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

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

15 **Plaintiff,**

16 **vs.**

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

21 **Defendants**  
22

CIVIL ACTION NO. 09-0066(E)

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

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

1 **MOTION TO WITHHOLD DOCUMENTS**

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

5 **FACTS**

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

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

11 On October 16, 2008, Defendant Fitial received an Open Government Act (hereinafter  
12 sometimes referred to as the “Act” or “OGA”) request, Exhibit “A” to Plaintiff’s complaint,  
13 asking for copies of: “(1) all contracts related to the [lawsuit against the federal government]  
14 (hereinafter the “903 Litigation”); (2) documents detailing payments made on said contracts; (3)  
15 documents identifying the source(s) of funding for the 903 Litigation; and (4) documents  
16 identifying the department(s) or of the CNMI government that might have had funds  
17 reprogrammed due to the 903 Litigation.”  
18

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

25 On December 11, 2008, Plaintiff sent another Open Government Act request, but this  
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27 <sup>1</sup> *Northern Mariana Islands v. United States*, No. 08-CV-01572 (D.D.C. Dec. 15, 2008).

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

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

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

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

## 8 OVERVIEW

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

## 16 ARGUMENT

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

18 Defendants wish to address a preliminary matter and clarify that Ms. Sablan’s request for  
19 documents is in her personal capacity, not her capacity as a legislator. If Ms. Sablan’s committee,  
20 or any proper committee of the Legislature, wishes to examine these documents, it is not only  
21 their right, but their responsibility, to do so. That this responsibility has not been exercised to  
22 date, by any committee of the Legislature, does not provide an excuse to abrogate a statute.  
23 While Defendants understand Ms. Sablan’s position that she believes these documents should be  
24 released immediately under the Open Government Act (sometimes hereinafter the “Act” or  
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26  
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28 <sup>3</sup> 1 CMC § 9918(a)(8); *see also* *Limstrom v. Ladenburg*, 963 P.2d 869 (Wash. 1998).

1 “OGA”), Defendants, respectfully, disagree and urge the Court to allow the documents to be  
2 withheld for OGA purposes<sup>4</sup> until the conclusion of the related “903 Litigation.”

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

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

10 In the case of discovery in a courtroom setting, a party is entitled to discover *all relevant*  
11 *evidence*. This means that relevance, need, and applicable privileges are all important parts in  
12 determining what documents must be produced in discovery.<sup>6</sup> In the OGA context, however, a  
13 party is only entitled to public records, and within that narrow entitlement, there are further  
14 exceptions to the production of public records found in the statute.<sup>7</sup> While information disclosed  
15 during courtroom discovery is limited to the parties and can be subject to protective orders  
16 against further disclosure, *when a document must be disclosed under the OGA, it must be*  
17 *disclosed, regardless of objections, to the general public, and the identity of the requester is*  
18 *irrelevant to whether disclosure is required.*<sup>8</sup> The litigation exception to the OGA, therefore,  
19 was enacted to avoid the serious disadvantage that the government or its agencies would suffer if  
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23 <sup>4</sup> Representative Sablan, is, of course, always able to exercise her powers and responsibilities  
24 as a legislator and convince her fellow committee members to request these documents, not in an  
OGA setting, but in their oversight capacity.

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

26 <sup>6</sup> See Com.R.Civ.P. 26(b)(1).

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

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

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

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

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

19 The Open Government Act applies when a member of the public asks an agency for a  
20 "public record." The Office of the Governor and the Department of Finance are agencies.  
21 Further, a public record is "any record which a public agency is required by law to keep or which  
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24 <sup>9</sup> 1 CMC § 9918(a)(8).

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

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

<sup>12</sup> *North*, 881 F.2d at 1096.

<sup>13</sup> Com.R.Civ.P. 37.

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

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

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

16 Documents detailing payments made on said contracts to date;

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

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

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

25 Generally, absent the current litigation, these requests would trigger release of: (1) the  
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27 <sup>14</sup> 1 CMC § 9902(f).

28 <sup>15</sup> *Limstrom*, 963 P.2d at 869.

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

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

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

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

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

12 Defendants admit that it is generally recognized that the communication of factual  
13 information is not protected by the attorney-client privilege, and thus, fee or retainer agreements,  
14 generally, are not privileged.<sup>18</sup> Moreover, the identity of the client, the amount of the fee, the  
15 identification of payment by case file name, and the general purpose of the work performed are  
16 usually not protected from disclosure by the attorney-client privilege. But, the information  
17 contained in such documents may still be found to be confidential.<sup>19</sup> Moreover, if  
18 correspondence, bills, ledgers, statements, and time records reveal the motive of the client in  
19 seeking representation, litigation strategy, or the specific nature of the services provided, such as  
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21 <sup>18</sup> See, e.g., *In re January 1976 Grand Jury*, 534 F.2d 719, 727 (7th Cir.1976) (determining  
22 matters regarding fees are generally not privileged); see also *In re Semel*, 411 F.2d 195, 197 (3d  
23 Cir.1969) (“In the absence of unusual circumstances, the fact of a retainer, the identity of the  
24 client, the conditions of employment and the amount of the fee do not come within the privilege  
25 of the attorney-client relationship.”); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Aetna Cas. &*  
26 *Surety Co.*, 384 F.2d 316, 317 n. 4 (D.C.Cir.1967) (fact of attorney-client relationship and reason  
27 for its existence generally are not privileged); *Finol v. Finol*, 869 So.2d 666  
28 (Fla.Dist.Ct.App.2004) (billing information that does not reveal mental impressions and opinions  
of counsel is not privileged); *P. & B. Marina, Ltd. P'ship v. Logrande*, 136 F.R.D. 50, 55  
(E.D.N.Y.1991) (request to pay fees and attached statement of fees was not privileged); *but cf.*  
*U.S. v. Sindel*, 53 F.3d 874 (8th Cir.1995) (attorney's release of information regarding payments  
would reveal substance of communication).

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

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

2 For example, in *United States v. Osborn*,<sup>21</sup> the court stated that fees paid for legal work  
3 and the general nature of legal work performed do not constitute a confidential communication,  
4 but that specific descriptions of services, by necessity, intrude upon the area of confidential  
5 communications. In other words, portions of the contracts, engagement letters, and billing  
6 statements are exempt because they include specific descriptions of services, the motives of the  
7 government in seeking representation, litigation strategy, or the specific nature of the services  
8 provided.<sup>22</sup> Thus, many parts of the contracts, engagement letter, and billing statements which  
9 Ms. Sablan seeks, although they are public records, unquestionably fall under the litigation  
10 exception because they are attorney-client privileged under the rules of courtroom discovery.  
11 This is so, because parts of the documents are (1) relevant to the controversy, and (2) exempt  
12 from disclosure under the rules of discovery. Thus, they are exempt, until the conclusion of the  
13 903 Litigation, from being turned over to the public. Defendants are aware of the argument that  
14 the edited portions of the contracts, engagement letters, and billing statements along with the  
15 other public records that are not attorney-client privilege should be released. This would be an  
16 acceptable argument except that there is another reason that would preclude the government from  
17 having to turn the edited and remaining documents over in a discovery setting.  
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25 <sup>20</sup> *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir.1999) (quoting *Clarke v. American*  
26 *Commerce National Bank*, 974 F.2d 127, 129 (9th Cir.1992)) (internal quotations and citations  
omitted); see also *In re Grand Jury Subpoena*, 204 F.3d 516, 520 (4th Cir.2000).

27 <sup>21</sup> 409 F.Supp. 406, 411 (D.Or.1975).

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

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

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

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

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

23          <sup>23</sup> *Pappas v. Frank Azar & Assoc., P.C.*, 2008 WL 652236, \* 2.

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

25          <sup>25</sup> *Pappas.*, 2008 WL 652236, \* 2.

26          <sup>26</sup> *Id.*

27          <sup>27</sup> 255 F.R.D. 300 (D.D.C. 2009).

28          <sup>28</sup> *Id.*, at 303.

1 relevant.”<sup>29</sup> Thus, courts have held that while agreements as to fees are not privileged, “they  
2 become relevant, at best, when Plaintiff prevails and seeks a fee.”<sup>30</sup> Further, courts are aware of  
3 the problem of using discovery to inquire into sensitive areas such as litigation budgets, holding  
4 that “assessing one's settlement posture by knowing what one's opponent is paying counsel is not  
5 a legitimate use of discovery; discovery seeks relevant evidence, not ammunition for settlement  
6 discussions, as welcome as they may be.”<sup>31</sup> This conclusion is buttressed by cases where  
7 attorneys’ fees are not sought by a party.  
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9         A Texas appellate court handled a similar issue to the one before this court, deciding that  
10 billing records in an underlying lawsuit were irrelevant when the opposing side did not seek  
11 reimbursement for its own legal expenses. In *MCI Telecomms. Corp v. Crowley*,<sup>32</sup> MCI petitioned  
12 the appellate court for a writ of mandamus to protect it from producing attorney billing records.<sup>33</sup>  
13 MCI had been sued by two former employees for sex discrimination,<sup>34</sup> and both underlying  
14 Plaintiffs sought recovery of their attorney fees.<sup>35</sup> In their discovery requests, the Plaintiffs asked  
15 for the production of MCI's attorneys' billing information.<sup>36</sup> The court noted that there was no  
16 authority that supported the Plaintiffs' attempt to discover the defendant's attorney fees where the  
17 defendant is not itself making a claim for reimbursement for expenses incurred in defending the  
18 underlying lawsuit.<sup>37</sup> The court concluded by holding that “MCI's attorneys' fees in its defense of  
19 this case are *‘patently irrelevant,’* “and not reasonably calculated to lead to the discovery of  
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22         <sup>29</sup> *Id.*

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

25         <sup>31</sup> *See Banks*, 222 F.R.D. at 13.

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

27         <sup>33</sup> *Id.* at 401.

28         <sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 401-02.

<sup>37</sup> *Id.* at 403.

1 admissible evidence.<sup>38</sup>

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

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

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22 The Court in *Mell v. New Castle County*,<sup>41</sup> faced exactly this problem. In *Mell*, a litigant  
23 sought discovery of New Castle County's payment of invoices from lawyers or law firms known  
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25 <sup>38</sup> *Id.*

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

<sup>40</sup> See *Banks*, 222 F.R.D. at 13.

<sup>41</sup> 835 A.2d 141 (Del. Sup. Crt. 2003).

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

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

## 15 CONCLUSION

16 As described in detail above, the public records requested by Ms. Sablan, by necessity, are  
17 either protected by attorney-client privilege or they are not relevant for discovery purposes. For  
18 these reasons Defendants ask that the public records Plaintiff seeks be denied and that Plaintiff  
19 take nothing in her suit.  
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25 <sup>42</sup> *Id.*, at 149.

26 <sup>43</sup> *Id.*, at 149 (citations omitted).

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

28 <sup>45</sup> 1 CMC § 9918(c).

