

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

CHRISTINA-MARIE SABLAN,
Plaintiff-Appellee,

v.

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

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

Cite as: 2009 MP 11

Decided August 28, 2009

Braddock J. Huesman, Assistant Attorney General, Saipan, Northern Mariana Islands, for
Defendants-Appellants
Christina-Marie Sablan, Pro Se
BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice;
JOHN A. MANGLONA, Associate Justice

PER CURIAM:

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

I

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

documents, but with the addition of all papers containing the specific words “Jenner” and “Block.” Secretary Inos also refused to produce any of the requested documents.

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

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

¶ 5 Upon applying this exception to the financial records, the trial court found that disclosing their contents would in no way disadvantage the Commonwealth in the federalization lawsuit, and additionally, that much of the information was already a matter of public record. *Sablan v. Fitial*, Civ. No. 09-0066E (NMI Super. Ct. June 18, 2009) (Order Releasing Requested Documents

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

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

Pursuant to the Open Government Act at 15). In all, the trial court ordered the government to disclose thirty invoice summaries and documents related to the payment of those debts. The following day, the government filed a motion for an emergency stay with both the trial court and this Court. The trial court denied its request, but this Court granted it in order to conduct an adequate, meaningful, and comprehensive review.

II

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

¶ 7 In 1994, the Commonwealth’s OGA was enacted. The legislature commented on its motivation for introducing and passing the act in its “Legislative Declaration,” stating that “[t]he people insist on remaining informed so that they may retain control over the instruments they have created.” 1 CMC § 9901. The legislation was first introduced in the senate, and appears to be modeled after the State of Washington’s Public Records Act, Wash. Rev. Code §§ 42.56.001-904 (2009).³ Since its enactment, the trial court has considered claims brought under the OGA on at least six different occasions,⁴ but the case at hand is the first to come before us on appeal. In

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

⁴ *Sablan v. Tenorio*, Civ. No. 94-0500 (NMI Super. Ct. July 18, 1994); *Commonwealth v. Dowci*, 99-0072 (NMI Super. Ct. May 6, 2009); *Guerrero v. Dept. of Pub. Lands*, 06-0313(c) (NMI Super. Ct. Oct. 26, 2006); *Malone v. Northern Marianas Ret. Fund*, Civ. No. 06-0033 (NMI Super. Ct. Nov. 15, 2006);

reviewing a public entity’s denial of an OGA request, the judiciary is required to liberally construe provisions favoring disclosure of public records, and to strictly construe provisions providing for exceptions to the disclosure requirement. 1 CMC § 9901. It is with this statutory language in mind that we decide the issues now before us.

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

¶ 9 To preface our discussion of the appellants’ specific arguments, it is helpful to first review the sequence of events and analysis that lead to the application of 1 CMC § 9918(c). First, the individual or group wishing to procure the record must establish that it is indeed “public.” The definition of a “public record” is set forth at 1 CMC § 9902(f), and encompasses records which an agency is required to keep by law, or that are necessary to discharge the agency’s duties. These records may include documents such as reports, memoranda, maps, and official meeting minutes. In the instant case, neither party disputes that the documents related to the federalization lawsuit are public records.

¶ 10 Generally, if a record is public, it must be disclosed. However, the legislature recognized that certain types of documents, while public, must be exempt from the disclosure requirement to

Richardson v. Commonwealth Ports Auth., 03-0413B (NMI Super. Ct. Apr. 4, 2005); *Hofschneider v. Demapan-Castro*, 04-0523B (NMI Super. Ct. Aug. 19, 2005).

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

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

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

Burden of Proof

¶ 12 In its order to release the documents at issue, the trial court stated that “[t]he government has failed to articulate why releasing the documents – which reveal how much money taxpayers have spent, how much the CNMI is being billed, and the source of the money – will set a dangerous precedent or disadvantage the lawsuit in any way.” *Sablan*, Civ. No. 09-0066E (Order Releasing Requested Documents Pursuant to the Open Government Act at 16). By stating that the government, not Sablan, failed to articulate sufficient justification for nondisclosure, the trial court signaled that it placed the 1 CMC § 9918(c) burden of proof on the government. The government asserts that this was an error. Whether the trial court incorrectly placed the burden of proof on a particular party is a legal question, which is reviewed *de novo*. *See e.g. Agulto v. Northern Marianas Inv. Group, Ltd.*, 4 NMI 7, 9 (1993). Additionally, “[w]here the record consists solely of documentary evidence, the standard of review of a trial court’s public disclosure ruling is *de novo*.” *CLEAN v. City of Spokane*, 947 P.2d 1169, 1178 (Wash. 1997). Consequently, this standard of review is appropriate for each issue herein.

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

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

¶ 15 Sablan also draws the Court’s attention to twelve other cases in which courts uniformly placed the burden of proof on the party whose interest stood to be harmed by disclosing public records, regardless of whether the party was the plaintiff or the defendant.⁶ Courts in ten of the twelve cases cited by Sablan placed the burden of proof on the government. In those cases, as well as most public disclosure cases, the government was the custodian of the public records it attempted to keep out of public view. It follows that the government was, and usually is, the party whose interest stands to be harmed by disclosure. In the case at hand, Sablan asserts that it is the government’s interest that stands to be harmed by disclosure, rather than her own. Sablan therefore claims that the trial court placed the burden of proof on the correct party. In addition to case law comparisons, Sablan also notes that she “cannot reasonably be expected to prove that no

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

vital government function would be compromised in disclosure when she has not even been allowed to see those records.” *Id.*

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

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

¶ 18 We begin our analysis of the 1 CMC § 9918(c) burden of proof by examining the structure of the OGA as a whole. Generally, when a statutory provision is accompanied by legislatively-created exception, courts often times find that the format of the statute itself supports a burden shift.⁸ This commonly-accepted principle of judicial review translates to claims brought under the OGA as well. When a plaintiff brings a claim under the OGA, he or she bears the initial burden of demonstrating that a document is a public record under 1 CMC § 9902(f). Next, “[a]gencies bear the burden to prove a particular statutory exemption applies” under 1 CMC § 9918(a). *Spokane Research and Defense Fund*, 117 P.3d at 1123. Because the initial burden of establishing that a document is public lies with the plaintiff, and the burden shifts to the

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

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

government to prove that a disclosure exemption applies, it is only logical that the burden should move back onto the plaintiff to demonstrate that nondisclosure is clearly unnecessary to protect a vital government interest.

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

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

¶ 21 In sum, we recognize that the legislative declaration of the OGA requires us to liberally construe each provision that favors disclosure, and to strictly construe provisions that create exceptions to the disclosure requirement. 1 CMC § 9901. However, in holding that the plaintiff

bears the burden of proving that the 1 CMC § 9918(c) exception applies, we are still able to give great deference to the plaintiff's arguments in conformity with the stated policy in favor of disclosure. The exception to the disclosure exemption ensures that, although certain documents may fall under one of the 1 CMC § 9918(a) exemptions, the government may not take shelter behind the Act to hide what it may perceive to be harmful information. Nevertheless, in reviewing the statutory structure, we find that the burden is on the plaintiff to demonstrate "that the exemption of such records is clearly unnecessary to protect . . . any vital government function." 1 CMC § 9918(c).

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

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

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

¶ 24 In its argument to the trial court, the government asserted that, should the documents become public, the federal government may discover the total amount of money the government has at its disposal, which would, in turn, "eviscerate the ability of the OAG and any outside

lawyers to stand toe-to-toe against strong, well-financed, and aggressive litigators.” *Sablan*, Civ. No. 09-0066E (Order Releasing Requested Documents Pursuant to the Open Government Act at 10). It suggested that the federal government could, upon inspecting the documents, ascertain a limit to the government’s litigation budget and thereafter increase motions and other miscellaneous paperwork to the point of exhausting the litigation fund. The government did not raise this specific argument in its brief to this Court, but nevertheless alluded to the issue in oral arguments.

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

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

¶ 27 In addition to suggesting that the federal government is not able to ascertain a definitive spending limit, Sablan and the trial court both noted that “[t]he government’s estimated litigation budget, and the CNMI’s general budget, are not matters of secrecy.” *Id.* The Commonwealth’s

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

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

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

Mell v. New Castle County

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

¶ 29 Like this case, *Mell* similarly implicates the "pending litigation" exemption to the Delaware FOIA. The court thoroughly examines the policy rationale behind the exemption and brings to light the potential negative consequences of allowing litigation opponents to access financial records. However, the trial court did not err in declining to rely on *Mell*. Commonwealth courts are not bound to follow the holding of a specific state court, and particularly not a state's trial court. More importantly though, Delaware's FOIA differs from the Commonwealth's OGA in one significant respect: Delaware's FOIA has a disclosure exemption

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

similar to the OGA’s “pending litigation” exemption, but it does not have an *exception* to the exemption similar to 1 CMC § 9918(c). In Delaware, once the court finds that an exemption applies, the analysis is finished. The OGA, on the other hand, requires additional scrutiny of a public record under 1 CMC § 9918(c) after the court has exempted it from disclosure. In effect, the Commonwealth has a two-step process that warrants further analysis of a document. Since the issue we are faced with is whether the trial court applied the second step of the disclosure analysis correctly, and Delaware has no corresponding second step, *Mell* is inapposite. Furthermore, the trial court would never err in refusing to follow a case that is non-binding, even if that case was on point.

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

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

¶ 31 Sablan, on the other hand, correctly states that the trial court merely used the case as “a reference point to highlight the ‘unquestionable legitimate concern’ that the public has in being able to access the requested public records to ensure the efficient administration of government.” Appellee’s Reply Br. at 13 (citing *Sablan*, Civ. No. 09-0066E (Order Releasing Requested Documents Pursuant to the Open Government Act at 12)). The trial court explicitly stated that

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

Tiberino “is not applicable to our case and, in fact, the opposite could be said about the information contained in the documents that Ms. Sablan has requested. The public has an unquestionable legitimate concern in the requested documents.” *Sablan*, Civ. No. 09-0066E (Order Releasing Requested Documents Pursuant to the Open Government Act at 12) (emphasis added). Accordingly, the trial court’s reliance, if any, on *Tiberino* is proper.

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

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

¶ 34 As Sablan points out, the trial court’s use of *Indian Law Resource Center* actually helps the government, as the trial court used the case to help justify nondisclosure of the Jenner & Block’s detailed billing statements and engagement letter. Furthermore, the trial court admits that, “[a]lthough the court was not applying a litigation exemption, the documents at issue are similar, so the case is illustrative.” *Sablan*, Civ. No. 09-0066E (Order Releasing Requested Documents Pursuant to the Open Government Act at 13). Since the documents in question are

essentially analogous to those in *Indian Law Resource Center*, we find no error in the trial court's decision to incorporate its analytical framework.

III

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

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

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