# IN THE
# SUPREME COURT OF THE REPUBLIC OF PALAU
# APPELLATE DIVISION

**SENATORS REGIS AKITAYA, CAMSEK E. CHIN, RUKEBAI K. INABO, J. UDUCH SENIOR, and MASON N. WHIPPS,**
*Appellants*,
**v.**
**MINISTER CHARLES I. OBICHANG, Ministry of Public Infrastructure, Industries & Commerce, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES**
*Appellee.*

Cite as: 2019 Palau 8
Civil Appeal No. 18-034
Appeal from Civil Action No. 18-025

Decided: March 6, 2019

Counsel for Appellants .................................................. Masami Elbelau, Jr.
Counsel for Appellee ...................................................... Christa Boyd-Nafstad

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
JOHN K. RECHUCHER, Associate Justice
R. BARRIE MICHELSEN, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Associate Justice, presiding.

## OPINION

MICHELSEN, Justice:

[¶ 1] This appeal requires a review of the Open Government Act, (the Act), 1 PNC §§ 901-908.[1] Specifically, the focus of the parties is centered on Section 906(a) of the Act, entitled "Records and government documents open

[1] Both parties ignored the Palau National Code and used citations to the public law number and sections of this 2014 law throughout their presentations. They provide no explanation for this approach. Once a law has been codified, it only makes sense to refer to the Palau National Code. We refer exclusively to the pertinent Code sections of the Act in this opinion.

to the public." Appellants here (plaintiffs in the trial court) asked for; a declaratory judgment that a violation of Section 906(a) of the Act occurred when they did not receive within ten days of their demand the documents they identified; an order requiring those documents to be turned over to them; and a civil fine to be imposed upon the Defendant, as provided in Section 907(c), for failure to meet the deadline.

[¶ 2] After the close of pleadings they moved for summary judgment, contending that the undisputed facts demonstrated that the defendant, Cabinet Minister Obichang, failed to comply with the statutory 10-day deadline for turning over the specified documents. Defendant filed a cross summary judgment motion. The trial court denied summary judgment to the Plaintiffs, and granted summary judgment to the Defendant. It held that since the deadline for a response was met, there was no basis for a declaratory judgment, a turnover order, or imposition of a civil fine. Upon *de novo* review, we agree and affirm.[2]

## STANDARD OF REVIEW

[¶ 3] This Court reviews the trial court's grant of summary judgment *de novo*. *Salvador v. Angel*, 2018 Palau 14 ¶ 5. As such, the "[C]ourt must reach the same conclusion of law as the trial court did to uphold a summary judgment ruling, and no deference is appropriate." *Id.* (quoting *Akiwo v. ROP*, 6 ROP Intrm. 105, 106 (1997)). We review both "'the determination that there is no genuine issue of material fact[] and whether the substantive law was correctly applied.'" *ROP v. Salii*, 2017 Palau 20 ¶ 2 (quoting *ROP v. S.S. Enters., Inc.*, 9 ROP 48, 51 (2002) (internal citation omitted)).

[¶ 4] The trial court's decision to grant or deny declaratory relief is discretionary and "[e]xercises of discretion are reviewed for abuse of that

[2] We also agree that the trial court was correct to point out the inappropriateness of the original pleading being deemed a "petition." *See* ROP R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court.") It may seem a trifling matter to point out the substitution of the word, "petition" for "complaint," but there is a reasonable objection to the terminology as an inference that this litigation is some sort of special proceeding not otherwise governed by the Rules of Civil Procedure. This concern with the failure to comply with Rule 3 is heightened by the Plaintiff's failure to file "a short and plain statement of the claim showing that the pleader is entitled to relief," ROP R. Civ. P. 8(a)(2), and instead filing an 11-page "petition" with 26 pages of unverified "exhibits."

discretion." *Kiuluul v. Elilai Clan*, 2017 Palau 14 ¶ 4 (quoting *Salvador v. Renguul*, 2016 Palau 14 ¶ 7.)

## FACTS

[¶ 5] Appellants did not comply with the requirements for a summary judgment motion,[3] (nor for that matter was Appellee's motion in full compliance), and on that basis alone, the trial court could have denied both summary judgment motions. We will accept as undisputed the facts as stated by the trial court. On appeal, the parties raised no objections to the trial court's factual findings.

[¶ 6] In 2015, the national government was in negotiations with multiple Japanese companies for renovation of the Roman Tmetuchl International Airport. On January 8, 2018, the five plaintiffs – all incumbent senators of the Olbiil Era Kelulau – sought, through counsel, access to five documents relating to the status of those negotiations: a feasibility study, the joint venture incorporation document, the concession agreement, the preliminary document regarding the design and estimated cost of the project, and the proposed financing arrangements through the Japan International Cooperation Agency.

[¶ 7] The trial court found no evidence that a feasibility study existed, and even if it did, it would not be in the government's possession. Therefore, the trial court did not consider it a public record in this case. Concerning the proposed financing agreement, the court stated that no agreement had been reached, so there was no agreement document to turn over.

[¶ 8] That left for consideration the joint venture agreement, the concession agreement (which was presumed to have been signed) and the design-and-cost document.

[3] "A party moving for summary judgment shall set forth in the supporting brief a separate statement of each material fact as to which the moving party contends there is no genuine issue to be tried and, as to each such fact, shall identify the specific document or affidavit, portion thereof, or discovery response or deposition testimony, by line and page, which it is claimed establishes the fact." ROP. R.Civ.P. 56(c)(1).

[¶ 9] The Minister responded to the January 8 request for all five documents eight days later on January 16, 2018. As summarized by the trial court:

> The Defendant stated that Plaintiffs already possessed the documents or substantially similar versions of the documents. He also expressed concern that these documents fell under an exception of the OGA. Specifically, he pointed to the exception in Section 8(a)(2) (codified as 1 PNC § 905(a)(2)). This provision allows the government actor to prevent the release of documents in the interest of national defense or foreign policy. This includes specific "information related to negotiations with another country or a another foreign entity that has its principal place of business in another country."
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> Despite the Defendant's initial hesitance to release the documents, on January 25, 2018, the Defendant provided the documents to the President of the Senate, the Speaker of the House, and the legal counsels for the respective houses of the Olbiil Era Kelulau (OEK) . . . On[] January 29, 2018, Plaintiffs filed their Petition alleging that they had not received the documents within ten days of making the request as required by 1 PNC § 906(a).

Decision 3.

## ANALYSIS

[¶ 10] Palau's Open Government Act was "modeled on the Commonwealth of Northern Mariana Islands Public Law No. 8-41." 1 PNC § 901, note. The express legislative findings for the Palau version are

> that having an open and transparent government is important to ensure the public is involved in the government to the fullest extent possible, consistent with the constitutional mandate for an open government. At the same time, the legislature recognizes the balance that must take place with privacy constraints and the realities imposed by financial administration and practicalities in operating government bodies.

[¶ 11] *Id.* Regarding access to public records, the obligations of the government are provided in section 906(a):

> Within ten (10) days of any request, all public records produced by a governing body shall be available by any person during regular business hours, unless the disclosure will take more time to produce due to exceptional circumstances or the volume of information requested, is in violation of the Constitution of the Republic, other law of the Republic, or is exempted under this chapter.

[¶ 12] The statutory language is straightforward. There is a ten-day deadline for a response to a request for public records made by "any person." To meet that ten-day deadline, the response of the government is to either (1) make the documents available to the requesting party during regular business hours; (2) indicate that the disclosure will take more time to produce because of the volume of information requested or other exceptional circumstances; (3) decline to provide the information because disclosure would violate a national statute or the Palau Constitution; or (4) assert that the requested records are exempt from disclosure pursuant to an exception provided for in the Act.

[¶ 13] The reason for the imposition of a ten-day response time is to insure that the requests for public records cannot be ignored, or responded to at the leisure of the government. The Act requires a timely reply but, as Section 906(a) makes clear, production of the requested documents within ten days is not the only permissible response. Here, within the statutory time requirement, the Minister declined to provide the documents on the basis that an identified exception applied. Of course, a person requesting documents may be dissatisfied with a timely response, and litigate the issue concerning its adequacy, *see* Section 907(a) of the Act, but that is a separate matter from whether the ten-day deadline was met.

[¶ 14] Based upon the express language of the statute, the Appellants' repeatedly-stated position that the plain meaning of Section 906 allows only

one response to a request for documents, *i.e.*, to produce them,[4] is clearly untenable. We therefore agree with the trial court's statement that

> by responding within 10 days through a detailed letter that explained why he was not forthrightly disclosing the documents, and following up shortly thereafter by delivering the documents, Defendant fulfilled his obligations under the [Open Government Act].

Decision 7.

[¶ 15] The only statutory justification the government offered in its timely response (and only one was needed) was that the documents fell within an exception identified in Section 905.[5] Any additional comments by the Minister or the trial court regarding the status of the requesting parties as senators, or that they already had the documents, or that the request was non-routine, or that the documents were provided shortly thereafter, are irrelevant when determining whether a response meets the requirements of Section 906(a).

[¶ 16] On appeal, both parties engaged in a protracted discussion concerning how, or if, the Court should apply the reasoning of a trial court decision from the Commonwealth of the Northern Mariana Islands: *Atalig v. Dela Cruz*, No. 10-0361 (N. Mar. I. Commw. Super. Ct. June 6, 2011). The fact pattern in that case is an example of the flip side of the facts in this case. In that litigation, "[e]ven though the [Open Government Act] requires that public records be made available within ten days of the request, no response or documents were produced within the time period." *Id.* at 5. Therefore, the *Atalig* court's resolution of a case where the government failed to respond offers no assistance in this case where there was a timely response.

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[4] "Under section 9(a) of the Open Government Act as enacted via RPPL 9-32, a governing body is required to produce public records within 10 days of a request." Appellant's Opening brief 9. "A plain reading of Section 9(a) of the Open Government Act requires a government office to make public documents available within ten days pursuant of a request." *Id.* at 18. "When a government office fails to make its public records available within 10 days of receiving a request for those records, it is in violation of the Open Government Act." *Id.* at 28.

[5] The exception applies to "information related to negotiations with another country or another foreign entity that has as its principal place of business in another country." 1 PNC § 905(a)(2).

[¶ 17] Although the Plaintiffs argued in the trial court that their proposed interpretation of the Act is consistent with Article IV, section 12 of the Constitution,[6] they did not specifically argue in this Division that the trial court's view of the Act meant that the statute was unconstitutional. An appellant is obligated to provide "a list of the questions presented in the appeal. This list shall set forth, in clear and concise terms, each question the party submitting the brief deems to be presented in the appeal." ROP R. App. P. 28(a)(6). The constitutionality of the Open Government Act, as construed by the trial court, was not listed as an issue.

[¶ 18] While this Court retains the right to notice plain error in exceptional circumstances, "appellate courts generally should not address legal issues that the parties have not developed through proper briefing." *Ngirmeriil v. Estate of Rechucher*, 13 ROP 42, 50 (2006) (quoting *Southwestern Penn. Growth Alliance v. Browner*, 121 F.3d 106,122 (3d Cir. 1997)). We adopt that approach here. *De novo* review does not require us to consider undeveloped arguments.

## CONCLUSION

[¶ 19] The trial court utilized plain meaning when interpreting Section 906(a). The statute does not obligate production of all requested public records within ten days. It only requires a response that comports with its requirements within that period. Plaintiffs were not entitled to declaratory relief that Section 906 requires a turnover of documents within ten days of the request, or that the facts herein compel an order to produce documents or justify the imposition of a civil fine. Conversely, Defendant was entitled to summary judgment on those issues. The trial court correctly entered final judgment for Defendant. For the foregoing reasons, we **AFFIRM** the Trial Division's grant of summary judgment in favor of Appellee.

[6] "A citizen has the right to examine any government document and to observe the official deliberations of any agency of government." ROP Const. art. IV, § 12.