutes, case law, court rules,
24 legislative rules and administrative rules, as well as the Covenant and provisions of the U.S. Constitution,
25 laws and treaties applicable under the Covenant.” *In re Buckingham*, 2012 MP 15.

1 As such, Defendants claim that enrolled bills are not addressed in the restatements of law, local
2 written law, or customary law addressing enrolled bills, and hence, the Court must follow the common law
3 principles set out above. However, Plaintiff argues that Defendants overlook the written law that clearly
4 contradicts the enrolled bill doctrine: the OGA.

5 The Court acknowledges that 1 CMC § 9907 explicitly provides that any legislative action taken in
6 contravention of the OGA's requirements shall be struck down as null and void, whereas 1 CMC § 9901
7 establishes this Court's jurisdiction to hear such matters, as well as the mechanisms for potential litigators
8 to seek relief in the form of fees and injunctions. These provisions lead the Court's analysis and control its
9 decision.

10 Accordingly, as the Court is prohibited from relying on a doctrine only rooted in common law which
11 clearly contravenes local written statutes, the Court is bound by the provisions of the Commonwealth law
12 and hereby disregards the enrolled bill doctrine as extraneous.

13 **G. LEGISLATORS NOT ENTITLED TO LEGISLATIVE IMMUNITY**

14 Lastly, the Court considers whether the legislator Defendants should be immune from personal civil
15 liability in the instant case.¹

16 Defendants argue that the doctrine of legislative immunity bars the complaints against them for lack
17 of subject matter jurisdiction, stating that Plaintiff's complaint merely describes the legislative process by
18 which the above-mentioned bills were enacted, all pursuant to the internal procedural rules of the
19 Legislature. (Def. Torres' Mot. to Dismiss, at 5.) Plaintiff claims that the doctrine of legislative immunity
20 does not apply because the legislator Defendants have not met their burden of showing that the act of
21 attending a legislative session is protected activity under the applicable provisions of the NMI Constitution.

22
23 ¹ The legislator Defendants have been charged with personal liability in connection with their attendance at a
24 legislative session undertaken in violation of the OGA. 1 CMC § 9915(a) provides the basis for personal liability, stating
25 that: "[e]ach member of the governing body who attends a meeting . . . in violation of [the OGA], with knowledge of the fact
that the meeting is in violation thereof shall be subject to personal liability in the form of a civil penalty in the amount of \$100
for the first offense and \$1,000 for subsequent offenses." Further, violations "do[] not constitute a crime and assessment of
the civil penalty by a judge shall not give rise to any disability or legal advantage based on conviction of a criminal offense."

1 Generally, legislative immunity is an affirmative defense which provides absolute, comprehensive
2 protection from suits challenging actions taken in the performance of official legislative functions. *See*
3 *Sablan v. Tenorio*, 4 N.M.I. 351, 355 (1996) (declining to discuss legislative immunity and deciding the case
4 on different grounds). The doctrine was first established in the CNMI by Article II of the Commonwealth
5 Constitution, which provides that: “[a] member of the legislature may not be questioned in any other place
6 for any written or oral statement in the legislature. . . .” N.M.I. Const. art. II, § 12. Moreover, “the
7 government official seeking immunity . . . has the burden of showing that an exemption from personal
8 liability is justified.” *Hansen v. Bennett*, 948 F.2d 397, 401 (7th Cir. 1991) (internal citations omitted).

9 Defendant relies heavily on a case in which the court dismissed a lawsuit filed against former
10 Governor Juan N. Babauta and the members of the Tinian and Aguiguan Legislative Delegation, where the
11 court held that the Governor enacted Tinian Local Law 14-1 pursuant to their specific constitutional
12 authority to enact laws. *See Tinian Casino Gambling Control Commission v. Babauta, et. al.*, Civ. No.
13 04-0326C, at 8. However, the party seeking action against the legislators in *Tinian Casino* did not rely on
14 a statute specifically authorizing personal liability or seek action based upon express statutory authority.
15 Thus, the case cannot be considered particularly helpful for the Court in determining what constitutes
16 protected legislative activity.

17 The United States Supreme Court has addressed the issue of legislative immunity, construing the
18 legislative capacity narrowly and holding that legislative immunity “does not prohibit inquiry into activities
19 that are casually or incidentally related to legislative affairs but not a part of the legislative process itself.”
20 *See United States v. Brewster*, 408 U.S. 501, 528 (1972). Further, the Supreme Court “noted that it has
21 accorded legislators absolute immunity only when they were voting on a resolution, speaking on legislation
22 or in a legislative hearing, or subpoenaing records for use in a legislative hearing.” *Hansen v. Bennett*, 948
23 F.2d 397, 402 (7th Cir. 1991) (stating that “[c]ases subsequent to *Brewster*, both in the Supreme Court and
24 in [the 7th] Circuit, have continued to limit legislative immunity to these narrow functions”). It is worth
25 noting that the U.S. Supreme Court has never extended absolute immunity to an activity which is not “a part

1 of the legislative process itself.” *Id.* at 401 (citing *Brewster*, 408 U.S. at 528).

2 The Ninth Circuit has also developed a test to determine whether a defendant is entitled to legislative
3 immunity, considering “(1) whether the act involves ad hoc decision making, or the formulation of policy;
4 and (2) whether the act applies to a few individuals, or to the public at large.” *San Pedro Hotel Co. v. City*
5 *of Los Angeles*, 159 F.3d 470 (9th Cir. 1998). Specifically, one Ninth Circuit case – *Bechard v. Rappold*,
6 287 F.3d 827 (9th Cir. 2002) – evaluates the above criteria in the context of an open meetings law. The
7 court declined to grant legislative immunity where county commissioners terminated an administrative
8 assistant because the determination to terminate was not made in accordance with the state open meetings
9 law and thus was, by its nature, ad hoc decision making. *Id.* at 830. The *Bechard* court relied on U.S.
10 Supreme Court, which it said to have evaluated “whether the action for which immunity is sought is formally
11 legislative in character and whether it bears the hallmarks of traditional legislation.” *Id.* at 831 (internal
12 citations omitted). The court stated that the “defendants’ lack of compliance with Montana [open meetings]
13 law makes the [action] at odds with both standards.” *Id.*

14 Similarly here, the Court finds that the legislator Defendants have not satisfied their burden of
15 proving they are entitled to legislative immunity, as there is no evidence that attending a meeting constitutes
16 protected legislative activity as envisioned by the framers of the CNMI Constitution. Legislators’ attendance
17 at a meeting held without proper public notice may be considered incidental to legislative affairs, but it
18 cannot be said to be part of the legislative process itself. Defendant cites “The Analysis of the Constitution
19 of the Commonwealth of the Northern Mariana Islands” as authority for the scope of applicability of Article
20 II, § 12, which states “[t]his provision makes members of the legislature immune from civil suits or criminal
21 prosecutions for any oral or written statement made on the floor of the legislature or in any legislative
22 activity such as a legislative committee or a legislative report.” *The Analysis of the Constitution of the*
23 *Commonwealth of the Northern Mariana Islands*, at 53-54 (Dec. 6, 1976). The Court does not find that
24 attending a meeting rises to the level of legislative activity as contemplated by the framers of the CNMI
25 Constitution, as they only specifically mention protection for legislative committees and legislative reports.

1 Furthermore, the Court would be remiss to allow Defendants to use the doctrine of legislative
2 immunity as a shield against liability by claiming that their allegedly prohibited acts were merely “legislative
3 activity” where they simultaneously insist that actions taken in contravention of explicit, written CNMI law
4 are typical in the formulation of policy, and that such typical actions do not violate applicable CNMI law.
5 The Court finds this argument to be logically flawed and disingenuous at best.

6 Justice, and more importantly, the CNMI’s own people, have called for transparency, accountability,
7 and public participation in the policy making process, especially in circumstances such as these where the
8 future of the CNMI and its economy are at stake. The Court will not shy away from that charge, as the
9 people have entrusted it with the power of judicial review of the actions of its elected officials, and will hold
10 the Commonwealth’s politicians to the high standards enumerated by the provisions of the OGA. Public
11 participation in policy making is one of the most important aspects of a functioning democracy, and the
12 strictures placed around such legislative activity will not be taken lightly by this Court in this instance or any
13 other.

14 Accordingly, the Court hereby finds that the legislator Defendants are not entitled to legislative
15 immunity barring Plaintiff’s claims against them, as they have not met their burden of demonstrating that
16 their actions taken in furtherance of passing the bills mentioned above constituted protected legislative
17 activity.

18 **V. CONCLUSION**

19 For the reasons stated above, it is **HEREBY ORDERED** that Defendants’ instant Motion to Dismiss
20 is **DENIED IN PART** and **GRANTED IN PART** as set forth below.

- 21
- 22 1. The Government’s Motion to Dismiss Defendant Lottery Commission as an improper party
23 is **GRANTED**, and thus the Lottery Commission is hereby dismissed as a party in this case.
- 24 2. The Government’s Motion to Dismiss the CNMI Government and Governor Eloy S. Inos as
25 improper parties is hereby **DENIED**.

3. The Government’s Motion to Dismiss Plaintiff’s claims is otherwise hereby **DENIED**.
4. The CNMI Legislative Bureau’s Motion to Dismiss on behalf of Defendants Joseph P. Deleon Guerrero, Rafael S. Demapan, and Felicidad T. Ogumoro is hereby **DENIED**.
5. Defendant Ralph DLG Torres’ Motion to Dismiss is hereby **DENIED**.

Furthermore, the Court hereby **ORDERS** the parties to be present at a Case Management Conference on **November 6, 2014 at 1:30 p.m. in Courtroom 223A** — subject to a hearing date to be set for any motions or other matters which would need to be heard in advance of said Case Management Conference.

SO ORDERED this 7th day of October, 2014.

 / s /
David A. Wiseman, Associate Judge