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Plaintiff *Pro Se*

SUPERIOR COURT
APR -8 2009 4:31
COURT

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

CHRISTINA-MARIE E. SABLAN,

Plaintiff

vs.

BENIGNO R. FITIAL, in his official
capacity as Governor of the
Commonwealth of
the Northern Mariana Islands; and

ELOY INOS, in his official capacity
as Secretary of Finance at the
CNMI Department of Finance,

Defendants.

Civil Action No. 09-0066(E)

**RESPONSE TO DEFENDANTS'
MOTION TO WITHHOLD
DOCUMENTS**

Date: Thursday, April 9, 2009
Time: 1:30pm
Judge: Hon. David A. Wiseman

OVERVIEW

- 1) Plaintiff seeks records pertaining to contracts, engagement letters, retainer agreements, fee arrangements, amounts paid, sources of funding, and reprogramming of public funds with respect to *CNMI v. USA, et al.*, 1:08-cv-01572 (hereinafter, “lawsuit” or “903 lawsuit” or “903 litigation”). Plaintiff’s Petition for Mandamus, Declaratory and Injunctive Relief, and Other Relief (hereinafter, “Plaintiff’s Petition”).
- 2) In the instant case, Defendants claim exemption from disclosure of records under 1 CMC § 9918(a)(8). According to 1 CMC § 9918(a)(8): “Records which are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the courts” are exempt from public inspection and copying.
- 3) In denying Plaintiff’s request, Defendants must sufficiently establish that the records Plaintiff seeks are both: 1) relevant to the 903 lawsuit; and 2) not discoverable to the United States Government under pretrial rules of discovery.
- 4) Further, a plain reading of 1 CMC § 9918(a)(8) suggests a two-pronged approach: in order for the exemption to apply, Defendants must first satisfy the requirement for relevance to a controversy before establishing that the records sought would not be discoverable.

SUMMARY OF PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO WITHHOLD DOCUMENTS

- 1) Defendants fail to establish sufficient evidence to support their claim that the records Plaintiff seeks in her petition would be exempt from disclosure pursuant to 1 CMC § 9918(a)(8). The requested records should therefore be released.

STANDARD

The Open Government Act must be liberally construed in favor of open records, and strictly construed against nondisclosure of records.

- 1) The legislative intent of the Open Government Act (hereinafter, “OGA” or “Act”) is to ensure that the actions and deliberations of the government be made openly, and that the people remain informed so that they may retain control over the instruments of government they have created. According to the legislative declaration of the Act, “The provisions requiring open meetings and records shall be liberally construed, and the provisions providing for exceptions to the Act shall be strictly construed against closed meetings and nondisclosure of records.” 1 CMC § 9901.
- 2) Public officials or agencies that refuse to disclose records requested under the Open Government Act bear the burden of proving that an exemption to public inspection and copying of such records applies pursuant to 1 CMC § 9918(a). According to 1 CMC § 9918(d), “[a]gency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part thereof) and a brief explanation of how the exemption applies to the record withheld.” *Id.*
- 3) Exemptions from public disclosure provided under 1 CMC § 9918(a) are inapplicable to the extent that information can be redacted from records in order to protect personal privacy or vital government interests. 1 CMC § 9918(b).
- 4) Any record exempt from public inspection or copying under 1 CMC § 9918(a) may still be disclosed if the Commonwealth Superior Court finds that the exemption is clearly unnecessary to protect any individual’s right of privacy or any vital governmental function. 1 CMC § 9918(c).

ARGUMENTS

Defendants' arguments that Plaintiff's request for records "is an OGA request, not a legislative request" and that Plaintiff is "acting in her personal capacity, not her official capacity as a legislator," are completely irrelevant to the instant case.

- 1) Any person, including a lawmaker acting in her official capacity, may request disclosure of records under the Open Government Act, and may file a petition for mandamus or injunction in order to stop or prevent threatened violations of the Act. 1 CMC § 9917 and § 9916(a). Indeed, as Defendants themselves note in their Motion to Withhold Documents, "the identity of the requester is irrelevant to whether disclosure is required [under the Open Government Act]". *Id.*, at 3.
- 2) Defendants offer no explanation or evidence for their statement that Plaintiff's request for documents was submitted "in her personal capacity, not her capacity as legislator," and ignore facts that are obviously to the contrary. Defendants' Motion to Withhold Documents, at 2. Plaintiff's requests for records were submitted to Defendant Fitial and Defendant Inos on her official letterhead on October 16, 2008 and December 11, 2008, respectively, and signed by her in her official capacity as a member of the CNMI House of Representatives, and a member of the House Committee on U.S. and Foreign Relations. Complaint Exhibits A and C, Plaintiff's Petition. Defendants' responses to Plaintiff on October 24, 2008 and December 19, 2008 were addressed to her in her official capacity. Complaint Exhibits B and D, Plaintiff's Petition. Further, Plaintiff's own petition plainly identifies her as "currently an elected member of the CNMI House of Representatives for Precinct 1 (Saipan)," and in their previous motion submitted to this court on March 20, 2009, Defendants also refer to Plaintiff in her official capacity. Plaintiff's Petition, at 1; Defendants Motion to Dismiss.

Defendants fail to establish that the records Plaintiff seeks are relevant to the 903 lawsuit.

- 1) According to Article 4, Rule 401 of the Commonwealth Rules of Evidence, relevant evidence means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Relevant evidence is that which tends to prove or disprove a fact at issue.
- 2) The only facts at issue in the 903 litigation are the provisions of Title VII of the Consolidated Natural Resources Act, Pub. L. No. 110-229, Title VII, Subtitle A, 122 Stat. 754, 853 (2008) (hereinafter, “CNRA”), and their interface with the terms of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263 (1976), as amended (hereinafter, “Covenant”). The focus of the U.S. District Court for the District of Columbia and the parties to the 903 litigation is the interpretation of two legal documents, the CNRA and the Covenant, and determining whether inconsistencies or ambiguities exist between them.
- 3) Disclosure of the records Plaintiff seeks pursuant to the Open Government Act can in no way tend to prove or disprove any facts at issue before the U.S. District Court in the 903 lawsuit. In their Motion to Withhold Documents, Defendants quite noticeably fail to offer any argument that would demonstrate the relevance of the requested records to any facts at issue. Instead Defendants evade the relevance question altogether, and therefore fail to satisfy the first necessary condition in order for their claimed exemption under 1 CMC § 9918(a)(8) to apply. They focus

instead on the question of discoverability, the second necessary condition under the same exemption. As previously stated, however, by a plain reading of 1 CMC § 9918(a)(8), Defendants have no basis for attempting to address the issue of discovery without having first established relevance of the requested records to the controversy. If relevance to the controversy cannot first be established, then Defendants' claimed exemption under 1 CMC § 9918(a)(8) does not apply, and the requested records should be released.

Nevertheless, Defendants also fail to establish that the requested records would not be discoverable by the United States government in the pending 903 litigation.

- 1) As Defendants themselves concede, it is well-established that records such as those sought by Plaintiff, including retainer agreements, fee agreements, engagement letters, contracts, matters involving receipts of fees, and general descriptions of legal work performed, are discoverable and not subject to attorney-client privilege. Defendants' Motion to Withhold Documents, at 6-7; *United States v. Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992); *Montgomery County v. Microvote Corp.*, 175 F. 3d 296, 304 (3d Cir. 1999); *In re Shargel*, 742 F. 2d 61 62 (2d Cir. 1984); *In re Michaelson*, 511 F. 2d 882, 888 (9th Cir. 1975); *Florida v. Investigation*, 802 So. 2d 1141 1145 (Fla. App. 2001); *Gold Standard, Inc. v. Am. Barrick Res*, 801 P. 2d 909, 911 (Utah 1990); *Krause v. GE Capital Mortgage Servs.*, #97 C 8589, 1998 WL 409395 (N. D. Ill, 7/14/1998); *Tokraz v. TRG Columbus Development Venture, Ltd.*, 2008 WL 3850692, 1 (S.D.Fla.) (S.D.Fla.,2008); *Stanziale v. Vanguard Info-Solutions Corp.*, 2008 WL 1808318, 2 (Bkrtcy.D.N.J.) (Bkrtcy.D.N.J.,2008); *Parker v. Kitzhaber.*, L 69960, 1 -2 (D.Or.,1989); *Cutrone v. Gaccione*, 210 A.D.2d 289, 291, 619 N.Y.S.2d 758, 760

(N.Y.A.D. 2 Dept.,1994); *Rumrill-Hoyt, Inc. v. Perri*, 97 A.D.2d 951, 951, 468 N.Y.S.2d 754, 754 (N.Y.A.D. 4 Dept.,1983).

- 1) It is further well-established in the Open Government Act and in case law that records that would generally be considered open, discoverable, and nonprivileged may be released in redacted form if they do contain any privileged or sensitive information. Under the Open Government Act, however, the public agency or official redacting information must still claim a specific exemption for the specific portions being withheld, and justify that claim. 1 CMC 9918(d).
- 2) Although Defendants acknowledge that the requested records could be redacted in order to protect portions that would be subject to attorney-client privilege, they assert, rather weakly, that the remaining portions of the records would not be discoverable by the United States Government “because they [said records] would be irrelevant for discovery purposes but relevant to the 903 Litigation.” Defendants’ Motion to Withhold Documents, at 8. Defendants then cite cases that are distinguishable from the instant case, and therefore may not be applicable – the cited cases do not involve expenditures of public funds in litigation, for example, or public records requests similar to the ones made by Plaintiff. Defendants do cite at least one case, *Mell V. New Castle County*, that involved a public records request, but in that case a party to a litigation was attempting to seek information through a public records request after his discovery request had already been denied in court. Moreover, Defendants ignore altogether the question as to how even redacted records could be relevant to the 903 lawsuit for the purposes of meeting the first requirement for the exemption they claim under 1 CMC § 9918(a)(8).

3) Defendants further assert that “[t]he reason that the Government is not required, and affirmatively should not release these documents under the OGA has everything to do with timing,” that is, that the 903 litigation is still on-going. According to Defendants, if this court orders the release of the records Plaintiff is seeking, “then parties who could not get the documents otherwise will be entitled to them as well.” Defendants even go so far as to claim that “it is clear that the Federal Government has already attempted to use Ms. Sablan [Plaintiff] in an effort to gain an upper hand in the 903 Litigation.” Defendants’ Motion to Withhold Documents, at 10-11. The Open Government Act does not provide for a timing exception, however, and if this court finds that the Plaintiff’s requested records are irrelevant to the 903 lawsuit and therefore not subject to an exemption under 1 CMC § 9918(a)(8), then timing and status of the lawsuit are also necessarily irrelevant, and the records should be disclosed. Furthermore, Defendants fail to substantiate their claim that Plaintiff has been “use[d]” by the United States Government in an attempt to obtain information that could not be obtained in discovery, an allegation that is based solely on a footnote that appears in the United States’ Memorandum in Support of Defendants’ Motion to Dismiss, referencing Plaintiff’s letter to Defendant Fitial of October 16, 2008. Exhibit “A,” Defendants’ Motion to Withhold Documents. Plaintiff is not in any way affiliated with the United States Government, nor is she acting on behalf of the U.S. Government.

CONCLUSION

Based on the foregoing, this court should find that Defendants have failed to justify their claimed exemption under 1 CMC § 9918(a)(8) and reject Defendants’ Motion to Withhold