IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

TEMMY L. SHMULL, as Governor of Peleliu State and in his Individual Capacity,
Appellant,
v.
JACKSON R. NGIRAINGAS,
Appellee.

Cite as: 2021 Palau 3
Civil Appeal No. 20-014
Appeal from Civil Action No. 18-155

Decided: January 28, 2021[1]

Counsel for Appellant ..... Siegfried B. Nakamura
Counsel for Appellee ..... Pro Se

BEFORE: OLDIAIS NGIRAIKELAU, Chief Justice
JOHN K. RECHUCHER, Associate Justice
GREGORY DOLIN, Associate Justice

Appeal from the Trial Division, the Honorable Lourdes F. Materne, Associate Justice, presiding.

OPINION[2]

PER CURIAM:

[¶ 1] In this appeal from the Trial Division, we conclude that Appellant did violate the Open Government Act, and accordingly we **AFFIRM** the judgment below.

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[1] This opinion supersedes the opinion that was issued on January 27, 2021, to correct non-substantive errors.

[2] Upon reviewing the briefs and the record, the panel finds this case appropriate for submission without oral argument pursuant to ROP R. App. P. 34(a).

BACKGROUND

[¶ 2] This case concerns a series of public records requests made between 2015 and 2018 by Appellee Jackson Ngiraingas to Appellant Temmy Shmull, the Governor of Peleliu State. When the Governor failed to timely produce such records, Appellee filed suit alleging violations of the Open Government Act ("OGA"), 1 PNC §§ 901-908.

[¶ 3] We dispense with recounting the lengthy and often acrimonious correspondence between the parties. Suffice it to say that the exchange of letters spanned several years and never resulted in the production of the requested documents. Furthermore, during the correspondence, Governor Shmull indicated, on more than one occasion, that Appellee will be required to pay the cost of reproducing requested records before being given any access to them.

[¶ 4] On October 31, 2018, Appellee filed suit in the Trial Division alleging that Governor Shmull violated the OGA and seeking an order directing the Governor to comply with the Act, as well as statutory damages of $500 for failure to do so during the period preceding the suit. On March 27, 2020, the Trial Division entered a judgment in Appellee's favor. In its Findings of Fact and Conclusion of Law, the trial court first held that Appellant violated the Act by failing to respond to Appellee's first three requests within 10 days. The trial court specifically rejected Appellant's argument that Appellee's failure to cite to the OGA relieved Appellant from the duty to answer Appellee's requests. The trial court also held that, while some of the later requests were answered in a timely manner, the answers were "conclusory and dismissive" in nature. The trial court did not make separate findings with respect to each specific request made by Appellee to the Governor; rather, the court below held that Appellant violated the OGA because he never satisfactorily answered *any* of Appellee's requests.

[¶ 5] The Trial Division ordered Governor Shmull to produce the requested documents and to pay the statutory fine of $500 for the previous violations of his obligation to do so. This timely appeal followed.

STANDARD OF REVIEW

[¶ 6] We review a trial court's findings of fact for clear error, and its conclusions of law de novo. *Kiuluul v. Elilai Clan*, 2017 Palau 14 ¶ 4. Because the relevant facts in this case are undisputed and the statutory standard is relatively clear, the issue is a mixed question of law and fact. *Ngiralmau v. ROP*, 16 ROP 167, 169 (2009) (citing 75A Am. Jur. 2d *Trial* § 604 (2007) ("In a mixed question of law and fact, (1) the historical facts are admitted or established; (2) the rule of law is undisputed; and (3) the issue is whether the facts satisfy the relevant statutory or constitutional standard . . .")). We review mixed questions of law and fact de novo. *In re Kemaitelong*, 7 ROP Intrm. 94, 95 (1998); *Remoket v. Omrekongel Clan*, 5 ROP Intrm. 225, 228 (1996).

DISCUSSION

[¶ 7] On appeal, Appellant raises three issues. First, he argues that a request for records must cite to the OGA in order to trigger a government official's duty to reply within 10 days. Second, he asserts that he complied with the OGA by replying within 10 days despite the trial court's determination that the substance of those replies did not satisfy the Act's requirements. Third, he argues that "[n]othing in the OGA requires a governing body to provide copies to a requestor." Appellant's Opening Br. at 16. None of Appellant's arguments are persuasive.

I.

[¶ 8] Before addressing the substance of Appellant's first argument, we note that it is made in passing, at best. And though usually "[u]ndeveloped arguments are waived," *Etpison v. ROP*, 2017 Palau 32 ¶ 13, given the importance of the issue presented, we exercise our discretion to resolve it, *see Tell v. Rengiil*, 4 ROP Intrm. 224, 226 (1994) ("[An] exception to the waiver rule arises in cases affecting the public interest. This exception, applicable when the general welfare of the people is at stake, affords the court the opportunity, in its discretion, to consider the public good over the personal interests of the litigants.").

[¶ 9] Palau's Open Government Act provides that "any request" for public records is subject to the Act and puts no specifications on what a request must

include. 1 PNC § 906. Further, the legislative findings indicate that the provisions of the Act regarding the disclosure of records must be liberally construed:

> It is a fundamental aspect of a democracy that government governs the people only with the consent of the people. The people, therefore, in consenting to be governed do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. . . .
>
> [I]n providing for an open government and open access to the documents of the government the law shall be liberally interpreted, and . . . the provisions providing for exceptions to the open meeting requirements and open records requirements . . . shall be strictly interpreted against closed meetings and the non-disclosure of records.

1 PNC § 901, Notes.

[¶ 10] Appellant's argument that a request for records must cite to the OGA in order to trigger a government official's duty to reply within 10 days is entirely devoid of legal support. To make up for this shortcoming, he argues that common sense supports his reading of the law. According to Appellant, "no recipient of . . . a request [that fails to cite to the OGA] would be able to figure out that a request is an OGA request. To rule otherwise would mean that any request made to an agency, whether trivial or not would be classified as an OGA request." Appellant's Opening Br. at 10. But what Appellant portrays as a problem is actually a key feature of the OGA.

[¶ 11] The statute's mandate is clear: *any request* for public records is governed by the OGA. *See* 1 PNC § 906. The statute's goal is to make it *easier* for the people to hold their government to account, not to create a game of bureaucratic "gotcha" where failure to check the right box absolves government officials of responsibility to produce the records. We are not persuaded by Appellant's suggestion that government officials will be lost if requests do not specifically cite to the OGA. *Every* government official must be presumed to be aware of the laws regulating him, and ignorance of the law is not a defense, especially for government officials. *See Bates v. Jean,* 745

F.2d 1146, 1152 (7th Cir. 1984) ("A reasonably competent public official is expected to know the law governing his conduct."); *see also In re Goddard*, 8 ROP Intrm. 267, 269 (2001) ("[A] 'deeply[ ]rooted common law principle is that ignorance of the law is no defense to its violation.'") (quoting *United States v. Wilson*, 133 F.3d 251, 261 (4th Cir. 1997)). To read in a requirement that the request must cite to the OGA would limit its scope, potentially restricting its use to only those citizens sophisticated enough to track down the relevant code provisions or hire a legal professional. That is utterly contrary to the broad scope and accessibility espoused in the legislative history. The statute intends to provide a mechanism for all citizens, regardless of their familiarity with the finer points of the law, to hold their elected officials accountable. Thus, if we have to choose whether to run the risk of confusing government officials (who often have attorneys advising them and helping them comply with various legal requirements) or regular citizens, the choice is clear. Accordingly, we hold that *any* request for records made to government officials acting in their official capacity is a request under the OGA triggering that Act's requirements.

[¶ 12] For the sake of clarity, we emphasize that the clear language of the statute imposes a quasi-strict liability scheme in which the official who fails to reply within the 10-day window is liable. Whether or not he found the request "trivial" is irrelevant. "The reason for the imposition of a ten-day response time is to [e]nsure that the requests for public records cannot be ignored, or responded to at the leisure of the government." *Akitaya v. Obichang*, 2019 Palau 8 ¶ 13. The subjective mindset of the government official who fails to comply is simply an irrelevant consideration. In responding to such requests, the government has four options. It may "(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." *Id.* ¶ 12.

[¶ 13] In this case, there is no dispute that at least some of Appellee's requests went unanswered within the 10-day period. Accordingly, the trial court's determination that Appellant violated the OGA at least with respect to

the April 20, April 22, and May 21, 2015, as well as the March 29 and April 13, 2016, requests was correct and is affirmed.

II.

[¶ 14] Appellant next takes issue with the trial court's finding that those of the replies that were timely still violated the OGA because they were "conclusory and dismissive." Findings of Fact and Decision (Mar. 27, 2020) at 6.

[¶ 15] On May 14, 2015, Appellant timely responded to Appellee's request. His reply stated that some of the information sought fell under specific OGA exemptions but did not clarify which documents were exempted from production. The letter also indicated that such a wide range of documents would take additional time to produce. Appellant provided similar responses to requests made on March 22, 2016, and September 4, 2018.

[¶ 16] In essence, Appellant's responses fit into the second and third categories of responses permitted under the Act. *See Akitaya*, 2019 Palau 8 ¶ 12. In light of these responses, the legal issue before us is the nature of the government's obligation (if any) following such an initial reply. We now hold that merely replying that the request will take more time to fulfill does not fully discharge the government's duty to produce the records. Such a reading would create a loophole that negates the statute's purpose.

[¶ 17] While Appellant replied within the 10-day window, the substance of these letters does not satisfy the OGA. The stated purpose of the statute is to increase transparency and accountability. 1 PNC § 901, Notes. Once a representation that it will take longer to produce records is made, the government entity of which records are requested is obligated to complete its search and production in an expeditious manner. Though the Act permits the government to produce documents after the 10-day deadline (provided that a response explaining the delay is made within the statutory period), it still requires the government to produce the documents.

[¶ 18] To the extent that Appellant's responses contended that the requested disclosure would violate a national statute or the Palau Constitution, the responses would have been sufficient had they stated the law correctly. However, Appellant's letters misstate the law by adding requirements found

nowhere in the Act or Peleliu's state procedures. The statute does not require that the request be in writing or that the requesters disclose why they seek the documents. Nor does the statute require the requester to identify exact documents because it is possible (and indeed likely) that the requester, who after all is often an outsider to the government entity of which information is sought, does not know of the existence of specific documents and only knows of the general subject matter. Condoning Governor Shmull's responses would be tantamount to discouraging Appellee (and others) from exercising his statutory rights. Given the OGA's mandate to favor disclosure, we decline to do so.

[¶ 19] As Appellee aptly states, Appellant "weaponized the word 'clarification.'" Appellee's Br. at 3. After three years, Appellant never made a single document available while repeatedly asking Appellee to "clarify" his requests without providing any clear instruction how to do so. He repeatedly told Appellee that he would need to pay for the records but never sent Appellee an invoice. He stated that there would be a delay in procuring the records, but never gave Appellee a timeframe for when his request would be processed. This pattern of delaying and dismissing the Appellee's valid requests violates the law. While we find no occasion to expound a precise standard for how OGA cases should be handled in the future, the facts of this case clearly demonstrate that Appellant violated the OGA given that the government has an obligation to attempt to accede to the request or, if they cannot, to clearly explain why.[3]

CONCLUSION

[¶ 20] We **AFFIRM** the Trial Division's judgment.

[3] Finally, we reject Appellant's last assignment of error. Though Appellant is correct that the OGA does not require government officials to make copies of documents and merely requires making the original open for inspection and review, the argument is irrelevant to the resolution of this case because Appellant neither provided copies nor made documents available for review.