GOVERNMENT OF PUERTO RICO
PUBLIC SERVICE REGULATORY BOARD
PUERTO RICO ENERGY BUREAU

IN RE: PUERTO RICO ELECTRIC POWER AUTHORITY RATE REVIEW	**CASE NO.:** NEPR-AP-2023-0003 **SUBJECT: Motion to Reiterate LUMA's Request to Compel PREPA's Production of FTI Scoping Report**

MOTION TO REITERATE REQUEST TO COMPEL PREPA'S PRODUCTION OF FTI SCOPING REPORT

TO THE HONORABLE PUERTO RICO ENERGY BUREAU, AND ITS HEARING EXAMINER, SCOTT HEMPLING:

COME NOW LUMA Energy, LLC ("ManagementCo"), and **LUMA Energy ServCo, LLC** ("ServCo") (jointly, "LUMA"), and respectfully state and request the following:

I. Summary

1. LUMA respectfully renews its request that the Honorable Puerto Rico Energy Bureau ("Energy Bureau") compel the Puerto Rico Electric Power Authority ("PREPA") to produce the FTI Consulting ("FTI") scoping report referenced in PREPA's Certified Fiscal Plan ("FTI Scoping Report").

2. Principally, and as explained in LUMA's November 5th *Motion to Compel PREPA's response to LUMA-of-PREPA-SUPPORT-9(c), see Exhibit 2 of this Motion,* the FTI Scoping Report contains factual assessments and remediation milestones central to issues now before the Energy Bureau.

3. PREPA's cursory invocation of the deliberative process privilege and "pre-decisional" claim does not withstand scrutiny. The report at issue is a third-party factual scoping product prepared by FTI Consulting through a public procurement administered by the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF") and the Puerto Rico Department of

Treasury; not an intra-agency policy deliberation. And, critically, Puerto Rico's Public–Private Partnerships Authority ("P3A") has already acknowledged the report's existence and substance. In an October 30, 2025 letter, P3A Executive Director Josué Colón states, "[a]s reflected in the report prepared by FTI Consulting ('FTI'), LUMA maintains responsibility for key financial control functions, including bank reconciliations, daily cash reporting, payables processing, and system access…." *See Exhibit 4 of this Motion*, at p. 10. If the FTI Scoping Report were truly "pre-decisional," the P3A would not be relying on it to describe operational facts and responsibility allocations.

4. The Energy Bureau should reject PREPA's pretext and order prompt production of the latest version of the FTI Scoping Report.

II. Relevant Background

5. On September 26, 2025, LUMA served onto PREPA a request for information identified as LUMA-of-PREPA-SUPPORT-9. Therein, LUMA requested the following:

> Please describe PREPA's efforts at balance sheet remediation that can facilitate the evolution of rate based regulatory rate making as well as access to capital markets financing.
>
> a. When does PREPA anticipate that its balance sheet remediation will be complete?
>
> b. Identify the costs included in PREPA's rate petition that supports balance sheet remediation and provide the worksheets and/or any supporting documents or analysis that show the derivation of such costs.
>
> **c. Provide the scoping report developed by FTI Consulting referred to in PREPA's certified fiscal plan. Please provide a detailed description of any and all conclusions, assessments, and recommendations included therein.**

See LUMA-of-PREPA-SUPPORT-9 (Emphasis ours).

6. On October 17, 2025, PREPA, by way of its Comptroller, Mr. Juan Carlos Adrover Ramírez, uploaded its response to LUMA-of-PREPA-SUPPORT-9 onto the Accion Discovery Platform. Mr. Adrover responded as follows:

> a. The process is being managed by the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF"). Therefore, PREPA does not have an estimated timeframe for the completion of the accounting remediation process.
>
> b. No costs were included in PREPA's rate petition that supports balance sheet remediation. As of the date of this response, the accounting remediation process is still being conducted and managed by AAFAF.
>
> c. **See PREPA's response to part a.**

See PREPA's Response to LUMA-of-PREPA-SUPPORT-9 (Emphasis added).

7. In other words, PREPA failed to produce the FTI Scoping Report, as referenced in PREPA's Certified Fiscal Plan, in response to LUMA-of-PREPA-SUPPORT-9(c).

8. Subsequently, on November 5, 2025, LUMA filed its *Motion to Compel PREPA's response to LUMA-of-PREPA-SUPPORT-9(c)* ("Motion to Compel"), seeking an order requiring PREPA to produce the latest version of the FTI Scoping Report referenced in PREPA's Certified Fiscal Plan. *See Exhibit 2 of this Motion.* LUMA argued that PREPA's response to LUMA-of-PREPA-SUPPORT-9(c) was plainly nonresponsive because it neither produced the FTI Scoping Report nor asserted objections or privileges. LUMA contended that the FTI Scoping Report is highly relevant to core issues in the captioned proceeding, including PREPA's balance sheet remediation, transition to FERC's Uniform System of Accounts ("UsoA") and Generally Accepted Accounting Principles ("GAAP"), feasibility and timing of accounting reconciliation milestones cited by the Energy Bureau's experts, rate base considerations, and compliance with provisions of the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement ("T&D OMA"). Moreover, LUMA posited that the FTI Scoping Report is within PREPA's

possession, custody, or control (or obtainable via AAFAF) given its governmental procurement origins and references in PREPA's Certified Fiscal Plan.

9. By way of an email sent that same day, the Honorable Hearing Examiner, Mr. Scott Hempling, granted LUMA's Motion to Compel, directing PREPA to provide the FTI Scoping Report if in its possession or take all practical steps to persuade the possessor to provide it, with a formal order to follow.

10. Shortly thereafter, counsel for PREPA responded to the Hearing Examiner's email ordering production of the FTI Scoping Report, maintaining, in sum, that the referenced report "has not been formally issued" and therefore no responsive final document exists.

11. Subsequently, the Hearing Examiner sent a follow-up email providing the following: "Work something out and come back to me; I will hold off on the order. Act swiftly please."

12. On that same day, counsel for LUMA reached out to counsel for PREPA and clarified that its Motion to Compel sought both the FTI Scoping Report referenced in PREPA's Fiscal Plan and a detailed description of its conclusions and recommendations, requesting the latest available version with attachments to reflect the substance of FTI's work. LUMA asked that PREPA produce the latest version or promptly coordinate with AAFAF (and related entities) to obtain and produce said report.

13. After conferring with her client, counsel for PREPA responded on November 6, 2025, reiterating that the FTI Scoping Report has not been formally issued and asserting the deliberative process privilege. Counsel for PREPA offered producing a privilege log and committed to produce the FTI Scoping Report once finalized. Counsel for PREPA also contended that LUMA's Motion to Compel expanded the original request for information.

14. That same day, counsel for LUMA responded to PREPA's supplemental privilege claim and clarified that LUMA seeks a third-party report rather than an agency-issued document, thereby disputing any applicable privilege.

15. Nonetheless, on November 6th, PREPA reiterated that the FTI Scoping Report has not yet been formally and finally issued by the third-party consultant engaged by AAFAF to prepare it, that it stands ready to defend its privilege claim, and is willing to produce the previously mentioned privilege log to keep LUMA posted on the existence of drafts.

16. One day later, during the November 7th Prehearing Conference, both parties stated their respective claims. In the end, the Hearing Examiner stated he would not order production of a document understood to be a draft but would be inclined to require production if the report is a finished product and directed the parties to confer to determine its status and, if they still disagree, present the issue by motion.[1]

17. On November 13, 2025, counsel for LUMA reached out to counsel for PREPA, and consistent with PREPA's prior commitment, asked PREPA to provide the previously offered privilege log identifying all withheld versions of the FTI Scoping Report and attachments (with dates, authors, recipients, subjects, and specific privileges), while expressly reserving LUMA's rights to challenge the asserted privileges and seek in-camera review and determinations from the Hearing Examiner or Energy Bureau.

18. As of today's date, *more than one week* after LUMA reached out to PREPA's counsel via email, the undersigned have not received any response from PREPA on this matter. Given PREPA's lack of response and because the subject matter of the FTI Scoping Report is

[1] *See* Virtual Prehearing Conference, held on November 7, 2025. *Available* at https://www.youtube.com/watch?v=4f4fqchXEwA, starting at 50:35.

relevant to the hearings scheduled for December 9 and 10, 2025, LUMA respectfully renews its request for an order requiring PREPA to produce the FTI Scoping Report. As discussed herewith, nothing on the record supports PREPA's unfounded and cursory claim that the FTI Scoping Report includes in whole or in part, pre-decisional opinions or deliberative materials regarding governmental decisions and policies that have not yet been formulated. PREPA has not provided any information to show that the FTI Scoping Report involves deliberations on the development of any policy by a governmental entity.

III. LUMA's Request to Compel PREPA's Production of FTI Scoping Report

19. LUMA hereby reasserts and incorporates herein by reference the threshold arguments raised in its unresolved Motion to Compel. Notwithstanding, LUMA hereby briefs its position regarding PREPA's assertion of a deliberative process privilege and once again moves for production of the FTI Scoping Report.

A. The Deliberative Process Privilege

20. The Puerto Rico Supreme Court has recognized that the deliberative process privilege protects public officials from the disclosure of documents that pertain to pre-decisional and deliberative processes. *See Bhatia Gautier v. Rosselló Nevares*, 199 DPR 59 (2017), *see Exhibit 6 of this Motion.* The purpose of this privilege is to promote open and honest communications between government officials in charge of deciding and implementing the state's public policy. *Id.*, at p. 87.

21. To avail itself from the deliberative process privilege, **the State** must comply with the following: (1) the head of the agency with control over the information must make a formal claim after careful consideration; (2) an agency official must provide the precise reasons for

asserting the confidentiality of the information or documents; and (3) the government must identify and describe the information or documents it wishes to protect. *Id.*

22. In addition, for the privilege to apply, the government must demonstrate that the document in question is deliberative and pre-decisional. *Id*., at pp. 87-88. Information is deliberative insofar as it relates to a process through which public policy is developed or formulated. *Id*., at p. 88. A document is 'pre-decisional' where it has been prepared to assist in the government's decision-making, which is to say, prior to making them. *Id*.

23. Pursuant to the foregoing, this privilege does not apply to factual matters, nor does it protect objective materials or documents in which the agency adopts its position over a particular matter or controversy. *Id.; see also Allocco Recycling, Ltd. v. Doherty,* 220 F.R.D. 407, 412-13 (S.D. N.Y. 2004).

24. In considering whether the privilege applies, the adjudicator's analysis must be based on a balance of interest. The courts should ponder factors such as "the interests of the private litigant, the need for accurate judicial fact finding, the public's interest in learning how effectively the government is operating, the relevance of the evidence sought, the availability of other evidence, the role of the government in the litigation and issues involved, and the impact on the effectiveness of government employees". *Id*., at pp. 88-89 (*citing* Moore's Federal Practice, pages 26-412.11). Pursuant to our evidentiary framework, the courts must follow a strict interpretation when determining whether the privilege applies. *See id.,* at p. 89; *see also* Rule 518 of Puerto Rico's Rules of Evidence, 32 LPRA Ap. VI (2025).

25. PREPA's invocation of the deliberative process privilege to withhold the FTI Scoping Report fails for multiple and independent reasons grounded in applicable law and the record of this proceeding.

26. As advanced in LUMA's Motion to Compel, the FTI Scoping Report concerns a government-administered procurement to advance statutory financial public-reporting obligations. Pursuant to RFP #2024-3,[2] AAFAF subscribed Professional Services Agreement No. 2025-000006,[3] as amended, with FTI, whereby FTI was contracted to provide advice and consulting services in connection with the assessment of PREPA's current accounting procedures and practices to provide recommendations on areas of opportunity and improvement, and the development of a proposed Accounting Remediation Plan to execute and achieve accurate and effective financial reporting.[4]

27. The FTI Scoping Report is a product of FTI, a third-party contractor engaged through a public procurement administered by AAFAF and the Department of the Treasury. As such, it is not an intra-governmental communication among public officials. PREPA's attempt to stretch a privilege designed for government officials in charge of deciding and implementing the state's public policy to cover a third-party contractor's report exceeds the privilege's scope.

28. Even if the pre-decisional privilege is deemed to apply to a government contractor such as FTI, PREPA has not met the strict procedural prerequisites for invoking the referenced privilege. As advanced, to validly assert the privilege, the State must demonstrate: (1) a formal claim by the head of the agency with control over the information after careful consideration; (2) precise, case-specific reasons for confidentiality; and (3) identification and description of the

[2] *Available* at https://www.colegiocpa.com/wp-content/uploads/2024/03/RFP-Project-Management-and-Accounting-Services-PREPA-Final-3.14.24-002.pdf.

[3] Publicly available at the Puerto Rico Comptroller's Contract Registry: https://consultacontratos.ocpr.gov.pr/contract/downloaddocument?code=aaa3ba22-cc6f-4b4c-bee8-e63daabeada2.

[4] LUMA notes that the FTI Scoping Report, or *Accounting Remediation Plan* (as referred to in RFP #2024-3), is not designated as a confidential document but rather intended to be discussed with the relevant stakeholders to improve PREPA's accounting practices.

specific information or documents for which protection is sought. PREPA did none of these. In its original response to LUMA-of-PREPA-SUPPORT-9(c), PREPA provided no objection and asserted no privilege. It simply directed LUMA to "see PREPA's response to part a," which conceded AAFAF's management of the accounting remediation process. That nonresponsive answer waived any claim of privilege on this record.

29. To the extent PREPA now attempts a retroactive assertion, it still has not produced a formal agency-head invocation, articulated precise reasons tailored to the contents of the FTI Scoping Report, or described with specificity the portions purportedly subject to protection. Under Puerto Rico's evidentiary framework, privilege assertions must be strictly construed. Consequently, PREPA's failure to comply with the threshold requirements is dispositive.

30. Moreover, PREPA has not carried its burden to show the report is "deliberative" and "pre-decisional" within the meaning set out in the cited jurisprudence. A document is deliberative only insofar as it relates to the process by which public policy is developed or formulated. Likewise, it is pre-decisional only if prepared to assist the government's policy decision-making before decisions are made. The FTI Scoping Report, by its nature and purpose as reflected in PREPA's Certified Fiscal Plan and the RFP #2024-3, catalogues existing accounting conditions, identifies factual deficiencies and reconciliation needs, and sets out milestones and workstreams for audit readiness and USoA alignment. This constitutes factual scoping, and not internal policy deliberation. It addresses the status of trial balances, balance sheet reconciliation, and steps necessary to prepare audited financial statements – technical, objective matters essential to execution and compliance rather than the formulation of public policy. Accordingly, even putting aside FTI's status as a third-party contractor, the FTI Scoping Report falls outside the

averred privilege because it is not a communication reflecting agency deliberation on policy choices.

31. Contrary to what PREPA has suggested without any support in case law, calling a document a "draft" or stating that a report has not been formally issued, is insufficient to couch a draft as a document that involves pre-decisional and deliberative materials to trigger the deliberative process privilege.

32. There is a legitimate interest to learn and consider in this proceeding, all relevant information on legacy issues regarding PREPA's legacy financial systems and data. The FTI Scoping Report discusses the state of PREPA's balance sheets and the necessary steps for remediation, which matter is crucial to multiple contested issues in this proceeding. The Energy Bureau is adjudicating rate-setting issues in which the state of PREPA's financial records, the feasibility of USoA alignment, and the costs and timelines of remediation are central. The FTI Scoping Report is highly relevant and noncumulative. Other or alternative evidence is unavailable. Accordingly, the balance of interests compels disclosure, even if PREPA may establish that a portion of the FTI Scoping Report could meet the pre-decisional and deliberative requirements of the deliberative process privilege.

33. Moreover, The FTI Scoping Report is essential to the Energy Bureau's ability to discharge its responsibilities in this rate case. The Energy Bureau's framework expects accounting consistent, to the extent feasible, with the FERC USoA, and – as explained by LUMA's Chief Financial Officer Andrew Smith – USoA presentation depends materially on the remediation of PREPA's legacy accounting records and the reconciliation of PREPA's balance sheet (LUMA Ex. 2.0, Qs. 38–40, pp. 34–35). The FTI Scoping Report bears directly on the path, scope, sequence, and timing of that remediation. Consistent with this testimony, the Energy Bureau's consultants,

Ralph C. Smith and Mark S. Dady, have recommended that the Bureau require LUMA and PREPA to produce a reconciled, USoA-conforming balance sheet by June 30, 2026 (PC Ex. 62, § II, pp. 3–7). The FTI Scoping Report is the foundational scoping document that identifies the tasks, dependencies, and schedule necessary for reconciliation, and is therefore critical for the Energy Bureau to evaluate the feasibility of the recommended milestone and to oversee the steps required to meet it.

34. Lastly, public documents and correspondence by the Financial Oversight and Management Board for Puerto Rico,[5] the P3A,[6] and the Puerto Pico Office of Budget and Management ("OGP", per its Spanish acronym)[7] confirms that the FTI Scoping Report was issued, includes historical facts and information relevant to this proceeding, was intended to be discussed with the incoming administration as per AAFAF's budgetary request to increase the sum of the FTI contract, and is within PREPA's possession, custody, or control, at least through AAFAF,

[5] In relevant portion, the FOMB letter dated October 20, 2025 states "the Accounting Remediation report prepared by FTI Consulting for AAFAF, P3A and the Puerto Rico Department of Treasury, underscores the critical deficiencies observed of the legacy accounting functions-marked by the absence of a unified finance structure, missing data, and unreconciled balances. These issues present immediate and significant challenges that cannot be ignored." *See* Exhibit 3, at p. 3.

[6] In a letter dated October 30, 2025, P3A Executive Director Josué Colón, replieds to the FOMB's October 20th letter, *see supra* note 6, stating, in what is relevant to this discussion, that "[a]s reflected in **the report prepared by FTI Consulting ("FTI"),** LUMA maintains responsibility for key financial control functions, including bank reconciliations, daily cash reporting, payables processing, and system access-. . . ." *See* Exhibit 4, at p. 10 (emphasis added).

[7] On December 18, 2024, AAFAF requested that the OGP approve a budget increase and extension of the FTI contract for the purpose of presenting the accounting remediation plan to the incoming administration and provide continuity to the project's implementation phase. OGP ordered AAFAF to seek the FOMB's approval of the fund extension up to June 30, 2025, which the FOMB granted on December 24, 2024, **to continue the execution of the accounting remediation plan for the Puerto Rico Electric Power Authority**. *See* Exhibit 5. The Puerto Rico Comptroller's Contract Registry shows that FTI's contract with AAFAF was extended through June 30, 2025. The undersigned have not found any further evidence of the FTI contract having been extended beyond June, 2025.

PREPA's fiscal agent. *See Exhibits 3 through 5 of this Motion*. These documents undermine any assertion that the report lies within privileged, intra-agency deliberations.

35. The fact of the matter is that FTI rendered its Scoping Report, said Report has been discussed with third parties and it is not a confidential document protected by the deliberative process privilege.

IV. Conclusion

36. For the foregoing reasons, and given PREPA's nonresponsive discovery conduct, its failure to satisfy the strict prerequisites for invoking the deliberative process privilege, and the FTI Scoping Report's central relevance to the Energy Bureau's adjudication of accounting remediation, USoA/GAAP alignment, rate base considerations, and compliance under the T&D OMA, LUMA respectfully requests that the Energy Bureau and its Hearing Examiner order prompt production of the FTI Scoping Report referenced in PREPA's Certified Fiscal Plan, and require PREPA to coordinate with AAFAF to obtain and produce the report, together with any other relief deemed just and proper to ensure a complete and accurate evidentiary record in this rate review.

WHEREFORE, LUMA respectfully requests that the Energy Bureau and its Hearing Examiner **take notice** of the aforementioned and enter an order that:

a. Determines that FTI Scoping Report is not subject to the deliberative process privilege;

b. Compels PREPA to produce the FTI Scoping Report;

c. To the extent PREPA contends it does not have possession, custody, or control of the FTI Scoping Report, directs PREPA to promptly coordinate with AAFAF to obtain and produce said document; and

d. Grants such other and further relief as deemed just and proper.

RESPECTFULLY SUBMITTED.[8]

[8] On May 9, 2025, this Energy Bureau issued a Resolution and Order, requiring that all substantive English-language filings be accompanied by concise Spanish summaries to enhance public accessibility and

In San Juan, Puerto Rico, this 22nd day of November, 2025.

WE HEREBY CERTIFY that this Motion was filed using the electronic filing system of this Energy Bureau and that electronic copies of this Notice will be notified to Hearing Examiner, Scott Hempling, shempling@scotthemplinglaw.com; and to the attorneys of the parties of record. To wit, to the ***Puerto Rico Electric Power Authority***, through: Mirelis Valle-Cancel, mvalle@gmlex.net; Juan González, jgonzalez@gmlex.net; Alexis G. Rivera Medina, arivera@gmlex.net; Juan Martínez, jmartinez@gmlex.net; and Natalia Zayas Godoy, nzayas@gmlex.net; and to ***Genera PR, LLC***, through: Jorge Fernández-Reboredo, jfr@sbgblaw.com; Giuliano Vilanova-Feliberti, gvilanova@vvlawpr.com; Maraliz Vázquez-Marrero, mvazquez@vvlawpr.com; ratecase@genera-pr.com; regulatory@genera-pr.com; and legal@genera-pr.com; ***Co-counsel for Oficina Independiente de Protección al Consumidor***, hrivera@jrsp.pr.gov; contratistas@jrsp.pr.gov; pvazquez.oipc@avlawpr.com; ***Co-counsel for Instituto de Competitividad y Sustentabilidad Económica***, jpouroman@outlook.com; agraitfe@agraitlawpr.com; ***Co-counsel for National Public Finance Guarantee Corporation***, epo@amgprlaw.com; loliver@amgprlaw.com; acasellas@amgprlaw.com; matt.barr@weil.com; robert.berezin@weil.com; Gabriel.morgan@weil.com; Corey.Brady@weil.com; alexis.ramsey@weil.com; ***Co-counsel for GoldenTree Asset Management LP***, lramos@ramoscruzlegal.com; tlauria@whitecase.com; gkurtz@whitecase.com; ccolumbres@whitecase.com; iglassman@whitecase.com; tmacwright@whitecase.com; jcunningham@whitecase.com; mshepherd@whitecase.com; jgreen@whitecase.com; ***Co-counsel for Assured Guaranty, Inc.***, hburgos@cabprlaw.com; dperez@cabprlaw.com; mmcgill@gibsondunn.com; lshelfer@gibsondunn.com; howard.hawkins@cwt.com; mark.ellenberg@cwt.com; casey.servais@cwt.com; bill.natbony@cwt.com; thomas.curtin@cwt.com; ***Co-counsel for Syncora Guarantee, Inc.***, escalera@reichardescalera.com; arizmendis@reichardescalera.com; riverac@reichardescalera.com; susheelkirpalani@quinnemanuel.com; erickay@quinnemanuel.com; ***Co-Counsel for the PREPA Ad Hoc Group***, dmonserrate@msglawpr.com; fgierbolini@msglawpr.com; rschell@msglawpr.com; eric.brunstad@dechert.com; Stephen.zide@dechert.com; david.herman@dechert.com; michael.doluisio@dechert.com; stuart.steinberg@dechert.com; ***Sistema de Retiro de los Empleados de la Autoridad de Energía Eléctrica,*** nancy@emmanuelli.law; rafael.ortiz.mendoza@gmail.com; rolando@emmanuelli.law; monica@emmanuelli.law; cristian@emmanuelli.law; lgnq2021@gmail.com; ***Official Committee of Unsecured Creditors of PREPA***, jcasillas@cstlawpr.com; jnieves@cstlawpr.com; ***Solar and Energy Storage Association of Puerto Rico,*** Cfl@mcvpr.com; apc@mcvpr.com; javrua@sesapr.org; mrios@arroyorioslaw.com; ccordero@arroyorioslaw.com; ***Wal-Mart Puerto Rico, Inc.,*** Cfl@mcvpr.com; apc@mcvpr.com***; Solar United Neighbors***, ramonluisnieves@rlnlegal.com; ***Mr. Victor González,*** victorluisgonzalez@yahoo.com; and ***the Energy Bureau's Consultants***, Josh.Llamas@fticonsulting.com; Anu.Sen@fticonsulting.com; Ellen.Smith@fticonsulting.com; Intisarul.Islam@weil.com; jorge@maxetaenergy.com; rafael@maxetaenergy.com; RSmithLA@aol.com; msdady@gmail.com; mcranston29@gmail.com; dawn.bisdorf@gmail.com; ahopkins@synapse-energy.com; clane@synapse-energy.com; guy@maxetaenergy.com; Julia@londoneconomics.com; Brian@londoneconomics.com; luke@londoneconomics.com; kbailey@acciongroup.com; hjudd@acciongroup.com; zachary.ming@ethree.com; PREBconsultants@acciongroup.com; carl.pechman@keylogic.com; bernard.neenan@keylogic.com; tara.hamilton@ethree.com; aryeh.goldparker@ethree.com; roger@maxetaenergy.com; Shadi@acciongroup.com; Gerard.Gil@ankura.com; Jorge.SanMiguel@ankura.com; Lucas.Porter@ankura.com; gerardo_cosme@solartekpr.net;

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participation. See also Energy Bureau Resolution and Order of June 4, 2025 (clarifying that full translations are optional but summaries are mandatory). In compliance with the Energy Bureau's standing directives regarding accessibility and ensuring citizen participation, LUMA is hereby submitting the corresponding Spanish-language summary of this Motion to Compel. *See* Exhibit 1.

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/s/ Margarita Mercado Echegaray
Margarita Mercado Echegaray
RUA 16,266

Exhibit 1

Moción para reiterar la solicitud de LUMA para compeler a PREPA a la producir el Informe de FTI
Presentada por LUMA Energy, LLC, and LUMA Energy ServCo, LLC

Mediante la presente Moción, LUMA Energy, LLC y LUMA Energy ServCo, LLC (conjuntamente, "LUMA") reitera su solicitud del 5 de noviembre de 2025 al Negociado de Energía de Puerto Rico para que se le ordene a la Autoridad de Energía Eléctrica (AEE) producir informe de contabilidad preparado por FTI Consulting ("Informe de FTI"), al que se ha referencia en el Plan Fiscal certificado de la AEE.".

LUMA reitera que el Informe de FTI es pertinente al caso de revisión de tarifas de epígrafe porque aborda la remediación de los libros financieros y la reconciliación contable de la AEE y material para la transición al "Uniform System of Accounts" ("USoA", por sus siglas en inglés) de la Comisión Federal Reguladora de Energía ("FERC", por sus siglas en inglés) y aplicación de los Principios de Contabilidad Generalmente Aceptados ("GAAP", por sus siglas en inglés).

LUMA establece que no aplica plausiblemente el privilegio de proceso deliberativo por varias razones. Primero, el Informe de FTI es producto de un contrato público adjudicado a un tercero (FTI) bajo el RFP #2024-3; y no es una comunicación intra-gubernamental de formulación de política pública. Segundo, PREPA no cumplió con los requisitos formales estrictos para invocar el privilegio. Tercero, el referido privilegio no aplica porque el Informe de FTI es predominantemente fáctico.

Amparándose en comunicaciones públicas de parte la Junta de Control Fiscal, la Autoridad de Alianzas Público-Privadas y la Oficina de Gerencia y Presupuesto, LUMA también argumenta que el informe existe y está dentro de la posesión, custodia o control práctico de la AEE, al menos a través de la Autoridad de Asesoría Financiera y Agencia Fiscal de Puerto Rico como su agente fiscal. La contención no fundamentada de la AEE de que el informe no "existe" por no estar "formalmente emitido" no desvirtúa la existencia de versiones vigentes o sustantivas del Informe de FTI que reflejen el alcance, hallazgos y recomendaciones.

Exhibit 2

GOVERNMENT OF PUERTO RICO
PUBLIC SERVICE REGULATORY BOARD
PUERTO RICO ENERGY BUREAU

IN RE: PUERTO RICO ELECTRIC POWER AUTHORITY RATE REVIEW	**CASE NO.:** NEPR-AP-2023-0003 **SUBJECT: Motion to Compel PREPA's response to LUMA-of-PREPA-SUPPORT-9(c)**

MOTION TO COMPEL PREPA'S RESPONSE TO LUMA-OF-PREPA-SUPPORT-9(C)

TO THE HONORABLE PUERTO RICO ENERGY BUREAU, AND ITS HEARING EXAMINER, SCOTT HEMPLING:

COME NOW LUMA Energy, LLC ("ManagementCo"), and **LUMA Energy ServCo, LLC** ("ServCo") (jointly, "LUMA"), and respectfully move for an order compelling the Puerto Rico Electric Power Authority ("PREPA") to produce the latest version of the scoping report developed by FTI Consulting, as referenced in PREPA's Certified Fiscal Plan (the "FTI Scoping Report"), which PREPA has failed to produce in response to LUMA-of-PREPA-SUPPORT-9(c):

I. Introduction and Relevant Background

1. As part of the ongoing discovery process in the captioned proceeding, on September 26, 2025, LUMA served onto PREPA a request for information identified as LUMA-of-PREPA-SUPPORT-9. Therein, LUMA requested the following:

> Please describe PREPA's efforts at balance sheet remediation that can facilitate the evolution of rate based regulatory rate making as well as access to capital markets financing.
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> a. When does PREPA anticipate that its balance sheet remediation will be complete?
>
> b. Identify the costs included in PREPA's rate petition that supports balance sheet remediation and provide the worksheets and/or any supporting documents or analysis that show the derivation of such costs.

> **c. Provide the scoping report developed by FTI Consulting referred to in PREPA's certified fiscal plan. Please provide a detailed description of any and all conclusions, assessments, and recommendations included therein.**

See LUMA-of-PREPA-SUPPORT-9 (Emphasis ours).

2. On October 17, 2025, PREPA, by way of its Comptroller, Mr. Juan Carlos Adrover Ramírez, uploaded its response to LUMA-of-PREPA-SUPPORT-9 onto the Accion Discovery Platform. Mr. Adrover responded as follows:

> a. The process is being managed by the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF"). Therefore, PREPA does not have an estimated timeframe for the completion of the accounting remediation process.
>
> b. No costs were included in PREPA's rate petition that supports balance sheet remediation. As of the date of this response, the accounting remediation process is still being conducted and managed by AAFAF.
>
> c. **See PREPA's response to part a.**

See PREPA's Response to LUMA-of-PREPA-SUPPORT-9 (Emphasis added).

3. In other words, PREPA failed to produce the FTI Scoping Report, as requested by LUMA.

4. As outlined below, LUMA seeks an order requiring PREPA to produce, within three (3) days, the latest version of the FTI Scoping Report and any attachments or appendices.

II. Motion to Compel

5. As a threshold finding, the Honorable Hearing Examiner should conclude that PREPA's response to subpart (c) of LUMA-of-PREPA-SUPPORT-9 was plainly **unresponsive**. PREPA directing LUMA to "[s]ee PREPA's response to part a" does not answer LUMA's request.

6. LUMA asked for a specific, identified document – the FTI Scoping Report – but PREPA provided none, offered no objection, and asserted no privilege. A textbook nonresponsive answer of this sort frustrates discovery and – as expounded upon below – denies the record a

document that the Energy Bureau's very experts and LUMA's witnesses have suggested is pivotal to PREPA's alignment with the Federal Energy Regulatory Commission ("FERC")'s Uniform System of Accounting ("USoA") and balance sheet reconciliation. A simple directive to produce will remedy this deficiency promptly and fairly.

7. The FTI Scoping Report is squarely relevant to issues under consideration of and subject to adjudication by the Energy Bureau. The FTI Scoping Report concerns the state of PREPA's balance sheets and the steps necessary for remediation. These topics are central to multiple contested issues.

8. The FTI Scoping Report concerns a government-administered procurement to advance statutory financial public-reporting obligations. On March 14, 2024, the Puerto Rico Department of the Treasury ("PRDT"), and Chief Financial Officer of the Government of Puerto Rico, pursuant to the Government of Puerto Rico Accounting Act, Act No. 230 of July 23, 1974, and Executive Order 2021-018, issued RFP #2024-3 to assess PREPA's accounting, develop a remediation plan, and assist in execution so that PREPA can timely produce audited financial statements in support of the Commonwealth's consolidated reporting.[1]

9. The procurement was administered by AAFAF through a request for proposals ("RFP"). Per RFP #2024-3: i) the Evaluation Committee comprised PRDT, AAFAF, and the Public-Private Partnerships Authority; ii) proposals were submitted to an AAFAF-managed address; and iii) public notices were to be made through AAFAF and PRDT. RFP #2024-3 targeted public-interest objectives, such as reconciling PREPA's trial balances, establishing milestones and timelines for audit readiness, and facilitating accurate, timely financial reporting. The FTI Scoping

[1] *Available* at https://www.colegiocpa.com/wp-content/uploads/2024/03/RFP-Project-Management-and-Accounting-Services-PREPA-Final-3.14.24-002.pdf

Report is referenced in PREPA's Certified Fiscal Plan.[2] Its government provenance and public purpose defeat any suggestion that the FTI Scoping Report lies beyond PREPA's possession, custody, or control, and further underscore why the FTI Scoping Report should be produced in this proceeding. LUMA notes that during RFP #2024-3 process, and in response to Requests for Clarifications ("RFCs"), AAFAF and PRDT clarified that the selected proponent would work with LUMA: *"The selected proponent(s) will work with PREPA (**including its agent, LUMA Energy ServCo**), PRDT, AAFAF, the Public-Private Partnerships Authority, and any other entity authorized by the Government and as established in the corresponding agreement(s) under this RFP."*[3]

10. The document is important for the Energy Bureau to be able to do its job. First, the Energy Bureau's rate case framework expects use of accounting that is consistent, to the extent feasible, with the FERC USoA. LUMA's ability to implement the USoA depends materially on the status and remediation of PREPA's legacy accounting records and the reconciliation of PREPA's balance sheet. The prefiled testimony of LUMA Chief Financial Officer, Mr. Andrew Smith, explains that the lack of a reconciled, current balance sheet constrains USoA presentation today, and that moving to USoA alignment turns on completing balance sheet remediation. *See* LUMA Ex. 2.0, Questions 38 through 40, at pp. 34-35. The FTI Scoping Report bears directly on that path, scope, sequence, and timing.

11. Second, the Energy Bureau's consultants, by way of the Expert Report of Ralph C. Smith and Mark S. Dady, expressly recommend the Bureau require LUMA and PREPA to work

[2] *See* LUMA Ex. 1.01, Section 3.3.4, *Remediation of PREPA Financial Records*, at pp. 40-41 (*referencing* a Phase 1 Report that at the time, was underway).

[3] *Available* at https://docs.pr.gov/files/AAFAF/Administrative_Documents/RFPs%20_%20RFQs/2024/MARCH/Not-Resp-PCR-and-Questions-RFP-2024-3.pdf?csf=1&web=1&e=FKwFMG, at p. 7 (Emphasis added).

together to produce a reconciled balance sheet conforming with USoA guidance by June 30, 2026, citing Andrew Smith's testimony. *See* PC Ex. 62, Section II, at pp. 3-7. LUMA understands that the FTI Scoping Report is a foundational scoping work that informs what reconciliation entails, with what dependencies, and on what timeframe. The document will help the Energy Bureau evaluate the feasibility of that milestone and the steps required to meet it.

12. Third, the Energy Bureau is considering whether and when FERC accounting can be implemented, and what costs may be associated with that effort. Without a clear understanding of the current condition of PREPA's financials and the remediation steps identified by FTI, neither LUMA nor the Energy Bureau can reliably opine on the readiness or cost to transition to USoA-based accounting.

13. Fourth, Section VI(B)(1) of Annex I to the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement ("T&D OMA") requires LUMA, in performing the O&M Services, to maintain a complete and separate set of financial and accounting records in accordance with GAAP and other applicable standards, including the FERC USoA. Without access to the scoping work reflected in the FTI Scoping Report LUMA is hindered in defining, sequencing, and implementing the remediation steps required to align its accounting and reporting processes with the T&D OMA's requirements. Production of the FTI Scoping Report therefore bears directly on LUMA's contractual compliance and the Energy Bureau's ability to evaluate USoA and GAAP alignment.

14. Fifth, the FTI Scoping Report will illuminate the basis for balances recorded historically, including the integrity of inherited CC&B data and accounts receivable. That information is necessary for assessing collectability, establishing a reliable bad-debt factor, and

ensuring appropriate treatment of legacy receivables. It also speaks to any observed deficiencies in financial statements that, by implication, affect LUMA's financial reporting as PREPA's agent.

15. Sixth, the Energy Bureau has raised the potential transition to a rate base methodology over time. LUMA cannot produce a T&D-only balance sheet suitable for rate base ratemaking without an understood, reconciled PREPA balance sheet as a starting point. LUMA understands that the FTI Scoping Report addresses the steps to get there.

16. Put simply, the FTI Scoping Report is relevant, noncumulative evidence that will materially aid the Hearing Examiner and the Energy Bureau in setting just and reasonable rates, establishing credible USoA compliance milestones, and assessing the practicality and timing of any accounting transition.

17. The reference in PREPA's Certified Fiscal Plan to the FTI Scoping Report establishes at a minimum PREPA's knowledge of, and practical access to, the document and the status of remediation efforts. PREPA should be required to produce the report or information within its possession, custody, or control regarding FTI's findings, or to promptly coordinate with AAFAF to secure its release. If PREPA believes the report contains sensitive information, the confidentiality framework established in this proceeding is available. None of the above, however, justifies outright nonproduction.

18. Lastly, the burden of production is minimal. PREPA either has the FTI Scoping Report or can obtain it promptly from AAFAF, PREPA's fiscal agent,[4] or from the Federal

[4] AAFAF, founded pursuant to the *Puerto Rico Fiscal Agency and Financial Advisory Authority Act,* Act 2-2017, was created for the "purpose of acting as fiscal agent, financial advisor, and reporting agent of all entities of the Government of Puerto Rico and to assist such entities in facing the serious fiscal and economic crisis that Puerto Rico is currently undergoing." *See* PR Laws Ann. Tit. 3 § 9365(a) (2025); 3 LPRA § 9365(a) (2025). Likewise, "the Authority shall be the government entity charged with supervising, executing, and administering the Fiscal Plan approved and certified in accordance with PROMESA and shall ensure that all the entities of the Executive Branch comply with the duly approved Fiscal Plan". *Id*., § 9365(b) (2025). In order to achieve its purposes, the Authority was

Oversight and Management Board, PREPA's exclusive title III representative. The document bears directly on multiple central issues and will reduce speculation about readiness, timelines, and cost by anchoring those questions to FTI's scoping work. Production will promote efficiency by avoiding repeated motion practice and allowing the Energy Bureau to tie any USoA or accounting-related directives to the actual state of PREPA's financial records.

19. LUMA appreciates the Hearing Examiner's efforts to keep discovery collaborative and efficient. This Motion to Compel is submitted to aid the Hearing Examiner in identifying a practical, collaborative mechanism to secure this plainly relevant document for use in the pending permanent-rate phase of the captioned proceeding and to facilitate the Energy Bureau's oversight of accurate, USoA-consistent accounting.

WHEREFORE, LUMA respectfully requests that the Energy Bureau and its Hearing Examiner **take notice** of the aforementioned and enter an order that:

a. Compels PREPA to produce the latest version of the FTI Scoping Report, as requested by LUMA by way of LUMA-of-PREPA-SUPPORT-9(c), within three (3) days;

b. To the extent PREPA contends it does not have possession, custody, or control of the FTI Scoping Report, directs PREPA to promptly coordinate with AAFAF to obtain and produce said document;

c. Provides that, if PREPA fails to produce the latest version of the FTI Scoping Report within the prescribed time, the Hearing Examiner may consider additional remedies as appropriate;

d. Grants such other and further relief as deemed just and proper.

RESPECTFULLY SUBMITTED.[5]

"conferred, and shall have and may exercise, all the rights and powers as are necessary or convenient to carry out such purposes", as outlined in Section 5(c) of Act 2-2017. *Id*., § 9365(c) (2025).

[5] On May 9, 2025, this Energy Bureau issued a Resolution and Order, requiring that all substantive English-language filings be accompanied by concise Spanish summaries to enhance public accessibility and participation. See also Energy Bureau Resolution and Order of June 4, 2025 (clarifying that full translations are optional but summaries are

In San Juan, Puerto Rico, this 5th day of November, 2025.

WE HEREBY CERTIFY that this Motion was filed using was filed using the electronic filing system of this Energy Bureau and that electronic copies of this Notice will be notified to Hearing Examiner, Scott Hempling, shempling@scotthemplinglaw.com; and to the attorneys of the parties of record. To wit, to the ***Puerto Rico Electric Power Authority***, through: Mirelis Valle-Cancel, mvalle@gmlex.net; Juan González, jgonzalez@gmlex.net; Alexis G. Rivera Medina, arivera@gmlex.net; Juan Martínez, jmartinez@gmlex.net; and Natalia Zayas Godoy, nzayas@gmlex.net; and to ***Genera PR, LLC***, through: Jorge Fernández-Reboredo, jfr@sbgblaw.com; Giuliano Vilanova-Feliberti, gvilanova@vvlawpr.com; Maraliz Vázquez-Marrero, mvazquez@vvlawpr.com; ratecase@genera-pr.com; regulatory@genera-pr.com; and legal@genera-pr.com; ***Co-counsel for Oficina Independiente de Protección al Consumidor***, hrivera@jrsp.pr.gov; contratistas@jrsp.pr.gov; pvazquez.oipc@avlawpr.com; ***Co-counsel for Instituto de Competitividad y Sustentabilidad Económica***, jpouroman@outlook.com; agraitfe@agraitlawpr.com; ***Co-counsel for National Public Finance Guarantee Corporation***, epo@amgprlaw.com; loliver@amgprlaw.com; acasellas@amgprlaw.com; matt.barr@weil.com; robert.berezin@weil.com; Gabriel.morgan@weil.com; Corey.Brady@weil.com; alexis.ramsey@weil.com; ***Co-counsel for GoldenTree Asset Management LP***, lramos@ramoscruzlegal.com; tlauria@whitecase.com; gkurtz@whitecase.com; ccolumbres@whitecase.com; iglassman@whitecase.com; tmacwright@whitecase.com; jcunningham@whitecase.com; mshepherd@whitecase.com; jgreen@whitecase.com; ***Co-counsel for Assured Guaranty, Inc.***, hburgos@cabprlaw.com; dperez@cabprlaw.com; mmcgill@gibsondunn.com; lshelfer@gibsondunn.com; howard.hawkins@cwt.com; mark.ellenberg@cwt.com; casey.servais@cwt.com; bill.natbony@cwt.com; thomas.curtin@cwt.com; ***Co-counsel for Syncora Guarantee, Inc.***, escalera@reichardescalera.com; arizmendis@reichardescalera.com; riverac@reichardescalera.com; susheelkirpalani@quinnemanuel.com; erickay@quinnemanuel.com; ***Co-Counsel for the PREPA Ad Hoc Group***, dmonserrate@msglawpr.com; fgierbolini@msglawpr.com; rschell@msglawpr.com; eric.brunstad@dechert.com; Stephen.zide@dechert.com; david.herman@dechert.com; michael.doluisio@dechert.com; stuart.steinberg@dechert.com; ***Sistema de Retiro de los Empleados de la Autoridad de Energía Eléctrica,*** nancy@emmanuelli.law; rafael.ortiz.mendoza@gmail.com; rolando@emmanuelli.law; monica@emmanuelli.law; cristian@emmanuelli.law; lgnq2021@gmail.com; ***Official Committee of Unsecured Creditors of PREPA***, jcasillas@cstlawpr.com; jnieves@cstlawpr.com; ***Solar and Energy Storage Association of Puerto Rico,*** Cfl@mcvpr.com; apc@mcvpr.com; javrua@sesapr.org; mrios@arroyorioslaw.com; ccordero@arroyorioslaw.com; ***Wal-Mart Puerto Rico, Inc.,*** Cfl@mcvpr.com; apc@mcvpr.com***; Solar United Neighbors***, ramonluisnieves@rlnlegal.com; ***Mr. Victor González,*** victorluisgonzalez@yahoo.com; and ***the Energy Bureau's Consultants***, Josh.Llamas@fticonsulting.com; Anu.Sen@fticonsulting.com; Ellen.Smith@fticonsulting.com; Intisarul.Islam@weil.com; jorge@maxetaenergy.com; rafael@maxetaenergy.com; RSmithLA@aol.com; msdady@gmail.com; mcranston29@gmail.com; dawn.bisdorf@gmail.com; ahopkins@synapse-energy.com; clane@synapse-energy.com; guy@maxetaenergy.com; Julia@londoneconomics.com; Brian@londoneconomics.com; luke@londoneconomics.com; kbailey@acciongroup.com; hjudd@acciongroup.com; zachary.ming@ethree.com; PREBconsultants@acciongroup.com; carl.pechman@keylogic.com; bernard.neenan@keylogic.com; tara.hamilton@ethree.com; aryeh.goldparker@ethree.com; roger@maxetaenergy.com; Shadi@acciongroup.com; Gerard.Gil@ankura.com; Jorge.SanMiguel@ankura.com; Lucas.Porter@ankura.com; gerardo_cosme@solartekpr.net; jrinconlopez@guidehouse.com; kara.smith@weil.com; varoon.sachdev@whitecase.com;

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mandatory). In compliance with the Energy Bureau's standing directives regarding accessibility and ensuring citizen participation, LUMA is hereby submitting the corresponding Spanish-language summary of this Motion to Compel. *See* Exhibit 1.

zack.schrieber@cwt.com; Isaac.Stevens@dechert.com; James.Moser@dechert.com; Kayla.Yoon@dechert.com; juan@londoneconomics.com; arrivera@nuenergypr.com; ahopkins@synapse-energy.com.

DLA Piper (Puerto Rico) LLC
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San Juan, PR 00901-1969
Tel. 787-945-9122 / 9103

/s/ Margarita Mercado Echegaray
Margarita Mercado Echegaray
RUA 16,266

/s/ Jan M. Albino López
Jan M. Albino López
RUA 22,891

Exhibit 1

Moción para Compeler Respuesta de PREPA a LUMA-de-PREPA-SUPPORT-9(c) y producción del Informe de FTI
Presentada por LUMA Energy, LLC, and LUMA Energy ServCo, LLC

Mediante la presente Moción, LUMA Energy, LLC y LUMA Energy ServCo, LLC (conjuntamente, "LUMA") solicitan al Negociado de Energía de Puerto Rico que ordene a la Autoridad de Energía Eléctrica ("AEE") la producción de la versión más reciente del informe de contabilidad preparado por FTI Consulting ("Informe de FTI"), al que se ha referencia en el Plan Fiscal certificado de la AEE.

Como cuestión de umbral, LUMA sostiene en la Moción que la AEE incumplió con la solicitud de información LUMA-of-PREPA-SUPPORT-9(c), pues su respuesta fue no responsiva. LUMA requirió un documento específico – el Informe de FTI –, y la AEE ni lo produjo ni presentó objeciones o reclamos de privilegio. Esa omisión obstaculiza el descubrimiento y priva al expediente de una pieza probatoria clave.

A renglón seguido, se explica en la Moción por qué el Informe de FTI es directamente pertinente a las cuestiones que el Negociado de Energía debe adjudicar en el proceso de revisión de tarifas. El Informe de FTI aborda el estatus los estados financieros de la AEE, la reconciliación de la hoja de balance y los pasos de remediación necesarios para alinear la contabilidad con el "Uniform System of Accounts" ("USoA", por sus siglas en inglés) de la Comisión Federal Reguladora de Energía ("FERC", por sus siglas en inglés) y con los Principios de Contabilidad Generalmente Aceptados ("GAAP", por sus siglas en inglés), conforme al marco del caso y las obligaciones contractuales del *Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement* ("T&D OMA" por sus siglas en inglés). Evidencia que consta en el expediente – tanto del testimonio del Director de Finanzas de LUMA ("Chief Financial Officer"), Andrew Smith, como de uno de los informes preparados por los consultores del Negociado de Energía – señala la necesidad de completar la remediación para viabilizar el alineamiento con el USoA y recomienda un hito de balance reconciliado para el 30 de junio de 2026. El Informe de FTI – por su alcance, secuencia y cronogramas – informaría la viabilidad de la transición contable, así como los costos asociados.

Por otra parte, en la Moción se explica que el Informe de FTI se generó en el contexto de un proceso competitivo de solicitud de propuestas ("RFP," por sus siglas en inglés) RFP #2024-3, emitido por el Departamento de Hacienda y administrado por la Autoridad de Asesoría Financiera y Agencia Fiscal de Puerto Rico ("AAFAF"), con propósitos públicos definidos: reconciliar "trial balances", establecer hitos y cronogramas para auditoría, y facilitar reportes financieros precisos y oportunos. El RFP preveía coordinación con la AEE y su agente LUMA. En la Moción se argumenta que el documento está dentro de la "posesión, custodia o control" práctico de la AEE o que, en su defecto, la AEE debe gestionar obtenerlo. Además, si el informe contuviera información sensible, el caso de revisión de tarifas dispone de un marco de confidencialidad idóneo, por lo que no hay base para su no producción.

De igual forma, la moción detalla las razones por las que el Informe de FTI incide directamente en la supervisión regulatoria y el cumplimiento contractual de LUMA: la implementación de USoA y GAAP bajo el T&D OMA. Sin el informe, ni el Negociado de Energía ni LUMA pueden evaluar con precisión el estado actual, la ruta de remediación y los costos para la transición contable.

En la Moción, LUMA solicita que el Negociado le ordene a la AEE producir la versión más reciente del Informe de FTI y sus anexos en el período de tres días. Si la AEE aduce que no tiene posesión, custodia o control del referido Informe, LUMA solicita que se le requiera coordinar inmediatamente con AAFAF para obtener y producir el documento y que se deje abierta la posibilidad de imponer remedios adicionales en caso de incumplimiento.

Exhibit 3

BY ELECTRONIC MAIL

October 20, 2025

Mr. Josué A. Colón Ortiz
Energy Czar
Executive Director
Puerto Rico Public-Private Partnerships Authority

Mr. Francisco J. Domenech
Governor's Chief of Staff
Executive Director
Puerto Rico Fiscal Agency and Financial Advisory Authority

Mr. Winnie Irrizarry
Chief Executive Officer
Genera PR, LLC

Mr. Juan Saca
President and Chief Executive Officer
LUMA Energy, LLC

Ms. Mary Carmen Zapata
Executive Director
Puerto Rico Electric Power Authority

Re: Liquidity Situation, Stabilization and Restoration of Puerto Rico's Energy Grid

To all stakeholders:

Thank you for your participation in last week's meeting regarding the liquidity situation, stabilization and restoration of Puerto Rico's energy grid. The challenges before us are urgent and

consequential, with profound implications for the people and businesses of Puerto Rico. The current lack of cooperation is untenable. Immediate, coordinated action is imperative, and the Oversight Board remains committed to convening all parties to drive meaningful progress.

As you are aware, the purpose of last week's meeting was to initiate discussion on the liquidity constraints within the energy system and to start exploring potential solutions. Some of these challenges do not assign fault to any single entity; rather, they underscore systemic issues that must be confronted by any operator. One fact is clear: the shortage of operating cash is having real and profound consequences on the ability to generate energy in a reliable way and to restore and stabilize the grid.

To support last week's dialogue, the Oversight Board presented preliminary observations derived from limited data provided by certain parties. As stated in the meeting, this information represented initial observations—not conclusions. There was no report prepared or definitive conclusions presented during the meeting because we do not yet have a complete picture of the system liquidity and operating cash needs. Despite repeated requests, critical information—including fuel transfer analyses, PREPA's internal operating costs, and other essential data—has not been furnished by PREPA, Genera and others. We are also seeking additional information from LUMA. This lack of transparency is a material impediment to decision making and progress. Decisions must be grounded in facts, not assumptions. Accordingly, we urge all parties to provide complete and accurate data without delay.

Against this backdrop, the following key observations emerged from our discussion:

Customer Cash Collections Remain Stable – Collections have remained consistent with budgeted levels, suggesting that liquidity shortages are not attributable to revenue shortfalls. There do appear, however, to be opportunities to further improve liquidity by further enhancing collections. As discussed, this could be achieved by having government agencies, which collectively owed $83 million as of September 2025, pay their bills. Other longstanding legacy challenges that predate the current operating model, such as fixing non-technical losses, should also be a focus. Non-technical losses in the system are well-documented in public statements and PREB filings.

GridCo Funding Has Been Inconsistent, and Has Declined This Year – While PREPA has transferred approximately $900 million more than GridCo's budget since privatization, the vast majority of those funds appear to have been spent on disaster response and restoration work as well as non-budgeted expenses such as emergency outage response work. Since February 2025, it is clear PREPA's monthly transfers to GridCo are less than GridCo's monthly approved budget, impacting GridCo's liquidity for operations. However, it is also clear that lack of Federal reimbursements have impacted liquidity. Until we have all information from all parties it is difficult to identify a path forward.

Operating Cash Reserves Are Nearly Exhausted – The lack of liquidity has severely depleted GridCo's cash reserves, resulting in employee layoffs and significant delays in supplier payments. Restoration projects are also being halted. Genera reports similar arrears, and payments to suppliers are also delayed as a result.

Funding Methodology May Need Adjustment – PREPA's current approach to calculating transfer amounts appears flawed when calculating the amount against cash needs. By reducing transfers based on GridCo's month-end cash balances, the methodology understates the actual operating cash requirements and assumes GridCo can operate with a zero cash balance each month. As noted in the meeting, this is not a viable or sustainable way to run operations.

Unrestricted Cash Holdings at HoldCo – Although overall liquidity in the energy system appears constrained, as of September 29, PREPA appeared to hold approximately $200 million in unrestricted cash. As discussed in the meeting, while this figure may have declined following the subsequent monthly funding cycle, it suggests that additional liquidity could potentially be available at the HoldCo level. This potential source of funding should be evaluated to see whether a portion is available for transfer to GenCo or GridCo to help stabilize near-term operations.

Federal Funding Reimbursement Delays – The pace of FEMA obligations has slowed considerably, extending reimbursement timelines. Similarly, COR3's review cycles and processes at Vivienda remain lengthy, creating significant interim cash pressures on the system. Currently, at least $745 million in disaster-related expenses from FEMA and Vivienda remain unreimbursed. This is not an isolated issue—it reflects a systemic failure across multiple entities, including LUMA, FEMA, COR3, PREPA, and Vivienda, driven by process inefficiencies and lack of coordination. Where the system operator is solely responsible for the reimbursement delay they must be held accountable. Nonetheless, we must work together to maximize FEMA and CDBG-DR reimbursements for Puerto Rico. During the meeting, the Oversight Board asked for all parties commitment to convene and eliminate the blockages preventing these reimbursements. Securing these funds—and accelerating future reimbursements—is critical to improving system reliability and enabling faster execution of restoration projects. Our top priority must be to deliver projects at the fastest possible pace.

During our meeting we also discussed how the legacy shortcomings in PREPA's data and accounting systems cannot be overstated. The Oversight Board's analysis is limited by these deficiencies. As discussed at our meeting, the Accounting Remediation report prepared by FTI Consulting for AAFAF, P3A, and the Puerto Rico Department of the Treasury, underscores the critical deficiencies observed of the legacy accounting functions—marked by the absence of a unified finance structure, missing data, and unreconciled balances. These issues present immediate and significant challenges that cannot be ignored.

The Oversight Board remains committed to supporting our collective efforts to improve financial and operational visibility, but meaningful progress will require full access to accurate data and collaboration from all stakeholders. While the current GridCo operator, LUMA, provided a significant amount of data in response to the Oversight Board's repeated requests, more information from GridCo is required. The GenCo operator, Genera, and PREPA itself need to fulfill all information requests. A transparent and complete set of data is needed to secure a holistic view of system operating cash needs from all parties. Let me close by reaffirming now is the time to unite and channel all our efforts toward addressing the challenges before us.

Sincerely,

Robert F. Mujica, Jr.
Executive Director

CC: Mr. Edison Avilés
Ms.Tina Francone

Exhibit 4

PUBLIC-PRIVATE PARTNERSHIPS AUTHORITY
GOVERNMENT OF PUERTO RICO

Eng. Josué A. Colón Ortiz I Executive Director

October 30, 2025

BY ELECTRONIC MAIL
robert.mujica@promesa.gov

Mr. Robert F. Mujica, Jr.
Executive Director
Financial Oversight and Management
Board for Puerto Rico
PO Box 192018
San Juan, Puerto Rico 00919-2018

Dear Mr. Mujica,

Initial
JCO

Re.: Response to FOMB's October 19 e-mail and October 20th, 2025 letter

We write in response to the electronic communication transmitted on October 19, 2025, and to your letter dated October 20, 2025, both issued following my correspondence of October 18. Your letter notes that the challenges before us are "urgent and consequential, with profound implications for the people and businesses of Puerto Rico," and further states that the "current lack of cooperation is untenable." You also state that the October 16th meeting "was to initiate discussions on the liquidity constraint within the energy system and to start exploring potential solutions."

While the Puerto Rico Public-Private Partnerships Authority ("P3A") appreciates the Financial Oversight and Management Board for Puerto Rico ("FOMB, or the Oversight Board") continued engagement on matters affecting the stability of Puerto Rico's energy system, the overall framing of the letter appears to diffuse responsibility among all parties and implies that liquidity constraint discussions are just starting, without addressing the core issue—LUMA Energy, LLC's ("LUMA") ongoing contractual noncompliance under the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement (the "T&D OMA"). This noncompliance has been, and continues to be, the principal and proximate cause of the liquidity challenges currently facing the Puerto Rico Electric Power Authority ("PREPA") and the energy system as a whole and have been subject of multiple letters and meetings, prior to October 16th, where P3A and PREPA have

advised FOMB, among others, of the inevitable consequences of LUMA's nonfulfillment.

Accordingly, the P3A respectfully submits this response to provide additional context and clarification for the record. The time has come to (a) move beyond general discussions, (b) focus on implementing concrete, results-oriented solutions, (c) call for decisive action from the parties responsible—including those entrusted with the use of public funds—and (d) ensure that accountability is clearly and fairly assigned where it is due. Anything less than achieving these objectives will only perpetuate the inefficiencies within Puerto Rico's electric service, allowing poor performance, lack of accountability, and escalating costs to persist — burdens that ultimately fall the people of Puerto Rico.

We refer to several written communications sent or copied to both LUMA and representatives of the FOMB in which PREPA provided detailed and precise data clearly demonstrating the negative liquidity trend caused by LUMA's actions. We likewise refer to multiple in-person meetings held with representatives of both the FOMB and LUMA, during which PREPA expressed its concern regarding the cash flow and liquidity projections affected by LUMA's negligent management of federal funds—particularly concerning more than $500 million (at that time, now a substantially higher amount, as previously stated) in unreimbursed federal expenditures that were paid with system revenues, that is, with funds collected from customers. In both instances—the letters and the meetings—PREPA presented detailed liquidity data leading to an unequivocal conclusion: LUMA's inability to secure reimbursement for expenditures paid with customer-billed revenues for federally eligible projects lies at the core of the current liquidity problem.

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Unfortunately, no material improvement has occurred in the pace or volume of federal fund reimbursements. As reflected in multiple communications from the Federal Emergency Management Agency ("FEMA") and the Central Office for Recovery, Reconstruction and Resiliency ("COR3"), persistent deficiencies remain in LUMA's management of the reimbursement process. While LUMA does not dispute the existence of delays—or the content of the FEMA and COR3 correspondence—it has attributed the lack of progress to external "bureaucratic" factors. Notwithstanding, experience demonstrates otherwise: both PREPA and Genera PR, LLC ("Genera"), operating under the same federal frameworks and procedural requirements, have consistently achieved substantially higher reimbursement rates. This contrast underscores that the central challenge lies not in the system itself, but in LUMA's execution and administrative performance. It is undeniable that LUMA's actions and cash-management practices are the sole drivers of PREPA's current liquidity shortfall. Further, LUMA's questionable internal funds management and accounting practices have been known since at least 2023, as documented in the previously referred letters from PREPA.

Your letter appropriately emphasizes the urgency of identifying solutions to the financial and liquidity challenges currently faced by PREPA, LUMA, and Genera. We recognize and value the Oversight Board's continued attention to these matters. However, it is equally important to ensure that the assessment of causes and responsibilities reflects the factual record as it stands. The record indicates that LUMA's performance has been the proximate cause of the current constraints. The most important fact to keep in mind is that LUMA has been handed access to billions in funding and provided ample liquidity, yet LUMA cannot or does not explain in simple terms where all the liquidity has gone. LUMA purports owing over $300 million to suppliers. The P3 is seeking to fully understand basic questions such as - who is this money owed to? for what purpose was it spent? and how did LUMA accrue such a significant Accounts Payable balance? The Government of Puerto Rico insists that LUMA must be held accountable before the FOMB jumps to "explore potential solutions" under the incorrect and unsupportable presumption that the liquidity crisis is a "system issue".

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We have provided—and will continue to present—the factual record that illustrates LUMA's inadequate management of transmission and distribution system revenues and expenditures. Our intent is to assist the FOMB in fully understanding the root causes of the energy system's persistent financial challenges and to emphasize the need for a reassessment of LUMA's performance under the existing contractual framework. In light of this, we respectfully submit that any future course of action must prioritize accountability, fiscal prudence, and the protection of public funds, ensuring that solutions are grounded in verifiable results and effective management practices, and must not further burden the people of Puerto Rico with bailouts for inefficient behavior.

Under the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), the FOMB is entrusted with the vital responsibility of helping covered entities achieve fiscal sustainability and restore market access, including through the certification of fiscal plans that ensure the funding of essential public services and safeguard the public interest. These responsibilities are owed to the Government of Puerto Rico and its residents – not private operators. The P3A and PREPA welcome and value continued alignment with the FOMB in pursuit of practical and lasting solutions. However, such alignment must always be grounded in fiscal responsibility, transparency, and accountability, ensuring that essential services are protected and that the integrity of the public record remains beyond question.

It is important to highlight that PREPA has provided full transparency to the representatives and technical advisors of the FOMB since the commencement of its bankruptcy proceedings in 2017. PREPA submits, on a regular basis, the following information:

- Weekly cash flow reports that include the balance of funds held by PREPA and the operators in each service account, revenues collected from customers, and cash disbursements.

- Weekly accounts payable reports from PREPA.

- PREPA's 13-week cash flow forecast and corresponding variance reports.

- Monthly budget-to-actual ("B2A") reports prepared by PREPA based on its accounting system records. (These reports are also submitted to the Puerto Rico Energy Bureau ("PREB").

Consistent with our spirit of cooperation, if there is specific information that you deem has not been produced by PREPA, please be specific and we will gladly facilitate the flow of information between PREPA and FOMB and invite you and your staff to a meeting with PREPA representatives to specifically address any financial data that remains outstanding, if any.

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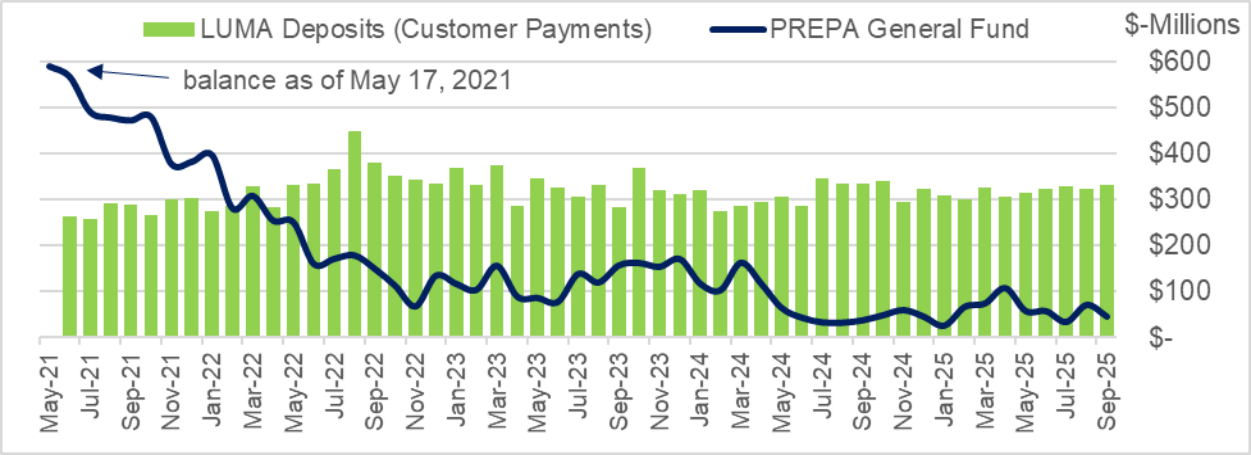
By contrast, the transparency deficit stems from LUMA's repeated refusal to provide timely, complete financial information, in breach of its duties under the T&D OMA. Accordingly, the P3A respectfully submits that the Oversight Board's call for "complete and accurate data without delay" should be directed primarily to LUMA, as the entity entrusted with managing and reporting on system operations and expenditures. While the Board's and Ernst & Young's ("EY") analyses have appropriately concentrated on PREPA's liquidity and budgetary conditions, a more balanced and comprehensive evaluation would also benefit from an in-depth review of LUMA's procurement practices, spending patterns, and accounts-payable records. Such a review is essential to advancing transparency, accountability, and sound fiscal management—principles that will help ensure the responsible use of public funds and strengthen the long-term reliability and sustainability of Puerto Rico's electrical system.

Below, we further address each of your letter's observations.

Customer Collections Remain Stable

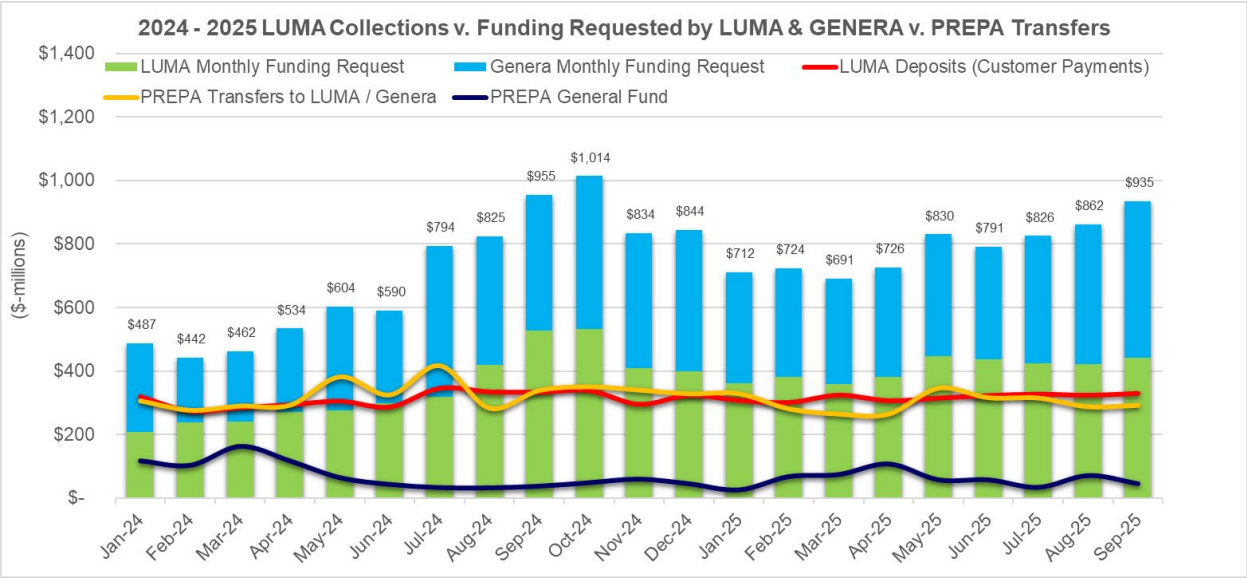
Your letter states that revenues and collections are stable and consistent with budgeted levels, and that PREPA has in fact transferred amounts in excess of LUMA's annual budgets consistently every year. However, it is important to underscore that PREPA's General Fund cash balance of nearly $600 million, in the month before LUMA's Service Commencement Date of June 1, 2021, has declined to less than $100 million due to LUMA's excess expenditures. This amount of over $500 million of additional funds provided to LUMA from PREPA's cash-on-

hand does not even consider the significant drawdown of PREPA's FEMA Reimbursement funds, also transferred to cover LUMA excess expenses.



This chart, and the information contained herein, was prepared by Ankura Consulting Group, PREPA's financial advisors in the Title III process since its commencement in 2017.

Initial



This chart, and the information contained herein, was prepared by Ankura Consulting Group, PREPA's financial advisors in the Title III process since its commencement in 2017.

The P3A agrees that LUMA should enhance its collections efforts. Under the T&D OMA, LUMA has been fully responsible for collecting from all customers, including post-service commencement government receivables, since June 2021. This is one of their core functions for which electric customers pay

approximately $140 million in operator fees (i.e., clean profit, regardless of performance) per year. If approximately 70,000 meters remained non-recording and non-technical losses persisted during that period, it is the direct consequence of LUMA's prolonged failure to implement effective metering remediation and loss-reduction measures, despite having full operational control and responsibility to do so. LUMA entered service commencement in June 2021, after more than a year of pre-service commencement due diligence before and during the so-called Front End Transition Period. After extensive due diligence and multiple years of operating under the T&D OMA, "legacy" rhetoric cannot inexplicably convert present obligations of an underperforming contractor into a ratepayer-funded excuse; LUMA must show measurable results, not after-the-fact excuses pointing everywhere but itself.

When serving as PREPA's Executive Director, the undersigned personally assisted LUMA in the collection and settlement of Pre-Service Commencement Date receivables totaling $145 million. While the contractual obligation to pursue such collections rests exclusively with LUMA, I remain willing to assist in its efforts by facilitating meetings and discussions with the relevant government agencies. Such cooperation, however, must be reciprocal — it requires that all parties involved actively engage and contribute to achieving meaningful results. Although obtaining these collections would help, it would not resolve the root cause of the liquidity crisis, which is evidently driven by LUMA's out-of-budget cash outlays, as shown in the table below.

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GridCo Funding Has Been Inconsistent and Has Declined this Year

EY's findings confirm what PREPA, and the P3A have been stating for some time - **LUMA has spent over $900 million beyond the authorized O&M Budgets.** This is the culprit of the liquidity strain that is the subject of this communication. A liquidity crisis that is entirely of LUMA's making. However, EY's finding regarding PREPA's transfers since February 2025, ignores the fact – either deliberately or by accident - that during fiscal year 2025 (i.e., between July 1, 2024 and June 30, 2025), PREPA transferred $42 million in excess of LUMA's O&M Budget for FY2025. It also ignores the fact that since FY 2022, PREPA has been overfunding the Operating account by hundreds of millions of dollars for which there has been zero accountability. Moreover, since February 2025, LUMA has had an average monthly cash balance in its O&M Accounts of $50 million, excluding federal funds and purchased power and reserve accounts and also held an average balance of $64 million in its Contingency Reserve Account. The combined O&M and Contingency account balances during this period were well in excess of LUMA's monthly authorized O&M Budgets. Please see the table below for more details:

(figures in $-millions)

PREPA Transfers to LUMA O&M Accounts	FY2022*	FY2023	FY2024	FY2025	FY22-25
Operating Account	$ 770.5	$ 1,064.3	$ 1,134.4	$ 796.5	$ 3,765.8
Capital Account - Non Federally Funded	$ 76.9	$ 40.9	$ 84.5	$ 81.7	$ 283.9
Total Operating & Non-Federally Funded	**$ 847.4**	**$ 1,105.3**	**$ 1,218.9**	**$ 878.2**	**$ 4,049.7**
LUMA Budget O&M Expenses	**FY2022**	**FY2023**	**FY2024**	**FY2025**	**FY22-25**
LUMA Interim Fixed Service Fee	$ 115.1	$ 121.8	$ 129.2	$ 134.7	$ 500.8
LUMA Title III Costs	$ -	$ -	$ 8.8	$ 8.8	$ 17.5
LUMA O&M Expenses	$ 648.9	$ 626.9	$ 663.0	$ 692.7	$ 2,631.4
Total LUMA Budget Expenses	**$ 764.0**	**$ 748.7**	**$ 800.9**	**$ 836.1**	**$ 3,149.7**
Difference (Cash Funding minus O&M Budget)	$ 83.4	$ 356.6	$ 418.0	$ 42.0	$ 900.0

Note: FY2022 includes initial funding of LUMA Service Accounts in June 2021

This chart, and the information contained herein, was prepared by Ankura Consulting Group, PREPA's financial advisors in the Title III process since its commencement in 2017.

Initial

Operating Cash Reserves Are Nearly Exhausted

This observation should not be surprising to any. As previously stated, for over two years, PREPA has been sounding alarms about the unfolding and foreseeable liquidity crisis caused by LUMA's out-of-budget spending and failed business model. LUMA's recently announced employee layoffs, and accrued supplier payments balances, are a direct result of LUMA's financial mismanagement and its own business decisions. I cannot stress enough, and it should not be ignored, that PREPA has transferred amounts that exceed LUMA's O&M Budgets by approximately **$900 million**. Additionally, as of October 15th, LUMA's O&M accounts (T&D Operating and Non-Federally Funded Capital) had over $87 million, after PREPA transferred nearly $77 million, which is equivalent to one month of O&M budget expenses. We underscore here that LUMA had sufficient liquidity to make payroll for the 160 employees it terminated, and it must be held accountable for its blatant political blame-shifting to PREPA to excuse its own business decisions.

Funding Methodology May Need Adjustment

PREPA acknowledges that the T&D OMA details PREPA's obligations related to funding the Service Accounts. Those obligations, however, do not exist in a vacuum; they are contingent on the availability of sufficient liquidity within PREPA's accounts, sourced from System Revenues and federal reimbursements for federally funded projects that have been funded with System Revenues. Under the T&D OMA, LUMA is responsible for generating sufficient revenues both from collection for power services and securing federal reimbursements. Since

commencement date, LUMA has demonstrably failed to comply with both of its revenue generation obligations, while incurring unnecessary and/or unreasonable spending (e.g. LUMA's Seconded Employees Program). By doing so, LUMA has rendered the T&D OMA business model unsustainable. As a result, PREPA's predictable and anticipated liquidity shortfall is directly caused by LUMA's deficient collection of power services and substantial delays in material amounts of federal reimbursements for projects that were paid with System Revenues

PREPA's approach to Service Account Funding is based on the mechanics established in the T&D OMA, nothing more. Notwithstanding, since August 2024, PREPA has had to make adjustments to the service account funding process to address the cash constraints caused by LUMA's financial mismanagement. Each month, PREPA has transferred essentially all the available unrestricted cash-on-hand deposited by LUMA to LUMA and Genera. Given the near-depletion of PREPA's working capital by LUMA, PREPA has been forced to make off-cycle, advance transfers to Genera's Fuel Account to ensure timely payment for the electric system's fuel supply.

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Month	LUMA Deposits (Customer Payments)	PREPA Transfers to LUMA Accounts	PREPA Transfers to Genera Accounts	LUMA Monthly Funding Request	Genera Monthly Funding Request	PREPA General Fund*	Bank Balance Date
Jan-24	$ 320	$ 119.3	$ 186	$ 207	$ 280	$ 118	1/17/2024
Feb-24	$ 274	$ 139.2	$ 137	$ 237	$ 205	$ 104	2/14/2024
Mar-24	$ 285	$ 142.2	$ 147	$ 242	$ 221	$ 163	3/19/2024
Apr-24	$ 294	$ 161.9	$ 130	$ 271	$ 263	$ 118	4/15/2024
May-24	$ 306	$ 164.2	$ 218	$ 275	$ 329	$ 65	5/14/2024
Jun-24	$ 287	$ 180.2	$ 144	$ 299	$ 291	$ 44	6/14/2024
Jul-24	$ 347	$ 192.9	$ 225	$ 318	$ 476	$ 34	7/16/2024
Aug-24	$ 335	$ 100.9	$ 182	$ 420	$ 405	$ 33	8/15/2024
Sep-24	$ 334	$ 143.3	$ 196	$ 527	$ 428	$ 39	9/16/2024
Oct-24	$ 339	$ 148.1	$ 202	$ 533	$ 481	$ 49	10/16/2024
Nov-24	$ 295	$ 160.6	$ 179	$ 409	$ 425	$ 61	11/18/2024
Dec-24	$ 324	$ 151.2	$ 177	$ 398	$ 446	$ 46	12/16/2024
Jan-25	$ 308	$ 137.5	$ 191	$ 361	$ 350	$ 27	1/17/2025
Feb-25	$ 301	$ 117.3	$ 163	$ 381	$ 343	$ 68	2/18/2025
Mar-25	$ 325	$ 107.0	$ 157	$ 359	$ 332	$ 75	3/18/2025
Apr-25	$ 307	$ 101.5	$ 162	$ 382	$ 344	$ 108	4/14/2025
May-25	$ 315	$ 159.1	$ 187	$ 448	$ 382	$ 58	5/14/2025
Jun-25	$ 323	$ 137.5	$ 178	$ 437	$ 354	$ 58	6/16/2025
Jul-25	$ 328	$ 129.9	$ 185	$ 424	$ 402	$ 35	7/15/2025
Aug-25	$ 324	$ 104.6	$ 183	$ 421	$ 441	$ 72	8/18/2025
Sep-25	$ 331	$ 112.7	$ 179	$ 442	$ 492	$ 46	9/15/2025

*PREPA General Fund Balances shown are end of day balances after monthly transfers to LUMA / Genera cleared, typically the 10th business day of the month or the next business day.

This chart, and the information contained herein, was prepared by Ankura Consulting Group, PREPA's financial advisors in the Title III process since its commencement in 2017.

Unrestricted Cash Holdings at PREPA

PREPA's cash balances fluctuate significantly over the course of each Service Account Funding Cycle, reaching a low point on the day of or immediately after Service Account Funding. This is based on a couple of key factors – LUMA's collections from customer billings, intra-cycle Service Account Funding Cycle transfers to Genera for Fuel Purchases, and transfers to LUMA and Genera's Service Accounts, which occur on the 10th business day of each month. Therefore, to effectively measure excess available cash when looking at PREPA cash balances, the relevant data point is the monthly low point of cash after transfers to both operators, not some arbitrarily selected day early or late in the month after collections have accumulated.

Against that backdrop, EY's reference to PREPA's cash balances appears to use September 26 rather than September 29. We respectfully note, however, that using an end-of-month reference point may not fully reflect PREPA's actual liquidity position, given the significant fluctuations that occur throughout each funding cycle. It is also important to clarify that the quoted cash balance includes federal fund reimbursements—approximately $42 million as of September 26—that are specifically designated for PREPA's federally funded projects and therefore not available for general operational purposes.

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As previously reported, PREPA's available and unrestricted cash balances for the week ending September 19th showed a balance in PREPA's General Fund of $79 million, while on September 15th, the service account funding date, the balance was only $46 million. These balances referenced are the true representation of PREPA's diminished cash position, significantly below the $200 million conclusion reached by EY.

Federal Funding Reimbursement Delays

The P3A agrees with the need to deliver reconstruction projects as fast as possible, however, respectfully disagree, with the characterization of approximately $745 million in disaster-related expenses incurred by LUMA as a "systemic reimbursement failure." The evidence shows that the unreimbursed amounts are largely concentrated in LUMA's transmission and distribution workstreams and include: (a) projects funded with System Revenues (i.e., customer collections) that remain unreimbursed; (b) FEMA, CDBG-DR, and the U.S. Department of Energy ("DOE") reimbursement requests submitted since January 1, 2023, without complete reconciliations of reimbursed, pending, or denied amounts; and (c) inventory purchases not linked to federally eligible work orders or reimbursement files. These issues stem from LUMA's internal execution and administrative processes rather than from broader systemic deficiencies, and they help explain why liquidity has deteriorated despite PREPA's consistent above-budget transfers.

As previously mentioned, both PREPA and Genera—operating under the same federal frameworks and requirements—have not exhibited remotely comparable and persistent reimbursement challenges. This contrast underscores the need for a more targeted assessment of LUMA's performance, and not for broad-brush assertions of a "systemic reimbursement failure" that mask LUMA's execution and compliance deficiencies.

Legacy Shortcomings

During the meeting and in subsequent communications, it was noted that certain limitations in PREPA's historical data and accounting systems may be contributing factors to the current liquidity challenges. While we acknowledge that PREPA's legacy systems have presented structural constraints over time, these do not diminish LUMA's present responsibilities under the T&D OMA to accurately report, document, and reconcile all Service Account transactions. Over the past four (4) years, LUMA has had both the mandate and the opportunity to strengthen and modernize these processes in accordance with its operational obligations.

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We respectfully suggest that the EY analysis focus on the areas of accountability most directly related to current operational performance. As reflected in the report prepared by FTI Consulting ("FTI"), LUMA maintains responsibility for key financial control functions, including bank reconciliations, daily cash reporting, payables processing, and system access—responsibilities that reside squarely with the operator, not within PREPA's legacy infrastructure. Differentiating between these domains is essential to ensuring an accurate assessment of the underlying causes of liquidity constraints.

Non-Technical Losses

Labeling non-technical losses as "legacy" also does not alter LUMA's present-tense duty under the T&D OMA to reduce losses through accurate metering, billing, collections, and control measures. It bears reminding, lest anyone forget, that LUMA assumed those duties after more than a year of pre-commencement due diligence, front end transition, all before service commencement in June 2021; baseline conditions were neither unforeseen, nor unknown and cannot now be conveniently invoked by LUMA to excuse current performance.

The "legacy" argument may have served its purpose on year one and maybe stretching it into year two. More than five (5) years into the T&D OMA, however, continued reliance on "legacy" narratives – again, after extensive due diligence and repeated representations of capability during procurement – is unjustified and unacceptable. We cannot accept in passing LUMA's operational gaps and mishaps onto the public balance; this situation simply underscores that LUMA has

failed to deliver the measurable improvements it undertook and promised to provide years ago.

Conclusion

The solution is simple. It lies in LUMA fulfilling its contractual duties: correcting billing and collection deficiencies, accelerating federal reimbursements, curbing system losses, reconciling accounts, submitting complete, cost-effective FEMA project documentation and yielding honest transparency and information sharing as called for under the T&D OMA. These are matters of diligence and competence and are the sole responsibility of LUMA.

The Government of Puerto Rico, PREPA, and the P3A categorically reject LUMA's unfounded excuses for its consistent underperformance and failure to meet contractual obligations. Nearly five (5) years have passed since LUMA assumed responsibility for operating and maintaining the transmission and distribution system—at a current cost to customers of over $500 million during the past five (5) years—with unacceptable results. A similar financial and operational performance anywhere in the mainland would have resulted in fulsome rejection by elected officials, regulators and the public – with reason. Puerto Rico and its residents deserve no less.

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The Government demands immediate and decisive corrective action. Billions in federal funds are available, yet paperwork delays, missing reimbursements, and unreconciled balances and faulty paperwork/documentation in LUMA's accounts persist. These are not bureaucratic complications or budgetary anomalies — they are clear indicators of mismanagement and systemic non-performance, which some call incompetence. LUMA pledged expertise, efficiency, and transparency. Five (5) years and billions of dollars later, the record shows otherwise: only 4% of FEMA funds have been reimbursed, billions of dollars have been put in jeopardy, while the system's reliability continues to decline and visibility over its internal finances is, ironically, more obscure and less accountable than in PREPA's so called "legacy" days.

The Oversight Board's statutory responsibility is to the Government of Puerto Rico and its citizens, ensuring that public funds are managed and disbursed based on certified and verifiable information. In that shared objective, the P3A and PREPA remain fully aligned with the Oversight Board. We believe that sound decision-making in this matter—and in all matters that directly affect ratepayers and the public—must be guided by objective data and transparent documentation rather than by shifting narratives or public commentary.

The information and documentation that have been provided to the FOMB offer a consistent, verifiable picture of the current cash flow and liquidity situation. We

respectfully submit that these materials should continue to serve as the foundation for any assessment or course of action. Upholding this standard of data-driven transparency will not only reinforce the FOMB's credibility but also strengthen public confidence in the integrity and fiscal responsibility of Puerto Rico's energy transformation process.

The P3A and PREPA reaffirm their commitment to work in close coordination with the FOMB to establish transparent and accurate processes aimed at rehabilitating Puerto Rico's electric system. This includes ensuring the efficient, transparent, and cost-effective use of the billions of dollars in available federal funds, to deliver a modern and reliable system that serves the best interests of the 3.2 million American citizens residing in Puerto Rico.

Cordially,

Signed by:

Josué A. Colón Ortiz

ACAE19A8DEF549C...

Josué A. Colón-Ortiz
Executive Director

c. Francisco J. Domenech, Executive Director, AAFAF, fjdomenech@aaaf.pr.gov
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Antonio Torres Miranda, Esq., Associate Commissioner, PREB; atorres@jrsp.pr.gov

Exhibit 5

Resumen Planteamiento – Transacciones fiscales – Extensión de vigencia

# Planteamiento:	2025-41239
Agencia:	Autoridad de Asesoría Financiera y Agencia Fiscal (AAFAF)
Fecha sometido:	12/18/24
Título:	Fund Extension - FTI
Resumen:	El propósito de esta petición es solicitar extensión de vigencia hasta el 30 de junio de 2025, a fondos por $875k solicitados originalmente mediante planteamiento presupuestario 2024-56897con vencimiento de 31 de diciembre de 2024. Dichos fondos recibidos mediante una transferencia interagencial por parte de la Autoridad para las Alianzas Público Privadas, para cubrir servicios profesionales para el desarrollo y ejecución del plan de remediación de contabilidad de la Autoridad de Energía Electrica.
Tipo de planteamiento:	Fund Extension - (Extensión de Vigencia)
Tipo de fondo:	Fondo General
Fondo General:	Resolución Conjunta del Presupuesto General

Detalle Planteamiento

Razón de extensión:	Se solicita extensión al 30 de junio de 2025 para que el Plan de remediación pueda presentarse a la Administración entrante y se pueda dar continuidad al proyecto y a su fase de implementación y ejecución.
Justificación:	El Plan de remediación debe presentarse a la Administración entrante a modo de dar continuidad al proyecto y a su fase de implementación y ejecución.
Vigencia Actual:	12/31/24
Vigencia Solicitada:	06/30/25
Cifra de cuenta:	030

Cifra de cuenta

Cifra de cuenta	Tipo de costo	Costo	Partida	Fecha de creación
E0000-1110-2950000-0001-081-2025-SM1/ 030-058775	Débito	$875,000.00	Fondo Estatal No PRIFAS	12/18/24 4:18 p.m.

Análisis

Fecha	Tipo de Análisis	Análisis	Usuario	Monto a recomendar
12/18/24 5:14 p.m.			Representante Autorizado Morayma Negron	
12/18/24 6:36 p.m.	Aprobar	Corregir en el planteamiento en el costo la cifra de cuenta La Autoridad de Asesoría Financiera y Agencial Fiscal (AAFAF) solicita una extensión de vigencia hasta el 30 de junio de 2025, a fondos por $875k solicitados originalmente mediante planteamiento presupuestario 2024-56897con vencimiento del 31 de diciembre de 2024. Dichos fondos recibidos mediante una transferencia interagencial por parte de la Autoridad para las Alianzas Público-Privadas, para cubrir servicios profesionales para el desarrollo y ejecución del plan de remediación de contabilidad de la Autoridad de Energía Eléctrica.	Juan Alejandro	$875,000.00
12/18/24 6:53 p.m.	Aprobar	La Autoridad de Asesoria Financiera y Agencia Fiscal solicitar extensión de vigencia hasta el 30 de junio de	Wilson Rivera	$875,000.00

	2025, a fondos por $875k solicitados originalmente mediante planteamiento presupuestario 2024-56897con vencimiento de 31 de diciembre de 2024. Dichos fondos recibidos mediante una transferencia interagencial por parte de la Autoridad para las Alianzas Público Privadas, para cubrir servicios profesionales para el desarrollo y ejecución del plan de remediación de contabilidad de la Autoridad de Energía Electrica. Plan de remediación pueda presentarse a la Administración entrante y se pueda dar continuidad al proyecto y a su fase de implementación y ejecución. Los fondos fueron depositados en cuenta Bancaria BPPR 030-058775. Recomendamos Favorable solicitar autorización de parte de FOMB para proceder con lo solicitado.

Fecha de descarga:

Hon. Pedro R. Pierluisi Urrutia

Gobernador

Juan C. Blanco Urrutia

Director de la Oficina de Gerencia y Presupuesto

Usuario:

BY ELECTRONIC MAIL

December 24, 2024

Mr. Juan C. Blanco Urrutia
Executive Director
Office of Management and Budget

Re: Response to various reapportionment requests

Dear Mr. Blanco Urrutia,

This letter is in response to various budgetary reprogramming requests submitted by certain government agencies through the Office of Management and Budget ("OMB") to the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board") for review and approval.

After reviewing the requests and the supporting documentation, the Oversight Board makes the following determinations:

1. 2025-32952 Department of Public Safety (045) - Prior year fund release and fund extension through June 30, 2025, from FY2023 GF appropriations of the Puerto Rico Department of Justice for Victims of Crimes Act ("VOCA") funds grant and operating expenses for the payment of invoices for the acquisition of computer equipment and printers.

Determination: Approved with Observations
Approved amount: $86,566

Request	Determination	Agency	Fund	Account	Amount	Date of extension
32952	Approved with Observations	(045)-Department of Public Safety	GF	111-0450000-0001-081-2023	$86,566	2/28/2025

Observation: The Oversight Board approves a prior year fund release and fund extension through February 28, 2025, instead of the requested date of June 30, 2025, from FY2023 GF appropriations of the Puerto Rico Department of Justice for VOCA funds grant and operating expenses for the payment of invoices for the acquisition of computer equipment and printers

2. 2025-24581 Assignments under the custody of the Department of the Treasury (025) - Prior year fund release and fund extension until June 30, 2025, to comply with Regulation No. 21, *Funds belonging to members of the Correctional Population in Correction Administration Institutions*, to pay claims from ex-convicts or family members related to unclaimed funds or deposits that belonged to inmates.

Determination: Approved
Approved amount: $86,378

Request	Determination	Agency	Fund	Account	Amount	Date of extension
24581	Approved	(025)-Assignments under the custody of the Department of the Treasury	SRF	793-0250000-001-1998	$86,378	6/30/2025

3. 2025-41239 Fiscal Agency & Financial Advisory Authority (295) - Fund extension until June 30, 2025, of FY2024 professional services appropriations to continue the execution of the accounting remediation plan for the Puerto Rico Electric Power Authority.

Determination: Approved
Approved amount: $209,925

Request	Determination	Agency	Fund	Account	Amount	Date of extension
41239	Approved	(295)-Fiscal Agency & Financial Advisory Authority	GF	R0081-111-2950000-0001-081-2024	$209,925	6/30/2025

4. 2025-39560 Department of Correction and Rehabilitation (137) - Prior year fund release and fund extension until June 30, 2025, to purchase nine vehicles for the transportation of inmates.

Determination: Approved
Approved amount: $553,707

Request	Determination	Agency	Fund	Account	Amount	Date of extension
39560	Approved	(137)-Department of Correction and Rehabilitation	SRF	253-1370000-011-2022	$553,707	6/30/2025

5. 2025-39644 Puerto Rico National Guard (043) - Fund extension of FY2024 undistributed appropriations account until June 30, 2025, to complete the acquisition of six portable hospitals for emergency and disaster response.

Determination: Approved
Approved amount: $1,429,997

Request	Determination	Agency	Fund	Account	Amount	Date of extension
39644	Approved	(043)-Puerto Rico National Guard	GF	141-0430000-0001-081-2024	$1,429,997	6/30/2025

6. 2025-39996 Puerto Rico Tourism Company (180) - Prior year fund release until June 30, 2025, to support the Public Building Authority and the Department of Public Safety in the modernization of the Loiza Street police station and the purchase of equipment and vehicles, respectively.

Determination: Approved with Observations
Approved amount: $7,951,122

Request	Determination	Agency	Fund	Account	Amount	Date of extension
39996	Approved with Observations	(180)-Puerto Rico Tourism Company	SRF	2970-1720-180000-0001-007-2023/011-32230623	$7,951,122	6/30/2025

Observation: The Oversight Board approves the prior year fund release in the amount of $7,951,122 to support the Public Building Authority ("PBA") and the Department of Public Safety ("DPS") in the modernization of the Loiza Street police station and the purchase of uniforms, equipment and vehicles. In addition, the Oversight Board approves an interagency cash transfer in order for the Puerto Rico Tourism Company to execute the following transactions: transfer of $7,231,250 to PBA and transfer of $719,872 to DPS. Disbursement of the cash transfer is contingent on PBA and DPS each submitting the appropriate budgetary reprogramming request and obtaining approval from the Oversight Board for the use of the transferred funds.

7. 2025-39364 Department of Correction and Rehabilitation (137) - Reapportionment from FY2025 SRF professional services to cover prior period debts and other operational expenses related to payroll of inmates for jobs performed as part of their rehabilitation process.

Determination: Approved
Approved amount: $1,820,000

FY	Entity	Fund	Program	Concept	Object	JR Tag	Certified Budget	Budget As Is	Adjustment	Revised Budget
25	Department of Correction and Rehabilitation	SRF	N/A - no program breakout	Professional Services	Information technology (IT) professional services	N/A - not a special appropriation item	$2,202,000	$2,202,000	-$500,000	$1,702,000
25	Department of Correction and Rehabilitation	SRF	N/A - no program breakout	Professional Services	Other professional services	N/A - not a special appropriation item	$4,374,000	$4,374,000	-$1,320,000	$3,054,000
25	Department of Correction and Rehabilitation	SRF	N/A - no program breakout	Other Operating Expenses	Other operating expenses	N/A - not a special appropriation item	$689,000	$689,000	$100,000	$789,000
25	Department of Correction and Rehabilitation	SRF	N/A - no program breakout	Prior Periods Debts	Payments of current and prior period obligations	N/A - not a special appropriation item	$1,800,000	$1,800,000	$1,720,000	$3,520,000

8. 2025-35758 Department of Health (071) – Reapportionment from professional services and new object allocation to cover fringe benefit expenses.

Determination: Approved
Approved amount: $2,974

FY	Entity	Fund	Program	Concept	Object	JR Tag	Certified Budget	Budget As Is	Adjustment	Revised Budget
25	Department of Health	GF	N/A - no program breakout	Professional Services	Other professional services	For the Commission for the Implementation of Public Policy in the Prevention of Suicide, as provided in Law 227-1999, as amended	$30,000	$30,000	-$2,974	$27,026
25	Department of Health	GF	N/A - no program breakout	Payroll and Related Costs	Other payroll	For the Commission for the Implementation of Public Policy in the Prevention of Suicide, as provided in Law 227-1999, as amended	$0	$0	$2,974	$2,974

9. 2025-00010M Assignments under the custody of the Office of Management and Budget (017) - Interagency transfer, fund extension and prior year fund release until June 30, 2025, from Assignment under the custody of the OMB to various government agencies to cover the payroll expenses for FY2024 and FY2025 related to the employees that should have been included to receive salary increases pertaining to the second phase implementation of the Civil Service Reform adjustment in June 2024.

Determination: Approved with Observations
Approved amount: $615,316

FY	Entity	Fund	Program	Concept	Object	JR Tag	Certified Budget	Budget As Is	Adjustment	Revised Budget
24	Assignments under the custody of the Office of Management and Budget	GF	N/A - no program breakout	Payroll and Related Costs	Other payroll	To implement Civil Service Reform	$95,710,000	$79,886,706	-$39,221	$79,847,485
24	Puerto Rico Planning Board	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$4,534,000	$4,541,938	$6,603	$4,548,541
24	Office of The Commissioner of Insurance	SRF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$0	$4,656	$448	$5,104
24	Puerto Rico Department of the Treasury	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$54,537,000	$51,211,926	$2,598	$51,214,524
24	Puerto Rico Department of Justice	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$72,517,000	$68,990,993	$196	$68,991,189
24	Special Investigation	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$2,741,000	$3,271,374	$1,783	$3,273,157
24	Puerto Rico National Guard	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$4,144,000	$4,274,970	$286	$4,275,256
24	Puerto Rico Department of Natural and Environmental Resources	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$31,617,000	$29,309,664	$3,199	$29,312,863
24	Puerto Rico Department of Labor and Human Resources	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$4,676,000	$4,611,481	$255	$4,611,736
24	Puerto Rico Labor Relations Board	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$390,000	$384,558	$676	$385,234
24	Department of Housing	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$8,723,000	$6,879,932	$448	$6,880,380
24	Institute of Puerto Rican Culture	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$4,200,000	$4,023,829	$2,873	$4,026,702
24	Department of Recreation and Sports	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$8,440,000	$10,801,463	$1,361	$10,802,824
24	Mental Health and Drug Addiction Services Administration	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$10,347,000	$9,631,603	$72	$9,631,675
24	Public Housing Administration	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$2,134,000	$2,125,510	$791	$2,126,301
24	Vocational Rehabilitation Administration	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriatio	$2,090,000	$2,176,047	$1,664	$2,177,711

						n item				
24	Department of Correction and Rehabilitation	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$157,411,000	$139,537,758	$995	$139,538,753
24	Parole Board	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$1,230,000	$1,286,424	$56	$1,286,480
24	Elderly and Retired People Advocate Office	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$612,000	$621,388	$3,459	$624,847
24	Administration for Integral Development of Childhood	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$965,000	$946,421	$2,433	$948,854
24	Puerto Rico Gaming Commission	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$742,000	$751,832	$8,389	$760,221
24	Public Service Regulatory Board	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$1,505,000	$1,181,097	$636	$1,181,733
25	Assignments under the custody of the Office of Management and Budget	GF	N/A - no program breakout	Payroll and Related Costs	Other payroll	To implement Civil Service Reform	$78,032,000	$62,846,107	-$576,095	$62,270,012
25	Puerto Rico Planning Board	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$4,718,000	$4,718,000	$109,224	$4,827,224
25	Puerto Rico Department of the Treasury	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$57,231,000	$56,327,729	$62,343	$56,390,072
25	Puerto Rico Department of Justice	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$74,578,000	$80,814,023	$4,702	$80,818,725
25	Special Investigation	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$4,007,000	$4,007,000	$42,791	$4,049,791
25	Puerto Rico National Guard	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$5,661,000	$5,583,276	$6,852	$5,590,128
25	Puerto Rico Department of Natural and Environmental Resources	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$31,718,000	$31,145,600	$66,333	$31,211,933
25	Puerto Rico Labor Relations Board	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$409,000	$403,000	$16,213	$419,213
25	Institute of Puerto Rican Culture	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$4,616,000	$4,616,000	$68,947	$4,684,947
25	Department of Recreation and Sports	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$11,935,000	$11,935,000	$32,661	$11,967,661
25	Mental Health and Drug Addiction Services Administration	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$12,342,000	$10,588,232	$1,720	$10,589,952
25	Vocational Rehabilitation Administration	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$4,193,000	$4,193,000	$39,933	$4,232,933
25	Department of	GF	N/A - no	Payroll and	Salaries	N/A - not a	$163,826,000	$153,025,107	$23,878	$153,049,588

	Correction and Rehabilitation		program breakout	Related Costs		special appropriation item				
25	Parole Board	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$1,478,000	$1,451,288	$1,347	$1,452,635
25	Elderly and Retired People Advocate Office	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$525,000	$525,000	$83,013	$608,013
25	Administration for Integral Development of Childhood	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$1,492,000	$1,450,708	$4,363	$1,455,071
25	Public Service Regulatory Board	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$667,000	$619,586	$11,775	$631,361

Request	Determination	Agency	Fund	Account	Amount	Date of extension
00010M	Approved	(152)-Elderly and Retired People Advocate Office	GF	111-1520000-1091-001-2024	$3,459	6/30/2025
00010M	Approved with Observations	(022)-Office of The Commissioner of Insurance	GF	111-0220000-1236-001-2024	$448	6/30/2025
00010M	Approved	(068)-Puerto Rico Labor Relations Board	GF	111-0680000-2009-001-2024	$676	6/30/2025
00010M	Approved with Observations	(298)-Public Service Regulatory Board	GF	111-2980000-0001-001-2024	$636	6/30/2025
00010M	Approved	(018)-Puerto Rico Planning Board	GF	111-0180000-0001-001-2024	$6,603	6/30/2025
00010M	Approved	(139)-Parole Board	GF	111-1390000-1214-001-2024	$56	6/30/2025
00010M	Approved	(082)-Institute of Puerto Rican Culture	GF	111-0820000-0001-001-2024	$2,873	6/30/2025
00010M	Approved	(043)-Puerto Rico National Guard	GF	111-0430000-0001-001-2024	$286	6/30/2025
00010M	Approved with Observations	(078)-Department of Housing	GF	111-0780000-0001-001-2024	$448	6/30/2025
00010M	Approved	(067)-Puerto Rico Department of Labor and Human Resources	GF	111-0670000-0001-001-2024	$255	6/30/2025
00010M	Approved	(041)-Special Investigation	GF	111-0450041-1192-001-2024	$1,783	6/30/2025
00010M	Approved with Observations	(050)-Puerto Rico Department of Natural and Environmental Resources	GF	111-0500000-0001-001-2024	$3,199	6/30/2025
00010M	Approved	(087)-Department of Recreation and Sports	GF	111-0870000-0001-001-2024	$1,361	6/30/2025
00010M	Approved	(038)-Puerto Rico Department of Justice	GF	111-0380000-0001-001-2024	$196	6/30/2025
00010M	Approved	(024)-Puerto Rico Department of the Treasury	GF	111-0240000-0001-001-2024	$2,598	6/30/2025
00010M	Approved	(137)-Department of Correction and Rehabilitation	GF	111-1370000-0001-001-2024	$995	6/30/2025
00010M	Approved	(106)-Public Housing Administration	GF	111-1060000-1125-001-2024	$791	6/30/2025
00010M	Approved	(095)-Mental Health and Drug Addiction Services Administration	GF	111-0950000-0001-001-2024	$72	6/30/2025
00010M	Approved	(126)-Vocational Rehabilitation Administration	GF	111-1260000-1089-001-2024	$1,664	6/30/2025
00010M	Approved	(311)-Puerto Rico Gaming Commission	GF	111-3110000-0001-001-2024	$8,389	6/30/2025
00010M	Approved	(241)-Administration for Integral Development of Childhood	GF	111-2410000-1666-001-2024	$2,433	6/30/2025

Observation: The Oversight Board approves the interagency transfer, fund extension, and prior year fund release in the amount of $615,316 until June 30, 2025, from Assignments under the custody of the OMB to various government agencies to cover the FY2024 and

FY2025 payroll fiscal impact for the employees that did not receive the second phase implementation of the Civil Service Reform adjustment in June 2024. The approved amount by the Oversight Board is $4 over the amount requested by the government to account for rounding differences in the FY2024 interagency transfer.

10. 2025-Legislative 002 Legislative Assembly of the Commonwealth (100) - Interagency transfer from FY2024 Assignments under the custody of the OMB to cover Senate employee liquidation settlements. Additionally, requests an interagency transfer from FY2025 Assignments under the custody of the OMB for the payroll milestone completion for the Legislative Assembly to be released following compliance with monthly reporting requirements.

Determination: Partially Approved
Approved amount: $2,600,000

FY	Entity	Fund	Program	Concept	Object	JR Tag	Certified Budget	Budget As Is	Adjustment	Revised Budget
24	Assignments under the custody of the Office of Management and Budget	GF	N/A - no program breakout	Payroll and Related Costs	Other payroll	Compliance of the Senate with Civil Service Reform and other obligations	$3,600,000	$2,600,000	-$2,600,000	$0
24	Legislative Assembly of the Commonwealth	GF	N/A - no program breakout	Payroll and Related Costs	Other payroll	For employee liquidations of the Senate	$0	$0	$2,600,000	$2,600,000
25	Assignments under the custody of the Office of Management and Budget	GF	N/A - no program breakout	Payroll and Related Costs	Other payroll	Milestone Incentive for payroll for Legislative Assembly to be released following compliance with monthly reporting requirements	$1,538,000	$1,538,000	$0	$1,538,000
25	Legislative Assembly of the Commonwealth	GF	N/A - no program breakout	Payroll and Related Costs	Salaries	N/A - not a special appropriation item	$0	$0	$0	$0

Observation: The Oversight Board partially approves the interagency transfer in the amount of $2,600,000, from FY2024 Assignments under the custody of the OMB to cover Senate employee liquidation settlements, as agreed during the FY2025 budget development process. The Oversight Board denies the interagency transfer of $384,500 from FY2025 Assignments under the custody of the OMB for the payroll milestone completion for the Legislative Assembly to be released following compliance with monthly reporting requirements, because no budgetary need was identified to consider the early approval and release of the budget milestone incentive.

11. 2025-41064 Puerto Rico Department of Natural and Environmental Resources (050) - Interagency transfer from the FY2025 GF milestone incentive for the leasing of portable flood pumps under the custody of the OMB to provide funds for pump rental services for

flood control at ten (10) pumping stations.

Determination: Approved
Approved amount: $13,440,000

FY	Entity	Fund	Program	Concept	Object	JR Tag	Certified Budget	Budget As Is	Adjustment	Revised Budget
25	Assignments under the custody of the Office of Management and Budget	GF	N/A - no program breakout	Purchased Services	Other purchased services	Milestone incentive for the leasing of portable flood pumps	$15,000,000	$15,000,000	-$13,440,000	$1,560,000
25	Puerto Rico Department of Natural and Environmental Resources	GF	N/A - no program breakout	Purchased Services	Leases (excluding PBA)	Milestone incentive for the leasing of portable flood pumps	$15,000,000	$15,000,000	$13,140,000	$28,140,000
25	Puerto Rico Department of Natural and Environmental Resources	GF	N/A - no program breakout	Materials & Supplies	Other materials and supplies	N/A - not a special appropriation item	$793,000	$793,000	$300,000	$1,093,000

12. 2025-17897 Puerto Rico Infrastructure Financing Authority (161) - Interagency transfer from FY2025 GF appropriations for payments of judgements against the state under the custody of the OMB for the payment of the United Surety & Indemnity Company case (SJ2020CV06906) and for contract 2009-000160 with Torres & Colón, Inc.

Determination: Approved
Approved amount: $203,935

FY	Entity	Fund	Program	Concept	Object	JR Tag	Certified Budget	Budget As Is	Adjustment	Revised Budget
25	Assignments under the custody of the Office of Management and Budget	GF	N/A - no program breakout	Donations, Subsidies and Distributions	Other donations and subsidies	For payments of judgements against the State	$3,999,000	$2,844,764	-$203,935	$2,640,829
25	Puerto Rico Infrastructure Financing Authority	GF	N/A - no program breakout	Donations, Subsidies and Distributions	Other donations and subsidies	N/A - not a special appropriation item	$0	$0	$203,935	$203,935

13. 2025-21728 Office of Management and Budget (016) - Reapportionment of FY2021 appropriations of the Puerto Rico Broadband Program from various cost concepts to cover expenses related to FY2025 payroll and various operational expenses related to the Puerto Rico Broadband Program operations and interagency transfer from FY2021 Assignments under the custody of the OMB to cover sub-grantee projects of the Puerto Rico Broadband Program related to connectivity projects, pole replacements, hardening and resiliency programs, among others.

Determination: Approved with Observations
Approved amount: $74,681,548

FY	Entity	Fund	Program	Concept	Object	JR Tag	Certified Budget	Budget As Is	Adjustment	Revised Budget
21	Office of Management and Budget	GF	N/A - no program breakout	Professional Services	Other professional services	To cover services related to the Telecom Pole Attachment initiative, per the Puerto Rico Telecommunications Bureau determination	$0	$15,000,000	-$15,000,000	$0
21	Office of Management and Budget	GF	N/A - no program breakout	Professional Services	Other professional services	To cover consulting services for capacitation efforts to upskill future Internet Service Provider ("ISP") workers related to the Puerto Rico Broadband Program Workforce Development initiative	$0	$19,500,000	-$15,312,000	$4,188,000
21	Office of Management and Budget	GF	N/A - no program breakout	Professional Services	Other professional services	To cover hardware costs for the Puerto Rico Innovation and Technology Services ("PRITS") Data Center initiative in correlation to the Puerto Rico Broadband Program Government Services initiative	$0	$30,000,000	-$30,000,000	$0
21	Office of Management and Budget	GF	N/A - no program breakout	Professional Services	Other professional services	To cover legal services related to the Puerto Rico Broadband Program	$0	$592,000	-$56,176	$535,824
21	Office of Management and Budget	GF	N/A - no program breakout	Professional Services	Other professional services	To cover design and engineering services related to the Island-Wide Conduit system project per the Puerto Rico Broadband Program's Buried Fiber Design initiative	$0	$10,500,000	-$10,500,000	$0
21	Office of Management and Budget	GF	N/A - no program breakout	Professional Services	Other professional services	To cover service costs for the development of a connectivity network for the Puerto Rico Broadband Program's La Perla initiative	$0	$900,000	-$900,000	$0
21	Office of Management and Budget	GF	N/A - no program breakout	Professional Services	Other professional services	Puerto Rico Broadband Program Contingency Reserve	$0	$6,055,729	-$377,729	$5,678,000
21	Office of	GF	N/A - no	Other	Other	To cover	$0	$300,000	-$231,035	$68,965

	Management and Budget		program breakout	Operating Expenses	operating expenses	monthly subscription of the Grant Management platform related to the Puerto Rico Broadband Program				
21	Office of Management and Budget	GF	N/A - no program breakout	Materials & Supplies	Other materials and supplies	To cover the purchase of materials and supplies for the Puerto Rico Broadband Program's La Perla initiative	$0	$200,000	-$173,930	$26,070
21	Office of Management and Budget	GF	N/A - no program breakout	Equipment Purchases	Other equipment purchases	For the Puerto Rico Broadband Program	$0	$67,500	-$28,457	$39,043
21	Assignments under the custody of the Office of Management and Budget	GF	N/A - no program breakout	Incentives and Subsidies - Social Wellness	Other social well-being for Puerto Rico	Broadband Infrastructure Expansion	$400,000,000	$222,143,772	-$2,102,221	$220,041,551
21	Office of Management and Budget	GF	N/A - no program breakout	Payroll and Related Costs	Other payroll	To cover new positions upon implementation of the Puerto Rico Broadband Program	$0	$1,499,306	$208,750	$1,708,056
21	Office of Management and Budget	GF	N/A - no program breakout	Facilities and Rent	Other facilities costs	For the Puerto Rico Broadband Program	$0	$6,300	$5,218	$11,518
21	Office of Management and Budget	GF	N/A - no program breakout	Purchased Services	Other purchased services	For the Puerto Rico Broadband Program	$0	$25,000	$8,656	$33,656
21	Office of Management and Budget	GF	N/A - no program breakout	Transportation	Other transportation	For the Puerto Rico Broadband Program	$0	$30,480	$15,324	$45,804
21	Office of Management and Budget	GF	N/A - no program breakout	Professional Services	Other professional services	To cover grant administration and oversight, marketing, telecomunications, and other consulting services related to the Puerto Rico Broadband Program	$0	$7,859,400	$1,271,266	$9,130,666
21	Office of Management and Budget	GF	N/A - no program breakout	Professional Services	Other professional services	To cover an independent assessment of the Telecom Pole Attachments, per the Puerto Rico Telecommunications Bureau determination	$0	$1,500,000	$5,500,000	$7,000,000
21	Office of Management and Budget	GF	N/A - no program breakout	Professional Services	Other professional services	To cover feasibility and technical studies, project inspections, and field studies for the Puerto Rico Broadband Program	$0	$0	$2,200,000	$2,200,000
21	Office of Management and Budget	GF	N/A - no program breakout	Professional Services	Other professional services	Services for the study and development of a system that will evaluate the quality of broadband	$0	$3,000,000	$5,000,000	$8,000,000

						service for end users per the Puerto Rico Broadband Program's Quality of Service initiative				
21	Office of Management and Budget	GF	N/A - no program breakout	Equipment Purchases	Other equipment purchases	To cover acquisition of Grant Management Software for the Puerto Rico Broadband Program	$0	$0	$750,000	$750,000
21	Office of Management and Budget	GF	N/A - no program breakout	Non Government Entities	Other appropriations to non-governmental entities	To cover expansion efforts related to Projects & Sub-Grantees related to the Puerto Rico Broadband Program	$0	$78,882,938	$59,722,334	$138,605,272

Observation: The Oversight Board approves with observations the request in the amount of $74,681,548. Approve the reapportionment in the amount of $72,579,327 instead of the requested amount of $16,959,061, from various cost concepts to cover the Puerto Rico Broadband Projects FY2025 payroll ($208,750), facilities and rent ($5,218), purchased services ($8,656), transportation ($15,324), professional services ($13,971,266), equipment purchases ($750,000), and for non-government - sub-grantee projects ($57,620,113). Approve the interagency transfer in the amount of $2,102,221, instead of the requested amount of $57,118,252, from FY2021 appropriations under the custody of the OMB.

The Puerto Rico Broadband Program team confirmed that various projects would be cancelled, reprioritized, and/or addressed through Sub-Grantee Projects; as such, the Puerto Rico Broadband Program within the Office of Management and Budget, and the Oversight Board's Economic Growth and Development team identified $55,620,266 appropriations under the Broadband Program's FY2021 General Fund Certified Budget to cover the Sub-Grantee Projects through reapportionments, reducing the amount needed through the interagency transfer. Therefore, the total approved amount by the Oversight Board is $604,235 over the amount requested by the Government given that the cancelled projects funds that are being reapportioned exceeded the Puerto Rico Broadband Projects initial projection from professional services to non-government entities, sub-grantee projects.

The Office of Management and Budget is required to submit a monthly progress report on the Puerto Rico Broadband Program, along with a detailed account of how the funds are being used, as agreed in meetings with the Oversight Board. This includes a fiscal year breakdown of the budgeted funds and a detailed breakdown by projects. Most of the projects fall under the professional services and sub-grantees categories, and the disbursement for each initiative must be clearly illustrated. Additionally, key milestones

for each project must be included to track their progress and ensure proper budgeting for future years based on the respective action plans.

14. 2025-18202 General Services Administration (031) - Interagency transfer from capital expenditures appropriations under the custody of the OMB to cover capital expenditures for the integration of the JEDI 2.0 procurement tool in seven additional government agencies and instrumentalities including the Department of Education, and to acquire additional services to support the government Enterprise Resource Planning ("ERP") procurement module.

Determination: Partially Approved
Approved amount: $1,000,000

FY	Entity	Fund	Program	Concept	Object	JR Tag	Certified Budget	Budget As Is	Adjustment	Revised Budget
25	Assignments under the custody of the Office of Management and Budget	GF	N/A - no program breakout	Capital Expenditures	Other capex	For ERP Implementation related to GSA's JEDI 1.0 and JEDI 2.0 subject to ERP Steering Committee and FOMB approval	$3,400,000	$3,000,000	-$1,000,000	$2,000,000
25	General Services Administration	GF	N/A - no program breakout	Capital Expenditures	Other capex	To cover the integration of the JEDI 2.0 procurement tool in government agencies and instrumentalities	$0	$0	$1,000,000	$1,000,000

Observation: The Oversight Board partially approves the interagency transfer in the amount of $1,000,000 from Assignments under the custody of the OMB to cover capital expenditures for the integration of the JEDI 2.0 procurement tool in seven additional government agencies and instrumentalities, including the Department of Education. However, for any integration between JEDI 2.0 and the Department of Education's SIFDE system, the General Services Administration must coordinate with the ERP Steering Committee before taking any action to ensure alignment with the ERP implementations. The Oversight Board denies the interagency transfer in the amount of $441,000 from capital expenditures appropriations under the custody of the OMB to acquire additional services to support the government ERP procurement module since no resources and/or proposals have been identified and no action plan of the technical resources needed to support the request was provided.

15. 2025-39843 Retirement Board of the Government of Puerto Rico (312) - Interagency transfer from Assignments under the custody of the OMB to cover non-recurring PayGo expenses associated with death benefits for beneficiaries and the reimbursement of contributions to participants.

Determination: Approved
Approved amount: $5,486,000

FY	Entity	Fund	Program	Concept	Object	JR Tag	Certified Budget	Budget As Is	Adjustment	Revised Budget
25	Assignments under the custody of the Office of Management and Budget	GF	N/A - no program breakout	PayGo	Payments to PayGo	Reserve for non-recurring expenses associated with PayGo	$35,800,000	$24,258,000	-$5,486,000	$18,772,000
25	Retirement Board of the Government of Puerto Rico	GF	N/A - no program breakout	PayGo	Payments to PayGo	Non-recurring expenses associated with PayGo	$0	$11,542,000	$5,486,000	$17,028,000

16. 2025-40620 Puerto Rico Department of Transportation and Public Works (049) - Interagency transfer from Assignments under the custody of the OMB to cover prior period contract fees owed to the electronic transit fine service providers.

Determination: Approved
Approved amount: $2,957,666

FY	Entity	Fund	Program	Concept	Object	JR Tag	Certified Budget	Budget As Is	Adjustment	Revised Budget
25	Assignments under the custody of the Office of Management and Budget	GF	N/A - no program breakout	Undistributed Appropriations	Undistributed Appropriations	Payment of outstanding liabilities	$8,433,000	$8,433,000	-$2,957,666	$5,475,334
25	Puerto Rico Department of Transportation and Public Works	GF	N/A - no program breakout	Prior Periods Debts	Payments of current and prior period obligations	To cover prior period contract dues owed to the electronic transit fine service providers.	$0	$0	$2,957,666	$2,957,666

17. 2025-00014M Assignments under the custody of the Office of Management and Budget (017) Interagency transfer and prior year fund release until June 30, 2025, from Assignments under the custody of the OMB to the custody of the Treasury to distribute the funds to the Parroquia Nuestra Señora del Pilar to cover the FEMA recovery state fund matching for the restoration of the historic building of Nuestra Señora del Pilar in San Juan.

Determination: Approved
Approved amount: $250,000

FY	Entity	Fund	Program	Concept	Object	JR Tag	Certified Budget	Budget As Is	Adjustment	Revised Budget
24	Assignments under the custody of the Office of Management and Budget	GF	N/A - no program breakout	Capital Expenditures	Construction / Infrastructure	For the Institute of Puerto Rican Culture, for matching, for permanent works and improvements to the Nuestra Señora del Pilar	$0	$250,000	-$250,000	$0

						Historic Building in San Juan				
24	Assignments under the custody of the Department of the Treasury	GF	N/A - no program breakout	Undistributed Appropriations	Undistributed Appropriations	For the Institute of Puerto Rican Culture, for matching, for permanent works and improvements to the Nuestra Señora del Pilar Historic Building in San Juan	$0	$0	$250,000	$250,000

Request	Determination	Agency	Fund	Account	Amount	Date of extension
00014M	Approved	(025)-Assignments under the custody of the Department of the Treasury	GF	141-0250000-1640-081-2024	$250,000	6/30/2025

18. 2025-21201 Department of Recreation and Sports (087) - Prior year fund release until June 30, 2025, and interagency transfer from FY2024 GF undistributed appropriations - *Spending reserve for current liabilities* under the custody of the OMB to multiple FY2024 accounts (purchased services, professional services, materials and supplies, appropriations to non-governmental entities and other operating expenses) to cover various agency needs.

Determination: Approved
Approved amount: $286,828

FY	Entity	Fund	Program	Concept	Object	JR Tag	Certified Budget	Budget As Is	Adjustment	Revised Budget
24	Assignments under the custody of the Office of Management and Budget	GF	N/A - no program breakout	Undistributed Appropriations	Undistributed Appropriations	Spending reserve for current liabilities	$110,712,000	$62,311,354	-$286,828	$62,024,526
24	Department of Recreation and Sports	GF	N/A - no program breakout	Purchased Services	Other purchased services	N/A - not a special appropriation item	$676,000	$1,386,555	$65,082	$1,451,637
24	Department of Recreation and Sports	GF	N/A - no program breakout	Professional Services	Other professional services	N/A - not a special appropriation item	$50,000	$50,000	$112,500	$162,500
24	Department of Recreation and Sports	GF	N/A - no program breakout	Other Operating Expenses	Other operating expenses	N/A - not a special appropriation item	$50,000	$70,274	$59,246	$129,520
24	Department of Recreation and Sports	GF	N/A - no program breakout	Non Government Entities	Other appropriations to non-governmental entities	N/A - not a special appropriation item	$0	$240,000	$50,000	$290,000

Request	Determination	Agency	Fund	Account	Amount	Date of extension
21201	Approved	(087)-Department of Recreation and Sports	GF	111-0870000-1157-014-2024	$50,000	6/30/2025
21201	Approved	(087)-Department of Recreation and Sports	GF	111-0870000-0001-007-2024	$59,246	6/30/2025
21201	Approved	(087)-Department of Recreation and Sports	GF	111-0870000-0001-006-2024	$112,500	6/30/2025

21201	Approved	(087)-Department of Recreation and Sports	GF	111-0870000-0001-003-2024	$65,082	6/30/2025

19. 2025-35186 Department of Health (071) **AMENDED** - Reapportionment and a prior year fund release until June 30, 2025, to provide specialized assistance to qualified medically indigent patients and the payment of outstanding debts from previous years.

Determination: Approved
Approved amount: $1,373,500

FY	Entity	Fund	Program	Concept	Object	JR Tag	Certified Budget	Budget As Is	Adjustment	Revised Budget
24	Department of Health	SRF	N/A - no program breakout	Facilities and Rent	Other facilities costs	N/A - not a special appropriation item	$362,000	$195,050	-$61,707	$133,343
24	Department of Health	SRF	N/A - no program breakout	Purchased Services	Other purchased services	N/A - not a special appropriation item	$4,373,000	$4,763,920	-$26,599	$4,737,321
24	Department of Health	SRF	N/A - no program breakout	Transportation	Other transportation	N/A - not a special appropriation item	$2,485,000	$1,924,800	-$164,385	$1,760,415
24	Department of Health	SRF	N/A - no program breakout	Other Operating Expenses	Other operating expenses	N/A - not a special appropriation item	$1,974,000	$1,714,296	-$176,260	$1,538,036
24	Department of Health	SRF	N/A - no program breakout	Materials & Supplies	Other materials and supplies	N/A - not a special appropriation item	$4,841,000	$4,073,360	-$305,005	$3,768,355
24	Department of Health	SRF	N/A - no program breakout	Equipment Purchases	Other equipment purchases	N/A - not a special appropriation item	$1,861,000	$1,827,443	-$365,000	$1,462,443
24	Department of Health	SRF	N/A - no program breakout	Advertisement	Media and Advertisements	N/A - not a special appropriation item	$410,000	$431,000	-$274,544	$156,456
24	Department of Health	SRF	N/A - no program breakout	Non Government Entities	Other appropriations to non-governmental entities	For the Catastrophic Disease Fund, as provided in Law 150-1996, as amended	$3,000,000	$3,000,000	$900,153	$3,900,153
24	Department of Health	SRF	N/A - no program breakout	Prior Periods Debts	Payments of current and prior period obligations	For the Catastrophic Disease Fund, as provided in Law 150-1996, as amended	$0	$0	$473,347	$473,347

Request	Determination	Agency	Fund	Account	Amount	Date of extension
35186	Approved	(071)-Department of Health	SRF	410-0710000-089-2024	$473,347	6/30/2025
35186	Approved	(071)-Department of Health	SRF	410-0710000-014-2024	$900,153	6/30/2025
35186	Approved	(071)-Department of Health	SRF	410-0710000-782-2024	$1,373,500	6/30/2025

OMB shall allocate the approved amounts in the appropriate PRIFAS accounts and communicate the current budgetary allocations by cost object to the relevant agencies.

We trust the foregoing answers to the requests identified herein and look forward to continuing our work together for the benefit of the people of Puerto Rico.

Sincerely,

Robert F. Mujica, Jr.
Executive Director

CC: Hon. Omar J. Marrero Díaz
Mr. Nelson Pérez Méndez
Hon. Alexis Torres Ríos
Hon. Ana Escobar Pabón
Gen. Miguel Méndez Fontánez
Mr. Carlos Mercado Santiago
Hon. Carlos Mellado López
Mr. Julio Lassús Ruiz
Mr. Alexander Adams Vega
Hon. Domingo Emanuelli Hernández
Mr. Rafael Freytes Cutrera
Hon. Anaís Rodríguez Vega
Ms. Nahiomy Álamo Rivera
Ms. Nancy Berríos Díaz
Mr. William Rodríguez Rodríguez
Mr. Carlos Ruiz Cortés
Hon. Ray Quiñones Vázquez
Ms. Carmen Bonet Vázquez
Mr. Alejandro Salgado Colón
Ms. Némesis Vargas Ortiz
Ms. Aixa Pérez Mink
Hon. Ciení Rodríguez Troche
Mr. Juan Santaella Marchán
Mr. Edison Avilés Deliz
Mr. Eduardo Rivera Cruz
Ms. Karla Mercado Rivera
Mr. Luis Collazo Rodríguez
Hon. Eileen Vélez Vega
Ms. Carmen Sánchez Salgado
Hon. José Dalmau Santiago

Exhibit 6

Bhatia Gautier v. Rosselló Nevares

Supreme Court of Puerto Rico

September 15, 2017, Decided

CC-2017-668

Reporter
2017 PR Sup. LEXIS 180 *; 2017 TSPR 173; 199 D.P.R. 59

HON. EDUARDO BHATIA GAUTIER, in his capacity as Minority Leader for the POPULAR DEMOCRATIC PARTY in the PUERTO RICO SENATE, respondent, v. HON. RICARDO ROSSELLÓ NEVARES, in his capacity as GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO, and the COMMONWEALTH OF PUERTO RICO, petitioners.

Prior History: CERTIORARI to review a RESOLUTION issued by Erik J. Ramírez Nazario, Luisa M. Colom García, and Giselle Romero García, JJ. of the Court of Appeals denying the issuance of a writ of certiorari requested by the Government of Puerto Rico. Without further proceeding and under Supreme Court Rule 50, 4 LPRA App. XXI-B **[*1]** , the requested writ of certiorari is issued and the Resolution and Order of July 26, 2017, issued by the Court of First Instance regarding the production of the document at issue for inspection in chambers is reversed in part. In addition, said Resolution and Order is affirmed in all other aspects that are compatible with this opinion. The stay is lifted and the case is remanded to the trial court for further proceedings consistent with this decision.

Core Terms

inspect, executive privilege, in camera, proposed budget, trial court, public document, public information, confidentiality, budget, disclosure, deliberative process, request information, mandamus, assembly, moot, oversight, constitutional right, official information, derecho, deliberative, claim of privilege, prerogative, probatorio, public policy, access to information, course of action, caselaw, petition for certiorari, chamber, governor's

Headnotes/Summary

Headnotes

1. COURTS—NATURE, EXTENT, AND EXERCISE OF JURISDICTION—IN GENERAL—JUSTICIABLE CONTROVERSY.

Courts may only entertain justiciable cases. A controversy is not justiciable where (1) it presents a political question, (2) one of the parties lacks standing, (3) events taking place after the action is commenced renders the controversy moot, (4) the parties are attempting to obtain an advisory opinion, or (5) the case is not ripe.

2. PARTIES—PLAINTIFFS—PERSONS WHO MAY OR MUST SUE—LEGAL **[*2]** CAPACITY OR STANDING TO SUE.

"Standing" has been defined as the capacity required of the party bringing suit to appear as a litigant before the court and effectively carry out procedural acts, thereby obtaining a binding judgment.

3. ID.—ID.—ID.—ID.

To show that they have standing, the plaintiff must establish the following: (1) they have suffered clear and palpable injury; (2) the injury is real, immediate, and distinct, not abstract or hypothetical; (3) there is a connection between the injury suffered and the cause of action filed; and (4) the cause of action arises under the Constitution or a law.

4. ID.—ID.—ID.—ID.—LEGISLATIVE STANDING.

Legislators have standing to vindicate a personal interest in the full exercise of their legislative powers that have been affected by the actions or omissions of the Executive Branch, among other capacities. In these scenarios, they must show that their constitutional or statutory rights have been infringed.

5. ID.—ID.—ID.—ID.

In order for a legislator to show standing, they must satisfy the same requirements all citizens must meet. To do this, they must establish that they have suffered clear and immediate injury to their legislative prerogatives, making **[*3]** sure not to invoke an abstract prerogative or one that is far removed from the exercise of their legislative functions. Similarly, such legislators must show a connection between the injury they have allegedly suffered and the action they have brought.

6. CONSTITUTIONAL LAW—DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS—JUDICIAL POWERS AND FUNCTIONS—ENCROACHMENT ON THE JUDICIARY—RESTRICTION ON THE JURISDICTION OF THE COURTS—MOOTNESS.

The mootness doctrine requires that there be an actual controversy between the parties in all cases brought before a court. A case becomes moot when the matter at issue succumbs to the passage of time, whether due to changes in the facts or the law. The consequence of this would be that the ruling eventually rendered by the court would not have any practical effect on the parties.

7. ID.—ID.—ID.—ID.—ID.—ID.—EXCEPTION.

There may be situations where courts may hear the case even though it is clearly moot. In keeping with the above, the exceptions to mootness apply where (1) an issue that is capable of repetition and tends to evade judicial review is brought before the courts; (2) the defendant has altered the factual situation, but the change does not seem **[*4]** to be permanent; and (3) where aspects of the controversy have become moot, but collateral consequences subsist.

8. MANDAMUS—NATURE AND GROUNDS IN GENERAL—RELIEF IN GENERAL.

A mandamus is a high prerogative, extraordinary remedy directed to a natural or legal person with the purpose of demanding compliance through court order of a ministerial duty which appertains to the office they hold. As a rule, prior to petitioning the court, the interested party must make a demand to the government official responsible for complying with the ministerial duty demanded. A party may be exempted from the interpellation requirement where doing so would be futile or where the duty claimed is of a public nature, that is, where it affects the general public and not the moving party exclusively.

9. ID.—SUBJECTS AND PURPOSES OF RELIEF—MANDAMUS TO PUBLIC OFFICERS, BOARDS AND MUNICIPALITIES—PUBLIC OR OFFICIAL DOCUMENTS.

A mandamus is usually an appropriate mechanism to compel inspection and to obtain copies of public documents. When entertaining a petition for mandamus, courts must consider the possible impact of their decision on the public interests involved and avoid any undue interference in matters that **[*5]** pertain to the Executive Branch.

10. CONSTITUTIONAL LAW—PERSONAL, CIVIL, AND POLITICAL RIGHTS—RIGHT OF ACCESS TO INFORMATION ON PUBLIC UNDERTAKINGS.

In *Soto v. Srio. de Justicia*, 112:477 [12:597], the Supreme Court recognized the right of the press and citizens in general to access public information as a fundamental right of constitutional ilk. This right is firmly associated with the exercise of the rights of freedom of speech, of the press, and of association that are formally enshrined in *Article II, Section 4 of the Constitution of Puerto Rico, PR Const. art. II, § 4, LPRA tit. 1*.

11. ID.—ID.—ID.

Access to public information constitutes a fundamental pillar of any democratic society. This knowledge allows citizens to adequately evaluate and oversee public functions, while contributing to effective public participation in the governmental processes that impact their social milieu.

12. ID.—ID.—ID.—PUBLIC DOCUMENTS.

Section 409 of the Code of Civil Procedure, 32 LPRA § 1781, recognizes the right of all citizens to inspect and copy any public document of Puerto Rico. The right to information, however, does not operate in a vacuum. It is necessary that the document intended to be disclosed is in fact of a public nature.

13. ID.—ID.—ID.—ID.

Our legal framework defines the term "public document" as any document which originates, or is kept **[*6]** or received in any dependency of the Commonwealth of Puerto Rico according to the law or in relation to the management of public affairs and that is required to be permanently or temporarily preserved as evidence of transactions or for its legal value. It includes those

documents produced electronically which meet the requirements established by law and regulations.

14. ID.—ID.—ID.

The right to information is not absolute and is subject to those limitations that the State may impose for compelling reasons. However, these restrictions must be duly justified since the right of access to public information cannot be denied arbitrarily or capriciously. As this is a fundamental right, in order to prevail, the restrictions imposed by the state apparatus must be in furtherance of a compelling government interest.

15. ID.—ID.—ID.—PUBLIC DOCUMENTS—VALID CLAIMS OF CONFIDENTIALITY BY THE STATE.

The State may validly make a claim of privilege concerning information in its possession when (1) it is provided by law, (2) the communication is protected by any of the evidentiary privileges a citizen may assert, (3) disclosing the information may injure the fundamental rights of third parties, (4) the identity **[*7]** of an informant is involved, and (5) it is "official information" under Evidence Rule 514 (32 LPRA App. VI).

16. RULES OF EVIDENCE—PRIVILEGES—OFFICIAL INFORMATION—IN GENERAL.

Evidence Rule 514 (32 LPRA App. VI) provides what is known as "privilege for official information" in our jurisdiction. It defines "official information" as that which is acquired in confidence by a public officer or employee in the course of their duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made. This privilege accrues if the court finds that said matter is official information and disclosure is forbidden by law, or that disclosure of such information in the proceeding is against government interests.

17. ID.—ID.—ID.—ID.

Courts must be cautious to lightly grant any request for privilege by the State. When evaluating whether to recognize the privilege, the alternatives of an in camera inspection or providing limited access to the confidential file are always available. However, the option of an in camera inspection may be limited according to the circumstances of each case.

18. ID.—ID.—ID.—ID.

o avail itself from the deliberative process privilege, the State must comply with the following: (1) the head of **[*8]** the agency with control over the information must make a formal claim after careful consideration, (2) an agency official must provide the precise reasons for which the confidentiality of the information or documents is claimed, and (3) the government must identify and describe the information or the documents it wishes to protect.

19. ID.—ID.—ID.—ID.

To assert the privilege, the government must show that the document in question is "deliberative" and "pre-decisional." Therefore, the information or document is also not privileged subsequent to the government's decision. Pursuant to the above, this privilege does not cover

factual matters. Nor does it protect objective materials or documents in which the agency adopts its position on a matter or a controversy.

20. ID.—ID.—ID.—ID.

To determine whether this privilege prevails, similar to the privilege for official information, a balance of interests must be made. Additionally, the court must evaluate the effect that disclosure would have on the frank discussion of the policies and decisions in question. In short, this privilege may yield when it has been thoroughly shown that the particular need to obtain the information overrides the reasons **[*9]** for non-disclosure.

21. CONSTITUTIONAL LAW—DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS—EXECUTIVE POWERS AND FUNCTIONS—EXECUTIVE PRIVILEGE.

Executive privilege seeks to protect communications between the Chief Executive and his or her subordinates, advisors, or aides. As compared to the privilege on state secrets, executive privilege is of a lower rank. The latter is qualified; therefore, it does not grant the Executive Branch absolute power to withhold information because of its alleged confidentiality.

22. ID.—PERSONAL, CIVIL, AND POLITICAL RIGHTS—RIGHT OF ACCESS TO INFORMATION ON PUBLIC UNDERTAKINGS—PUBLIC DOCUMENTS—VALID CLAIMS OF CONFIDENTIALITY BY THE STATE.

Although the Freedom of Information Act allows for the in-chambers examination of documents, this alternative has been repeatedly disfavored in cases where certain governmental privileges are claimed. Moreover, it should not be the first alternative since the State must initially be afforded an opportunity to justify and demonstrate its claim of confidentiality. This may be accomplished by allowing the State to present a detailed explanation of the privilege asserted, which may serve as a substitute for in camera inspection **[*10]** of the document at issue. Were the court to determine at this stage that the privilege is in order, in camera inspection shall not be required.

Counsel: Luis R. Román Negrón, Solicitor General, and Amir Cristina Nieves Villegas, Assistant Solicitor General, counsel for petitioners.

Margarita Mercado Echegaray, counsel for respondent.

Judges: JUSTICE FELIBERTI CINTRÓN delivered the opinion of the Court. JUSTICE KOLTHOFF CARABALLO, concurring. CHIEF JUSTICE ORONOZ RODRÍGUEZ, dissenting. JUSTICE RODRÍGUEZ RODRÍGUEZ, dissenting. JUSTICE ESTRELLA MARTÍNEZ, dissenting. JUSTICE COLÓN PÉREZ, dissenting.

Opinion by: FELIBERTI CINTRÓN

Opinion

JUSTICE FELIBERTI CINTRÓN delivered the opinion of the Court.

(Rule 50)

Due to the high degree of public interest surrounding the matters before us, we proceed to discuss whether the dismissal of the case, as requested by the Government of Puerto Rico and its governor, the Hon. Ricardo Rosselló Nevares (Government or petitioners), was in order.[1] If the answer is no, then we must decide whether the trial court's order to produce the budget proposal submitted by the Government on April 30, 2017 to the Financial Oversight and Management Board for an in camera inspection was timely.

I

On May 4, 2017, the Hon. **[*11]** Eduardo Bhatia Gautier (Senator or respondent), in his capacity as Minority Leader of the Popular Democratic Party in the Puerto Rico Senate, filed a petition for a writ of mandamus with the Court of First Instance to order the Government to publish a copy of the Proposed Budget submitted on April 30, 2017, before the Board[2] and to deliver a copy to him.

After several procedural events, on June 26, 2017, the Government moved the court to dismiss[3] the petition for mandamus based on the following reasons: (1) the Senator lacks standing; (2) the cause of action is moot since the final proposed budget had been submitted to the legislative bodies for consideration and approval; (3) the Senator failed to comply with the statutory requirements for filing a petition for mandamus, specifically, with the requirement to exhaust all available legislative proceedings prior to turning to the courts; and (4) granting the requested relief would entail interference with the functions of the Chief Executive and the Legislative Assembly, which would violate the separation of **[*12]** powers. It also posited that the requested document is confidential as it is a work product prepared during the deliberative stage before a final decision had been made and is, therefore, is protected under executive privilege.

On June 29, 2017, the Senator filed a Motion to Oppose the Motion to Dismiss, wherein he alleged that he has standing since he has been exposed to a clear and palpable violation of his prerogatives as a legislator. He also invoked his constitutional right to access public information and documents. He also contended that his petition was not moot since the Government had not

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[1] As this is a dispositive motion, the Court of Appeals had the authority to review its denial through a petition for a writ of certiorari under Puerto Rico Civil Procedure Rule 52.1, 32 LPRA App. V.

[2] By express provision of the *Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 USCA § 2101 et seq.*, the governor of Puerto Rico, Hon. Ricardo Rosselló Nevares, was bound to submit a budget proposal before the Financial Oversight and Management Board (Board) prior to remitting it to the Puerto Rico Legislature for consideration. *48 USCA § 2142*.

We must mention that *Section 101(c) of PROMESA, 48 USCA § 2121(c)* provides as follows:

"*SEC. 101. FINANCIAL OVERSIGHT AND MANAGEMENT BOARD*.

"(c) TREATMENT.—*An Oversight Board* established under this section—

(1) *shall be created as an entity within the territorial government* for which it is established in accordance with this title; and

(2) shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government." Puerto Rico Oversight, Management, and Economic Stability Act, 114th Cong., 2nd Sess., [in Spanish at] https://juntasupervision.pr.,gov/wp-content/uploads/2017/02/PROMESA_SpanishVersion_02-22-2017.pdf (last visited Sept. 14, 2017). (Emphasis added.)

[3] Pursuant to Puerto Rico Civil Procedure Rule 10.2, 32 LPRA App. V.

confirmed whether the document it submitted to the Board is the same document that was presented for the consideration of the Legislative Assembly. Alternatively, he argued that his claim is capable of repetition, yet may evade judicial review. Moreover, he maintained that he had met all the requirements for the issuance of the writ of mandamus. Finally, he affirmed that the document requested was not a draft or a pre-decision document that contained the substance of the deliberative processes prior to the adoption of the budget and was, thus, not covered by executive privilege. Therefore, **[*13]** he concluded that it must be disclosed pursuant to the constitutional right to access public information.

On July 17, 2017, the Court of First Instance issued an order through which it scheduled a hearing for oral arguments on July 26, 2017 and requested that the Senator (1) place the court in a position to determine whether the petition for mandamus had become moot following the approval of the 2017-2018 Budget, (2) convince the trial court that the case was not a "transfer of the legislative debate to the judicial forum and actually about a genuine impairment of his legislative prerogatives"—Appendix, at 136—and (3) show that he had "exhausted all the remedies at his disposal so that his right to oversee the process for the approval of the 2017-2018 Budget might be recognized and he be allowed to exercise such right"—*id. at 136-137*. As to the Government, the court requested that it clarify whether the information requested by the Senator had been made public at any time.[4] Finally, it required both parties to appear prepared to argue their respective positions on the nature of the documents requested, that is, whether the documents were public or whether they contained information that was protected **[*14]** by executive privilege.

With the benefit of filings from both parties and a joint motion which stipulates certain facts and documents thereby demarcating the legal questions, on July 26, 2017, the hearing for oral arguments was held. That same afternoon, the trial court issued and served notice of a Resolution and Order denying the Government's motion to dismiss. The court concluded that the controversy was justiciable since the Senator had standing and the cause of action was not moot. As a result, the Government was granted a 10-day period to submit the Proposed Budget at issue in a sealed envelope for inspection in chambers so that the court might determine whether its disclosure is improper pursuant to executive privilege. Additionally, petitioners were required to file a motion through which they detailed the reasons for which they claimed that the requested information was privileged. *See*, Resolution and Order of July 26, 2017, issued by the Court of First Instance, at 3.

Disagreeing with the trial court's decision, on August 4, 2017, the Government of Puerto Rico filed a petition for a writ of certiorari and a motion for order in aid of jurisdiction with the Court of Appeals. **[*15]** On that same day, said court served notice of a resolution through which it denied the issuance of the requested writ of certiorari.[5] Not satisfied with that decision, on August 7, 2017, the Government appealed to us alleging the commission of the following errors:

First Error

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[4] The Court of First Instance granted the parties through July 21, 2017, to comply with the requirements in writing.

[5] Said resolution was signed by Judges Ramírez Nazario and Romero García of the Court of Appeals. In contrast, Judge Colom García made it known that she would have issued the writ.

> The Court of Appeals erred in not issuing the requested writ of certiorari and in not reversing the decision of the Court of First Instance which denied the *dispositive* motion to dismiss, thereby allowing the case to be heard on the merits even though the case has to do with a nonjusticiable matter since the plaintiff Senator has no legal standing and his claim has become moot.
>
> *Second Error*
>
> The Court of Appeals erred in not issuing the requested writ of certiorari and in not reversing the decision of the Court of First Instance which denied the *dispositive* motion to dismiss, thereby allowing the case to be heard on the merits despite the plaintiff Senator not having exhausted the remedies available in our legal framework prior to channeling his claim through the courts.
>
> *Third Error*
>
> The Court of Appeals erred in not reversing the resolution and order of the Court of First Instance which denied the motion to dismiss the **[*16]** above-captioned petition for mandamus even though, in this case, the issuance of such an extraordinary and privileged writ is not in order.

Petition for Certiorari, at 5.

In their Urgent Motion Reiterating Motion to Dismiss filed before the trial court, the Petition for Certiorari before the Court of Appeals, and the Petition for Certiorari filed with this Court, petitioners raised the issue and argued that the document that the Senator requested is protected by executive privilege and, therefore, its production is not in order.[6] On August 7, 2017, the Senator also appeared before us through an Urgent Motion to Oppose the Motion for Order in Aid of Jurisdiction and the Issuance of the Writ of Certiorari.

With the benefit of briefs from both parties, we issue the requested writ of certiorari and address the case of caption without further proceeding, pursuant to Rule 50 of this Court, 4 LPRA App. XXI-B.

II

A. *Standing*

[1] Courts may only entertain justiciable cases. *Asoc. Fotoperiodistas v. Rivera Schatz, 180 DPR 920 [80 PR Offic. Trans. 43] (2011)*. A controversy is not justiciable where (1) it presents a political question, (2) one of the parties lacks standing, (3) events taking place after the action is

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[6] Along with the Petition for Certiorari, the Solicitor General, representing the governor and the Government of Puerto Rico (Government or petitioners), filed an Urgent Motion for Order in Aid of Jurisdiction, through which he requested the stay of the proceedings before the trial court, specifically of the effects of the Resolution and Order issued by that court on July 26, 2017. Through that decision, the Court of First Instance ordered the Government to, among other things, deliver the proposed budget in a sealed envelope.

As the final day for submitting the document in question was August 7, 2017, and in order that the controversy not become moot, on that very day, we issued a resolution granting the motion in aid of jurisdiction and staying the proceedings before the Court of First Instance until this Court provided otherwise.

commenced renders the controversy moot, (4) the parties are attempting to obtain an advisory opinion, or **[*17]** (5) the case is not ripe. *Id.*

[2] Specifically, we have defined "standing" as the capacity required of the party bringing suit to appear as a litigant before the court and effectively carry out procedural acts, thereby obtaining a binding judgment. Rafael Hernández Colón, *Práctica jurídica de Puerto Rico: Derecho Procesal Civil* 121, San Juan, LexisNexis de Puerto Rico (6th ed., 2017); Javier A. Echevarría Vargas, *Procedimiento civil puertorriqueño* 132, Colombia, self-pub. (rev. 1st ed., 2010-2012). The purpose of the standing doctrine is to assure the trial court that the plaintiff's interest in the case is such that, in all likelihood, they will pursue their cause of action vigorously. *Sánchez et al. v. Srio. de Justicia et al., 157 DPR 360 [57 PR Offic. Trans. 30] (2002)*; *Hernández Agosto v. Romero Barceló, 112 DPR 407 [12 PR Offic. Trans. 508]* (1982).

[3] To show that they have standing, the plaintiff must establish that "(1) they have suffered clear and palpable injury; (2) the injury is real, immediate, and distinct, not abstract or hypothetical; (3) there is a connection between the injury suffered and the cause of action filed; and (4) the cause of action arises under the Constitution or a law." *Sánchez et al. v. Srio. de Justicia et al., 157 DPR, at 371 [57 PR Offic. Trans. 30,]*. See also, *Torres Montalvo v. Gobernador ELA, 194 DPR 760 [94 PR Offic. Trans. 55] (2016)*; *Hernández Torres v. Hernández Colón et al., 131 DPR 593 [31 PR Offic. Trans. 31] (1992)*. We have previously held that these factors must be construed flexibly and liberally where the action is against an agency or **[*18]** government officials. *Asoc. de Maestros v. Srio. de Educación, 156 DPR 754 [56 PR Offic. Trans. 54] (2002)*.[7] Moreover, the court must analyze the allegations in the manner that is most liberal and favorable to the plaintiff. *García Oyola v. J.C.A.*, 142 PR 532 [42 PR Offic. Trans. 44] (1997); *Col. Ópticos de P.R. v. Vani Visual Center, 124 DPR 559 [24 PR Offic. Trans. 383] (1989)*; *Salas Soler v. Srio. de Agricultura, 102 DPR 716 [2 PR Offic. Trans. 925]* (1974).[8]

[4] Regarding the standing of legislators, on several occasions we have recognized that they have standing to "vindicate a personal interest in the full exercise of their legislative powers that have been affected by the actions or omissions of the Executive Branch."[9] *Noriega v. Hernández Colón, 135 DPR 406, 428 [35 PR Offic. Trans. 29,] (1994)*. See also, *Hernández Torres v. Gobernador, 129 DPR 824 [29 PR Offic. Trans. 53] (1992)*. In these scenarios, they must show that their constitutional or statutory rights have been infringed. *Hernández Torres v. Gobernador*.

[5] Likewise, in order for a legislator to show standing, they must satisfy the same requirements all citizens must meet. *Hernández Torres v. Hernández Colón et al*. To do this, they must establish that they have suffered clear and immediate injury to their legislative prerogatives. *Id.*

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[7] *See also*, Javier A. Echevarría Vargas, *Procedimiento civil puertorriqueño* 132, Colombia, self-pub. (rev. 1st ed., 2010-2012).

[8] *Id.*

[9] We must point out that we have also recognized legislator standing, for example, to act "as an advocate of a traditional individual interest tied to legislative activities and asserted before the members of that body both in their individual capacity as a legislator and as a representative of a group belonging to that body." *Noriega v. Hernández Colón, 135 DPR 406, 428 [35 PR Offic. Trans. 29,] (1994)*. Also, to "contest an illegal executive action" as a designated representative of either the Senate or the House of Representatives. *Id.*

In complying therewith, they may not invoke an abstract prerogative or one that is far removed from the exercise of their legislative functions. *Id.* Specifically, when a member of the legislature alleges that they have been affected because they are prevented from adequately discharge their oversight **[*19]** role, they must be aware that this merely implies that they be afforded reasonable and necessary mechanisms that allow for their full participation at all stages of the legislative process. *Id.* To assert their right to oversee, legislators must exhaust all remedies at their disposal in the interest of having the exercise and recognition of that right. *Id.* Similarly, such legislators must show a connection between the injury they have allegedly suffered and the action they have brought. *Id.*

The Government alleges, among other things, that respondent has no standing on the basis of the following: (1) the Senator's allegations were generic; (2) the Senator failed to show how his legislative prerogatives were affected in not obtaining the proposed budget he requested; (3) legislative prerogatives, as they pertain to the approval of the budget, are triggered when the Government submits the document to the Legislature; (4) there is no ministerial duty to disclose the "first draft" of the budget proposal; therefore, the Senator did not suffer a clear and palpable injury that would justify his claim; and (5) respondent did not exhaust the proceedings before the Senate that are specifically **[*20]** designed to channel the request for information of its members.

After analyzing the applicable law and the information arising from the record, we conclude that respondent does have standing to make his claim in his capacity as legislator.

Respondent raised, among other things, that "[t]he lack of access to the budget document adopted by the governor and sent to the Board has curtailed and injured Senator Bhatia's power to exercise his prerogative and his role as legislator, and to evaluate and approve the budget *with the benefit of a public document that has bearing on the decision regarding the appropriateness of the budget submitted to the Senate for consideration*." Motion to Oppose the Motion to Dismiss, Appendix, at 98. (Emphasis added.) Subsequently he added that "[t]he governor's refusal to disclose and hand over to Senator Bhatia the budget adopted by the governor and submitted to the Board has interfered and continues to interfere with Senator Bhatia's prerogatives *to evaluate the budget with the benefit of poring over all the documents that have been the basis for the submission to the Legislative Assembly of the proposed budget approved by the Board*." *Id.* at 99. (Emphasis **[*21]** added.) He also mentioned that his prerogative to ensure that the procedures for the approval of the budget run smoothly and to guarantee transparency between the Chief Executive and the Board had been abridged.

To that end, we believe that respondent particularized his claim as to how the absence of the document in question affected his process of analysis prior to the approval of the budget submitted before both legislative bodies. We must also point out that the Senator's claim, in his official capacity, was similarly grounded in the constitutional right of access to public information.[10] We believe, therefore, that respondent, in his role as legislator, validly claimed

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[10] It is important to mention that, contrary to prior cases discussion legislator standing, in the situation at bar, the controversy does not develop in the legislative sphere, but rather as an *individual claim by the Senator in his official capacity* to comply with his legislative functions. In this way, there is no risk whatsoever that the decision of this Court would interfere with the separation of powers between the Legislative and Judicial Branches.

that he suffered clear and palpable injury that impacted his legislative prerogatives, and that this injury was produced when his access to what he alleges is public information was curtailed, thereby infringing the aforementioned constitutional right. There is also a connection between the injury claimed and the cause of action exercised.

Finally, and as we will see below, insofar as respondent appeared in his capacity as Senator in defense of his constitutional **[*22]** right of access to public information and specified the manner in which such infringement affected his legislative prerogatives, we find that he did not need to exhaust any legislative remedies prior to pleading his case before the court.

B. *Mootness*

[6] As we mentioned previously, mootness is one of the doctrines that demarcate the limits of the judicial function. *C.E.E. v. Depto. de Estado, 134 DPR 927 [34 PR Offic. Trans. 52] (1993)*. It requires that there be an actual controversy between the parties in all cases brought before a court. *Amador Roberts et al. v. ELA, 191 DPR 268 [91 PR Offic. Trans. 18] (2014)*. A case becomes moot when the matter at issue succumbs to the passage of time, whether due to changes in the facts or the law. *IG Builders et al. v. BBVAPR, 185 DPR 307 [85 PR Offic. Trans. 10] (2012)*; *U.P.R. v. Laborde Torres y otros I, 180 DPR 253 [80 PR Offic. Trans. 14] (2010)*; *Emp. Pur. Des., Inc. v. H.I.E. Tel., 150 DPR 924 [50 PR Offic. Trans. 71] (2000)*. The consequence of this would be that the ruling eventually rendered by the court would not have any practical effect on the parties. *IG Builders et al. v. BBVAPR*. That is,

> [c]ourts lose their jurisdiction over a case for mootness when changes occur during the judicial process in course of a specific controversy that cause it to lose its currentness such that the relief that may be granted by the court would not have any real effect on that controversy.

C.E.E. v. Depto. de Estado, 134 DPR, at 935 [34 PR Offic. Trans. 52, at].

[7] Whether due to constitutional imperative (absence of case or controversy) or judicial self-limitation, the courts must abstain from considering the merits of a **[*23]** case where we have determined that it has become moot. *Presidente de la Cámara v. Gobernador, 167 DPR 149 [67 PR Offic. Trans. 16] (2006)*; *Asoc. de Periodistas v. González, 127 DPR 704 [27 PR Offic. Trans. 26] (1991)*. Nevertheless, there may be situations where courts may hear the case even though it is clearly moot. *Emp. Pur. Des., Inc. v. H.I.E. Tel.*; *C.E.E. v. Depto. de Estado*. In keeping with the above, the exceptions to mootness apply where (1) an issue that is capable of repetition and tends to evade judicial review is brought before the courts; (2) the defendant has altered the factual situation, but the change does not seem to be permanent; and (3) where aspects of the controversy have become moot, but collateral consequences subsist. *Asoc. Fotoperiodistas v. Rivera Schatz; Rullán v. Fas Alzamora, 166 DPR 742 [66 PR Offic. Trans. 55]* (2006).

In the case at bar, the Government alleges that the controversy became moot when process for the approval of the 2017-2018 budget, considering that the Senator had the opportunity to evaluate the proposal when it was submitted to the legislative bodies. Nevertheless, we agree with the trial court that petitioners failed to show that the document that was submitted for the consideration and evaluation of the legislative bodies was in fact the same text that was

presented to the Board on April 30, 2017. Pursuant to the above, we believe that this litigation might have become moot *had the requested document been disclosed*, but that was not the case.[11]

Additionally, regardless of whether or not the budget was approved, as it is *a different document* that has not been produced, *and were it a public document*, the Government would have to disclose it unless protected by privilege.

As a result, we conclude that the matter raised in this petition is not moot.

C. *Mandamus*

[8] The Code of Civil Procedure establishes the mandamus as an extraordinary remedy of "high prerogative" directed to a natural or legal person with the purpose of demanding compliance through court order of a ministerial duty which appertains to the office they hold. Code of Civil Procedure, sec. 6[49] (32 LPRA § 342[1]). In other words, it concerns a definite obligation that does not admit the exercise of discretion. *AMPR v. Srio. de Educación, E.L.A., 178 DPR 253 [78 PR Offic. Trans. 5] (2010)*; *Báez Galib y otros v. C.E.E. II, 152 DPR 382 [52 PR Offic. Trans. 29] (2000)*. Due to its privileged nature, the statute itself provides that a mandamus is not appropriate where adequate and effective remedies are available to the petitioner. Code of Civil Procedure, sec. 651 (*32 LPRA § 3423*). Furthermore, as a rule, prior to petitioning the court, the interested party must make a demand to the government official responsible for complying with the ministerial **[*25]** duty demanded. *AMPR v. Srio. de Educación, E.L.A.* A party may be exempted from the interpellation requirement where doing so would be futile or where the duty claimed is of a public nature, that is, where it affects the general public and not the moving party exclusively. *Id.*

[9] We have recognized that a mandamus is usually an appropriate mechanism to compel inspection and to obtain copies of public documents. *Ortiz v. Panel F.E.I., 155 DPR 219 [55 PR Offic. Trans. 18] (2001)*. When entertaining a petition for mandamus, courts must consider the possible impact of their decision on the public interests involved and avoid any undue interference in matters that pertain to the Executive Branch. *AMPR v. Srio. de Educación, E.L.A.*; *Báez Galib y otros v. C.E.E. II*; *Noriega v. Hernández Colón*.

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[11] On July 17, 2017, the Court of First Instance ordered the Government to clarify whether the information requested by the Hon. Eduardo Bhatia Gautier (Senator or respondent) had been made public since, according to the trial court, "Rosselló Nevares's arguments would seem to suggest that the information requested by Bhatia Gautier—the Proposed Budget Rosselló Nevares presented to the Board on April 30, 2017—is not the same information that was made public by the plaintiff." Order issued by the Court of First Instance on July 17, 2017, Appendix, at 136. In response, on July 21, 2017, the Government filed a Motion in Compliance with Order through which it maintained that the "Budget submitted to the Legislative Assembly was the one approved by the Fiscal Control Board *after incorporating* ***[*24]*** the amendments that the latter required of the governor pursuant to the process provided by PROMESA. The proposed budget that was handed into the Board has not been made public, as it constitutes work product that was intended to be—and in fact was—reviewed by the Fiscal Control Board and returned to the governor prior to submitting a final version to the Legislative Assembly." Motion in Compliance with Order filed by the Government with the trial court on July 21, 2017, Appendix, at 153. Moreover, in the Petition for Certiorari filed with this Court, the Government alleged that respondent did not particularize his claim of impairment to his legislative prerogatives, since he did not have the *first draft of the proposed budget* that the governor presented to the Board. *That document is not the proposed budget that was submitted for the consideration of the legislature for discussion, analysis, and approval*." Petition for Certiorari, at 15. (Some emphasis added.)

Petitioners argue that the petition for mandamus submitted in this case is defective for two reasons. First, they contend that the Senator, in his personal capacity, did not send a prior request to the governor. To that end, they posit that respondent's letter requesting a copy of the document at issue was sent exclusively in his capacity as senator. They also base the dismissal of the petition for mandamus on the argument that respondent did not exhaust the remedies provided in the Rules of the Senate of Puerto Rico, adopted through S.R. 13, 18th Leg., 1st Reg. Sess. **[*26]** (PR Jan. 9, 2017) (Senate Rules),[*] which establish a procedure for requesting documents through the Senate in his official capacity as senator.

i. *Request*

Petitioners contend that the Senator did not make a request for the production of the document in his personal capacity. They maintain that in the letter[12] sent to the governor for that purpose—dated May 2, 2017—respondent appeared exclusively as a legislator. We agree with this assessment.

First of all, the document was drafted on the official stationery of the Puerto Rico Senate, in which respondent's name appears as the Minority Leader for the Popular Democratic Party. At no point in the letter did he state that his claim under the constitutional right of access to information was pursuant to role other than as a public official. Furthermore, when we examine the petition for mandamus filed a mere two days after the letter was sent, we can confirm that the Senator's arguments, as set forth therein, were made strictly in his official capacity. It is not until after the motion to dismiss was filed that respondent amended his petition for certiorari to include, for the first time, references to his personal capacity.

On the other hand, that **[*27]** the Senator, in his official capacity, sent a prior request to the governor for the production of the document in question is not in dispute. Nevertheless, we must examine whether, in that capacity, he was also bound to comply with any further steps under the Rules.

ii. *Senate Rules*

Petitioners' focus their argument against the appropriateness of the petition for writ of mandamus filed by the Senator in his capacity as a legislator on that he presumably did not make use of the remedies available at law to channel his claim through the Senate Rules.

The Legislative Assembly's power to investigate constitutes an integral component of the legislative function. On the one hand, this authority serves as a valuable mechanism to make the necessary inquiries to evaluate future legislation. *Pueblo v. Pérez Casillas, 117 DPR 380 [17 PR Offic. Trans. 459] (1986)*. Aside from enacting legislation, this body performs other vital

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[*] Translator's note: The English rendition of the Rules of the Senate of Puerto Rico cited in this opinion were provided by the Bureau of Translations of the Supreme Court of Puerto Rico for lack of an official translation.

[12] In what is relevant hereto, the letter reads as follows:

"I have become aware that last Sunday, April 30, 2017, your team submitted a Proposed Budget for the 2017-2018 Fiscal Year to the Fiscal Oversight Board, as required by PROMESA, 48 USC § [2]101. Our Supreme Court has discussed the matter of access to information at length and has established clearly and unequivocally that the information in the possession of the State is public and must be accessible to the people at large. That is why I request that a copy of the aforementioned Proposed Budget be made public, and that you share a copy with this public servant immediately."

functions that are conducive to bolstering our democratic system of government. Among them are government oversight, fostering the debate of matters of general interest, and maintaining the country informed of public affairs. *Rullán v. Fas Alzamora; Silva v. Hernández Agosto, 118 DPR 45 [18 PR Offic. Trans. 55] (1986)*; *Pueblo v. Pérez Casillas*; Statement of Motives of Law No. 100 of June 23, 1955, as amended, *2 LPRA § 151 (Law No. 100*). This investigative process **[*28]** is commonly carried out through the different commissions or subcommittees of both houses. *Pueblo v. Pérez Casillas*; *Silva v. Hernández Agosto*.

The power of the Legislative Assembly to compel the appearance of witnesses and the production of documents is enshrined in the Political Code. As part of the statutory procedure, any subpoena to that effect is required to be signed by the President of the Senate, the Speaker of the House, or the chair of the committee before which the witness must appear. [ ]*2 LPRA § 151(a)*.

In cases of noncompliance, the Legislative Assembly may opt for criminal or civil proceedings to enforce compliance with a subpoena. Thus, it is authorized to submit the matter before the Secretary of Justice who "shall have the duty of bringing the corresponding charges before the Court of First Instance." *Political Code, sec. 34 (2 LPRA § 154(1)*). The filing of charges is not discretional. That is, if the statutory demands are met, the Office of the Prosecutor is duty bound to initiate criminal proceedings. *Pueblo v. Pérez Casillas*. Similarly, the Legislative Assembly may turn to the courts to require compliance through a civil contempt proceeding. *Political Code, sec. 34-A (2 LPRA § 154a*).

In line with the above, and with the purpose of making these broad investigative **[*29]** powers feasible, the Senate Rules were enacted, through which the applicable mechanism for issuing formal subpoenas was put in place. Thus, Senate Rule 13 governs matters concerning subpoenas for proceedings *before legislative committees*. In those cases, the subpoena must be signed by the President of the Senate or the chair of the appropriate committee. Senate Rule 13, sec. 13.14.

Sente Rule 18 provides the process concerning senate resolutions. Among other things, it defines the term "Resolution" as the means that that body uses to formulate Senate petitions, as well as to order research or investigation. Senate Rule 18, sec. 18.1(a) & (d). In the event that a senator wishes to request information from any of the other Branches of Government, its officials, or employees, "*on behalf of the Senate*," they must submit a petition, either orally or in writing, before that body to that end, and, were there any objections, the petition must be put to a vote. Senate Rule 18, sec. 18.2. (Emphasis added.) If after the appropriate steps have been taken the concerned official or employee does not abide the request, the Senate may resort to the court to demand compliance. *Id.*

As we can see, the Senate Rules envision two alternative methods for senators to obtain the documents through the processes **[*30]** established in the Rules. First, Senate Rule 13.1(b) authorizes subpoenas for the production of documents as part of its tasks of researching. analyzing, or evaluating a legislative bill or any matter that is under consideration by a committee belonging to legislative body, with the authorization of the President of the Senate or the senator chairing the committee. As the request at issue in this case is not associated with any committee whatsoever, this provision is does not apply.

Section 18.2 of Senate Rule 18 is also inapplicable to the controversy at bar. This provision establishes the process for when a senator wishes to obtain information from officials of any branch of government through a resolution on behalf of the Senate. This measure is highly effective insofar as it provides the means to compel the disclosure of the requested information through contempt of court.

However, there is nothing preventing a senator, on the basis of their constitutional right to access information, from *procuring public information directly* from a government official or entity. Nevertheless, were they to do so, they may not avail themselves of the process provided under the Senate Rules for compelling the production of the requested information. **[*31]** If they wish to enforce their request, the moving party must seek the corresponding court order or writ on their own behalf. Therefore, we reject the argument of the Senator's alleged noncompliance with the Senate Rules.

In conclusion, the Senator may to avail himself of the remedy of a mandamus to assert his claim.

D. *Constitutional Right to Access Public Information*

[10] It has been more than three decades since we recognized the right of the press and citizens in general to access public information as a fundamental right of constitutional ilk in *Soto v. Srio de Justicia, 112 DPR 477 [12 PR Offic. Trans. 597] (1982)*. This right is firmly associated with the exercise of the rights of freedom of speech, of the press, and of association that are formally enshrined in *Article II, Section 4 of the Constitution of Puerto Rico, PR Const. art. II, § 4, LPRA tit. 1*. *Trans Ad de P.R. v. Junta de Subastas, 174 DPR 56 [74 PR Offic. Trans. 8] (2008)*; *Ortiz v. Dir. Adm. de los Tribunales, 152 DPR 161 [52 PR Offic. Trans. 11]* (2000).

[11] Access to public information constitutes a fundamental pillar of any democratic society. This knowledge allows citizens to adequately evaluate and oversee public functions, while contributing to effective public participation in the governmental processes that impact their social milieu. *Trans Ad de P.R. v. Junta de Subastas; Colón Cabrera v. Caribbean Petroleum, 170 DPR 582 [70 PR Offic. Trans. 38] (2007)*. This supports transparency in government operations and promotes sound public administration. *See*, Carlos F. Ramos Hernández, *Acceso a la información, transparencia y participación política* ***[*32]*** , *85 Rev. Jur. UPR 1015 (2016)*.

We cannot forget that, in our political reality, the government as an entity exists to serve the People:

> Whichever definition we may assign to the concept of "democracy," its guiding principle is that political power ought to reside with the people, and those who govern exercise their functions for the people and by mandate of the people. A people who are oblivious of how their affairs are managed are ill-equipped to govern themselves.

Efrén Rivera Ramos, *La libertad de información: necesidad de su reglamentación en Puerto Rico*, 44 Rev. Jur. UPR 67, 69 (1975).

Likewise, it is not possible to effectively exercise the rights protected under Article II, Section 4 of the Constitution of Puerto Rico if there is no record of the activities of those elected to govern.

> The premise is simple, if the People are not duly informed of the manner in which public tasks are carried out, their freedom to express their satisfaction or dissatisfaction with the persons, rules, and processes that govern them, whether through their votes or otherwise, will be curtailed.

Ortiz v. Dir. Adm. de los Tribunales, 152 DPR, at 175 [52 PR Offic. Trans. 11,].

[12] Section 409 of the Code of Civil Procedure recognizes the right of all citizens to inspect and copy any public document of Puerto Rico. *32 LPRA § 1781*. The right to information, however, does not operate in a vacuum. It is necessary that the document intended to be disclosed **[*33]** is in fact of a public nature. *Ortiz v. Dir. Adm. de los Tribunales*.

[13] Our legal framework defines the term "public document" in the following manner:

> Any document which originates, or is kept or received in any dependency of the Commonwealth of Puerto Rico according to the law or in relation to the management of public affairs and that pursuant to the provisions of § 1002 of this title is required to be permanently or temporarily preserved as evidence of transactions or for its legal value. It includes those documents produced electronically which meet the requirements established by law and regulations.

Section 3(b) of Puerto Rico Public Document Administration Act, Law No. 5 of December 8, 1955, as amended (*3 LPRA § 1001(b)*).

[14] Thus, the right to information is not absolute and is subject to those limitations that the State may impose for compelling reasons. *Ortiz v. Dir. Adm. de los Tribunales*. However, these restrictions must be duly justified since the right of access to public information cannot be denied arbitrarily or capriciously. *Colón Cabrera v. Caribbean Petroleum*. As this is a fundamental right, in order to prevail, the restrictions imposed by the state apparatus must be in furtherance of a compelling government interest. *Nieves v. Junta, 160 DPR 97 [60 PR Offic. Trans. 3] (2003)*; *Noriega v. Gobernador, 130 DPR 919 [30 PR Offic. Trans. 65]* (1992).

[15] Our jurisdiction has not enacted specific **[*34]** legislation that would limit access to government documents subject to public scrutiny.[13] *Colón Cabrera v. Caribbean Petroleum*. However, through the controversies brought before us to address this issue, we have been able to define the following scenarios where the State may validly make a claim of privilege concerning information in its possession. These are when (1) it is provided by law, (2) the communication is protected by any of the evidentiary privileges a citizen may assert, (3) disclosing the information may injure the fundamental rights of third parties, (4) the identity of an informant is involved, and (5) it is "official information" under Evidence Rule 514 of the Rules of Evidence of 2009 (32 LPRA App. VI) (formerly Evidence Rule 31, 32 LPRA App. IV). *Colón Cabrera v. Caribbean Petroleum*. Bear in mind that the State has the burden of proving that any of the above-mentioned exceptions apply in order to validate its claim of privilege. *Colón Cabrera v. Caribbean Petroleum*.

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[13] In contrast to our legal system, this matter has been regulated statutorily at the federal level, and the evaluation of requests for government information directed at the different components of the Executive Branch is governed by the provisions of the *Freedom of Information Act (FOIA), 5 USCA § 552*. *This statute* applies exclusively to the agencies in the executive branch of the Federal Government *and does not apply to the Government of Puerto Rico. See*, *5 USCA §§ 551(1)(C)* & 552(f)(1).

E. *Privilege for Official Information; In General*

[16] A claim of privilege by the State can prosper where it concerns official privileged information, among other reasons. *Colón Cabrera v. Caribbean Petroleum; Santiago v. Bobb y El Mundo, Inc., 117 DPR 153 [17 PR Offic. Trans. 182] (1986)*. Thus, Evidence Rule 514 provides what is known as "privilege **[*35]** for official information" in our jurisdiction.[14] It defines "official information" as that which is "acquired in confidence by a public officer or employee in the course of [their] duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." Evidence Rule 514(a) (32 LPRA App. VI).[15] This privilege accrues "if the court finds that said matter is official information and disclosure is forbidden by law, or that disclosure of such information in the proceeding is against government interests." Evidence Rule 514(b).[16]

Professor Chiesa Aponte explains that:

> The privilege is based, on the one hand, on the government's need to keep certain information confidential for the proper functioning of the government, particularly in relation to the candid discussion of the government's alternatives or possible courses of action to address the multiplicity of the State's social and economic problems or problems of any other sort.

I Ernesto L. Chiesa Aponte, *Tratado de derecho probatorio* 292, Dominican Republic, Ed. Corripio (1998).

Now then, *this privilege is not absolute, but rather qualified, and subject to a balance of interests*. **[*36]** Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 292. Thus, *when evaluating a claim of privilege, judges must weigh, on the one hand, the government's need to keep certain sensitive information confidential and the injury the government may cite, and, on the other, the needs of the party requesting the information and their right to obtain it*. Ernesto L. Chiesa Aponte, *Reglas de Evidencia comentadas* 164, San Juan, Eds. Situm (2016). Thus, a privilege may only be claimed where "it has to do with 'official information' and where the balance of interests weighs in favor of confidentiality." Chiesa Aponte, *Tratado de derecho*

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[14] Due to the lack of special legislation to regulate the privilege of official information in our jurisdiction, it is proper to use Evidence Rule 514 (32 LPRA App. VI), as supplementary law on this issue. I Ernesto L. Chiesa Aponte, *Tratado de derecho probatorio* 304-305, Dominican Republic, Ed. Corripio (1998) (referencing ***Santiago v. Bobb y El Mundo, Inc., 117 DPR 153 [17 PR Offic. Trans. 182] (1986)***). We should point out that the cited evidentiary law treatise by Professor Chiesa Aponte analyzes former Evidence Rule 31 of the repealed Rules of Evidence of 1979 (32 LPRA App. IV), which is equivalent and substantively identical to current Evidence Rule 514. *See also*, Ernesto L. Chiesa Aponte, *Reglas de Evidencia comentadas* 164, San Juan, Eds. Situm (2016).

[15] To determine whether information was acquired in confidence, it is necessary to consider "the totality of the circumstances that surround the communication, as well as its very nature." Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 307 (citing ***Santiago v. Bobb y El Mundo, Inc., 117 DPR, at 162 [17 PR Offic. Trans., at 194]***). For example, in the context of an administrative entity, in ***López Vives v. Policía de P.R., 118 DPR 219, 233-234 [18 PR Offic. Trans. 264, 281] (1987)***, we held that, when facing a claim of privilege by the State, it is necessary to examine, among other things, "the nature and content of the document, and the effects that disclosure of the same may have on State interests."

[16] To make a claim of privilege, however, it does not suffice to show that the disclosure would be against government interests, "[i]t is necessary to address the degree of prejudice in comparison to that which the person or entity requesting the information would suffer should disclosure not be ordered." Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 308.

probatorio, supra, at 307. *When claiming the privilege for official information, the State must prove precisely and unequivocally that it applies. Santiago v. Bobb y El Mundo, Inc.*

As we have explained previously, "[t]he high rank of the constitutional right of access to information makes it difficult for the government to claim a privilege, especially in absence of a regulatory statute." Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 304. See also, *Colón Cabrera v. Caribbean Petroleum*. In line with this, and given the lack of legislation that would demarcate this privilege, it "must be zealously scrutinized." Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 304 (citing *Peña Clos v. Cartagena Ortiz, 114 DPR 576, 599 [14 PR Offic. Trans. 744, 772] (1983)*).[17] Thus, where the balance weighs against the privilege, the government—in due course—shall be required to **[*37]** "'present evidence and prove the existence of *compelling interests that supersede* the values protected by the citizens' freedom of information right.'" Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 308 (quoting *Noriega v. Gobernador, 130 DPR, at 938 [30 PR Offic. Trans. 65, at]*). Considering this, the State cannot make a generalized claim of privilege. *Santiago v. Bobb y El Mundo, Inc. See also*, Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 310. Professor Chiesa Aponte also opines that "a citizen's right of access to information on government affairs justifies placing a serious burden on the government to persuade when it claims a privilege for official information." Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 295.

[17] In short, courts must be "cautious to lightly grant any request for privilege by the State." *Santiago v. Bobb y El Mundo, Inc., 117 DPR, at 159 [17 PR Offic. Trans., at 191]*. When evaluating whether to recognize the privilege, "[t]he alternatives of an in camera inspection or providing limited access to the confidential file are always available." Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 310.[18] As we shall discuss below, however, the option of an in camera inspection may be limited according to the circumstances of each case.

F. *Privilege for Official Information; Decision-making Information in Deliberative Processes Concerning Public Policy*

Among the fundamental categories of official privileged information is the information used by public officials during deliberative processes related to the development **[*38]** of public policy. Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 292-293.[19] This category of official privileged information seeks to "promote candid communication among the government officials tasked with deciding and enforcing the public policy of the State." *Id. at 293*.[20] Regarding the

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[17] Similarly, "statutes that restrict the right of access to government information are subject to strict judicial scrutiny and must be construed restrictively." Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 305. See also, ***Soto v. Srio. de Justicia, 112 DPR 477 [12 PR Offic. Trans. 597] (1982)***

[18] When faced with a claim of privilege for official information "skepticism toward judicial intervention or review regarding [privilege over] state secrets" does not apply. Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 295. Note that state secrets constitute a high-ranking privilege that considers aspects pertaining to national security, including military secrets. ***Id. at 288***. Therefore, in the case of state secrets, the privilege may be recognized without need for an in camera inspection. ***Id. at 289-290***, discussing the case of *United States v. Reynolds, 345 U.S. 1 (1953)*.

[19] Note that, prior to this case, we had not had the opportunity to rule on this category, which is recognized at the federal level. Nevertheless, we shall discuss it insofar as it is illustrative of its applicability with regard to the privilege for official information discussed previously.

above, we believe Professor Chiesa is referring to the government's qualified privilege for deliberative process. *See*, 6 *Moore's Federal Practice § 26.52[5]* (3rd ed. 2016); 26A Wright & Graham, *Federal Practice and Procedure: Evidence* § 5680 (1992).

This privilege prevents adverse effects to the quality of governmental decisions and agency advisory functions. Paul F. Rothstein and Susan W. Crump, *Federal Testimonial Privileges: Evidentiary Privileges Relating to Witnesses and Documents in Federal Law Cases* 431-432 § 5:3, West (2nd ed. 2012). In line with this, it has been held that "a substantial public interest exists in maintaining and ensuring, full, frank, open exchanges of ideas between members of the agencies and other advisors and the decision maker." *Id. at 433*. Moreover, restricting access to this type of communication protects "against *premature disclosure* of proposed policies and decisions before they have been finally formulated or adopted." *Id. at 436*. (Emphasis **[*39]** added.)

[18] To avail itself from the deliberative process privilege, the State must comply with the following: (1) the head of the agency with control over the information must make a formal claim after careful consideration, (2) an agency official must provide the precise reasons for asserting the confidentiality of the information or documents, and (3) the government must identify and describe the information or documents it wishes to protect. *Moore's Federal Practice, supra*, at 26-412.10(1). See also, *United States v. Reynolds, 345 U.S. 1 (1953)*.

[19] *Furthermore, to assert the privilege, the government must show that the document in question is "deliberative" and "pre-decisional." Moore's Federal Practice, supra*, at 26-412.8. Information is deliberative insofar as it is related to a process through which public policy is developed or formulated. *Id.* at 26-412.9. A document is "pre-decisional" where it has been prepared to assist in the government's decision-making, which is to say, prior to making them. *Id.* at 26-412.8 & 26-412.9.[21] Therefore, "the information or document is also not privileged subsequent to the government's decision." Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 293. See, *N.L.R.B. v. Sears Roebuck & Co., 421 U.S. 132 (1975)*.

Pursuant to the above, this privilege does not extend to factual matters.[22] Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 293. Nor does it protect objective materials or documents that an **[*40]** agency adopts as its position on an issue or a controversy. *Moore's Federal Practice, supra*, at 26-412.6 & 26-412.7. For example, this privilege does not include "advisory opinions, recommendations, [or] communications relating to policy formulations." *Moore's Federal Practice, supra*, at 26-412.8.

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[20] In the United States, this privilege is regulated under FOIA Exemption Five, which expressly protects intra- or inter-agency communications (letters and memoranda) of the government. *5 USCA § 552(b)(5)*, *See*, Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 293; 26A Wright & Graham, *Federal Practice and Procedure: Evidence* § 5680 (1992).

[21] To determine whether a document is pre-decisional "the purpose of the advice and whether disclosure of the communication would be the type that is likely to chill intra- and inter-agency discussion and decision-making" may be taken into account. 6 *Moore's Federal Practice* 26-412.9 § 26.52[5] (3rd ed. 2016).

[22] Several federal courts have determined that factual matters may be protected under the referenced privilege insofar as they are intertwined with decision-making processes or protected deliberative materials. *Moore's Federal Practice, supra*, at 26-412.7 n.24.2.

[20] *To determine whether this privilege prevails, similar to the privilege for official information, a balance of interests must be made*. Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 293. Among the factors that the court must consider when pondering the balance of interests are the following: "*the interest of the private litigant, the need for accurate judicial fact finding, the public's interest in learning how effectively the government is operating, the relevance of the evidence sought, the availability of other evidence, the role of the government in the litigation and issues involved, and the impact on the effectiveness of government employees*." *Moore's Federal Practice, supra*, at 26-411. (Emphasis added.) *Additionally, the court must evaluate the effect that disclosure would have on the frank discussion of the policies and decisions in question. F.T.C. v. Warner Communications Inc., 742 F.2d 1156 (9th Cir. 1984)*. In short, this privilege may yield when it has been thoroughly shown that the particular need to obtain the information overrides the reasons **[*41]** for non-disclosure. *Moore's Federal Practice, supra*, at 26-412.11.

Courts must be flexible when evaluating this privilege so that we may ensure the protection of this deliberative process. *Moore's Federal Practice, supra*, at 26-412.10. Nevertheless, our evidentiary law framework demands a restrictive construction when determining the existence of a privilege. Evidence Rule 518 (32 LPRA App. VI).[23]

G. *Executive Privilege*

[21] "Executive privilege" was recognized in our legal framework in *Peña Clos v. Cartagena Ortiz* as deriving from the Constitution of Puerto Rico. *PR Const. art. I, § 2*; art. IV, §§ 1 & *4, LPRA tit. 1*.[24] This privilege *seeks to protect communications between the Chief Executive and his or her subordinates, advisors, or aides*. Chiesa Aponte, *Reglas de Evidencia comentadas, supra*, at 165; José J. Álvarez González, *Derecho constitucional de Puerto Rico y relaciones constitucionales con los Estados Unidos* 363, Bogatá, Ed. Temis (2009). Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 311.

As compared to the privilege on state secrets, executive privilege is of a lower rank. Chiesa Aponte, *Reglas de Evidencia comentadas, supra*, at 165. The latter is qualified; therefore, it does not grant the Executive Branch absolute power to "withhold **[*42]** information because of its alleged confidentiality." *Peña Clos v. Cartagena Ortiz, 114 DPR, at 598 [14 PR Offic. Trans., at 770*]. *See*, Wright & Graham, at 52. Thus, we must reiterate that "a naked allegation of public privilege, unsupported by adequate legislation, must be zealously scrutinized." *Peña Clos v. Cartagena Ortiz, 114 DPR, at 599 [14 PR Offic. Trans., at 772*].

Therefore, "[i]t is also incumbent upon the judicial branch to ultimately delineate the scope of such power." *Peña Clos v. Cartagena Ortiz, 114 DPR, at 598 [14 PR Offic. Trans., at 770*]. See also, *United States v. Nixon, 418 U.S. 683 (1974)*; Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 312. For this purpose, as we have indicated previously, we have used "[t]he

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[23] This restrictive construction does not apply to the privileges of a constitutional rank established in Evidence Rules 501, 502, and 512 (32 LPRA App. VI).

[24] Thus, the privilege was adopted as a corollary of the principle of the separation of powers. Chiesa Aponte, *Reglas de Evidencia comentadas, supra*, at 165, discussing the case of ***Peña Clos v. Cartagena Ortiz, 114 DPR 576 [14 PR Offic. Trans. 744] (1983)***. *See also*, José J. Álvarez González, *Derecho constitucional de Puerto Rico y relaciones constitucionales con los Estados Unidos* 363, Bogatá, Ed. Temis (2009).

balancing of competing interests method." *Peña Clos v. Cartagena Ortiz, 114 DPR, at 599 [14 PR Offic. Trans., at 772*]. See also, *United States v. Nixon*.

H. *In Camera Inspection*

For its illustrative value, we must engage with the federal case law based on the *Freedom of Information Act (FOIA), 5 USCA § 552*, as it pertains to the need for in camera inspection.

[22] Although FOIA (*5 USCA § 552(a)(4)(B)*) allows for the in-chambers examination of documents, this alternative has been repeatedly disfavored in cases where certain governmental privileges are claimed. See, for example: *Smith v. U.S. Marshals Service, 517 Fed.Appx. 542 (9th Cir. 2013)*; *Lion Raisins v. U.S. Dep't of Agriculture, 354 F.3d 1072 (9th Cir. 2004)*, *reversed in part and overruled on other grounds by Animal Legal Defense Fund v. U.S. Food & Drug Administration, 836 F.3d 987 (9th Cir. 2016)*; *Turner v. U.S. Dep't of the Treasury, 2017 WL 1106030 (E.D. Cal. 2017)*; *Truthout v. Department of Justice, 20 F.Supp.3d 760 (E.D. Cal. 2014)*, *affirmed*, *667 F.Appx. 637 (9th Cir. 2016)*.[25] Moreover, it should not be the first alternative since the State must initially be afforded an opportunity to justify and demonstrate its claim of confidentiality. *Lion Raisins v. U.S. Dep't of Agriculture; Conservation Force v. Jewell, 66 F.Supp.3d 46 (D. DC 2014)*, *affirmed*, 2015 WL 9309920 (DC Cir. 2015); *Truthout v. Department of Justice*. This may be accomplished by allowing the State to present a detailed explanation **[*43]** of the privilege asserted, which may serve as a substitute for in camera inspection of the document at issue. *Solers, Inc. v. Internal Revenue Service, 827 F.3d 323 (4th Cir. 2016)*; *Hamdan v. U.S. Dep't of Justice, 797 F.3d 759 (9th Cir. 2015)*; *Ethyl Corp. v. U.S. E.P.A., 25 F.3d 1241 (4th Cir. 1994)*. In other words, the court may rely on supplemental materials to determine whether the privilege claimed by the State is in order. *Lane v. Department of Interior, 523 F.3d 1128 (9th Cir. 2008)*; *Lion Raisins v. U.S. Dep't of Agriculture*. Were the court to determine at this stage that the privilege is in order, in camera inspection shall not be required. *Lewis v. I.R.S., 823 F.2d 375 (9th Cir. 1987)*.

For the purposes of the case at bar, we find the statements of the legislative history of one of the amendments to FOIA regarding the in camera inspection of documents very revealing and relevant.

> H.R. 12471 amends the present law to permit such in camera examination at the discretion of the district court. While in camera examination need not be automatic, in many situations it will plainly be necessary and appropriate. *Before the court orders "in camera" inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure*. The burden remains on the Government under this law.

S. Rep. No. 93-1200, 3 *US Congressional and Administrative News* 6285, 6287-6288 (1974). (Emphasis added.) See also, *Lewis v.* ***[*44]*** *I.R.S., supra*, at 378, n.4.

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[25] See also, *Lane v. Department of Interior, 523 F.3d 1128 (9th Cir. 2008)*; *Schell v. U.S. Dep't of Health & Human Services, 843 F.2d 933 (6th Cir. 1988)*; *Mead Data Central, Inc. v. U.S. Dep't of Air Force, 566 F.2d 242 (DC Cir. 1977)*; 33 Wright and Koch, *Federal Practice and Procedure: Judicial Review* 524 § 8440 (2006).

In short, in certain specific cases, in-chambers examination may be unnecessary. See, *Hamdam v. U.S. Dep't of Justice; Aids Healthcare Foundation v. Leavitt, 256 Fed. Appx. 954 (9th Cir. 2007)*; *Lion Raisins v. U.S. Dep't of Agriculture; Vaughn v. Rosen, 484 F.2d 820 (DC Cir. 1973)*; *Turner v. U.S. Dep't of the Treasury*. Particularly, in the case of *Lion Raisins*, the court determined that, as there was no controversy regarding the type of information contained in the document at issue, in camera inspection would be a futile exercise.[26]

Now then, where the record and the supplemental material of the State do not justify the government's claim of privilege to its satisfaction, the court may then inspect the documents at issue in chambers. *Islamic Shura Council of Southern California v. F.B.I., 635 F.3d 1160 (9th Cir. 2011)*; *Lane v. Department of Interior. See also*, 33 Wright and Koch, *Federal Practice and Procedure: Judicial Review* 524 § 8440 (2006).[27]

III

In the case at bar, the trial court held that in order to evaluate whether the document at issue is of a public nature and whether it is protected as privileged information, it had to perform an in camera inspection.[28] In the petition for certiorari before us, the Government alleged that the in camera inspection of a working document constitutes undue interference with the procedures and functions of the Executive Branch.[29] Specifically, it argued that there are certain governmental privileges that protect the confidentiality **[*45]** of documents related to the exercise of the governor's prerogatives and functions, namely: *executive privilege* and *deliberative process privilege*.

Accordingly, petitioners contended that the proposed budget at issue "constitutes interagency communication produced during the course of a process of deliberation and formulation of budgetary public policy by said public official" (in reference to the governor).[30] On the other hand, the Senator claimed that he is supported by the constitutional right of access to public information.

Based on the above, we conclude that, in this case, there is a genuine and justiciable dispute as to a question of law between the parties. As this is a matter of great public interest in which competing constitutional rights of members of the other two branches of government have been pitted against one other, it is imperative that we intervene at this time to consider *a priori* the

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[26] See, *Harvey's Wagon Wheel, Inc. v. N.L.R.B., 550 F.2d 1139 (9th Cir. 1976)*.

[27] We must not lose sight of the fact that, even when cautionary measures are taken, in camera inspections entail certain risks to the confidentiality of the information. Wright and Koch.

[28] *See*, Resolution and Order of the Court of First Instance, issued on July 26, 2017, Appendix, at 234-235.

[29] Petition for Certiorari, at 23.

[30] Petition for Certiorari, at 24. Petitioners also objected to the submission of the document at issue before the Court of First Instance for in camera inspection. *See*, Petition for Certiorari, at 19. ("In this case, the trial court clearly abused its discretion in acceding to pass on Senator Bhatia Gautier's claim on the merits and ordering the Chief Executive to deliver the disputed document in a sealed envelope for in camera inspection to determine whether it is confidential.")

need for an in camera inspection of the document under consideration, as ordered by the trial court.[31]

In camera inspection may be used in the proper context. See, *Santiago v. Bobb y El Mundo Inc.* However, as this is a controversy regarding a question of law and due to the nature **[*46]** of document in question, we believe that, *in this case*, an in camera inspection of the document *at this time* would not contribute to the inquiry of balancing interests. An examination of the *final* proposed budget suffices to know what the document at issue consists of.

Thus, we ask ourselves, what exactly could be found by inspecting the document in question in order to make a determination in this case? We cannot think of how this would be relevant to *the actual controversy in this case, which is whether the State would be able to satisfy the burden of proof necessary to sustain the privileges claimed*. Of course, prior to this, we must determine whether the referenced document is in fact a public document.

In order to render a determination in a balance of interests on whether any sort of privilege lies in this case, the parties must *first* place the court in a position to understand what the conflicting interests are. Later, for compelling reasons and if the court believes that the examination of the document is *essential* to its analysis, *then* the trial court may request the production of the document for an in camera inspection. *But not before*.

We should recall that in this case the **[*47]** State claimed certain governmental privileges based on the alleged confidentiality of the document at issue. Among these, it alleged executive privilege, which has a constitutional basis. When faced with a claim of a privilege of this nature, courts must be cautious when handling the information at issue. So much so that the production of the document for in camera inspection should not be ordered unless it is *strictly necessary*.

Consequently, we are of the opinion that, in the case before us, the trial court correctly denied the Government's motion to dismiss; however, it should have initially ordered the parties to submit their respective briefs so that they might place the court in a position to determine whether the document is of a public nature and, were it so, to determine whether the privileges alleged apply.[32] Only so, and considering the balance of interests involved, may the trial court determine whether the privileges alleged may be asserted. In contrast, the trial court ordered the production of the document in question for in camera inspection *before* it had determined whether it was of a public nature and *before* it had decided whether the confidentiality of the document **[*48]** in itself was protected by any of the privileges claimed. *In doing so, it abused its discretion*.

Therefore, *we conclude that the Court of Appeals erred in denying the issuance of the writ, as did the trial court in ordering the production of the document in question for an in camera*

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[31] As we have indicated, the usefulness of an in camera inspection has been recognized on multiple occasions as a supplementary means to resolve conflicts regarding claims of privilege.

[32] It bears mentioning that, through its Resolution and Order of July 26, 2017, the Court of First Instance not only ordered the Government to produce "the Draft Budget submitted to the Board on April 30, 2017, for in camera inspection," but also to "file a motion *explaining in detail the reasons for which the requested information, or part thereof, qualifies for the application of the privilege raised*." Resolution and Order of July 26, 2017, Appendix, at 235.

inspection at the stage in which it did so, without yet having the specific justifications of the State for non-disclosure.

IV

For the foregoing reasons, and without further proceeding under Rule 50 of the Rules of this Court, *we issue the requested writ of certiorari and reverse in part the Resolution and Order of July 26, 2017, of the Court of First Instance on the production of the document at issue for in camera inspection. Said Resolution and Order is affirmed in all other aspects that are compatible with what we have provided hereunder. The stay is lifted, and the case is remanded to the trial court for further proceedings consistent with this decision*.

Judgment will be rendered accordingly.

Justice Kolthoff Caraballo issued a concurring opinion. Chief Justice Oronoz Rodríguez, **[*49]** Justice Rodríguez Rodríguez, Justice Estrella Martínez, and Justice Colón Pérez issued separate dissenting opinions.

Concur by: KOLTHOFF CARABALLO

Concur

JUSTICE KOLTHOFF CARABALLO, concurring.

I

The record of this case clearly shows that the document at issue is a *rough draft*. This means that it is a document that is not yet final, since the possibility still exists that it might be modified *prior to being delivered to its intended recipient*. The respondent insists on arguing that it is not a draft, but rather a "proposed budget" or a "proposal" directed to the Financial Oversight and Management Board for Puerto Rico (Fiscal Oversight Board). Whichever way this document is entitled, what is uncontroverted is the fact that it was subject to change and that, therefore, it would not be final until it had been sent to its recipient. The truth of the matter is that what the Executive Branch prepared, which is the object of this controversy here, was the proposed budget that, pursuant to constitutional provisions, it is required to send to the Legislative Assembly every year.[1] This is the same constitutional procedure that has been correctly followed since the enactment of our Highest Law. The only difference **[*50]** on this occasion is that the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA)[2] provides that this draft of the proposed budget must be reviewed by the Fiscal Oversight Board that was created under PROMESA. For over 60 years, the Executive has prepared the proposed budget and had the space to—as it is a draft, after all—make the necessary changes *before* delivering it to the Legislative Assembly.

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[1] ***PR Const. art. IV, § 4, LPRA tit. 1***.

[2] *Puerto Rico Oversight, Management, and Economic Stability Act of 2016 (48 USCA § 2101 et seq.*)

This being so, what law makes the *draft* budget that the Executive Branch sent, not to its intended recipient, which is the Legislative Assembly, but to the board created by federal law, a public document? Does PROMESA make it a public document? If this were not the case, does Section 1001 of the Puerto Rico Public Documents Administration Act[3] address this particular situation? The answer to these questions is no, and it seems to me that it can be no other way. *The right of the People to know, which emanates from the First Amendment to the United States Constitution and our own Bill of Rights as the cornerstone of our democracy, does not include, nor can it include—pursuant to the parameters of common sense and justice—the "draft" of what at some point might become a public document*. Otherwise, the ideas, views, and thoughts of officials in their public capacity would succumb to the possibility being held for ransom (among other fates) by the dreaded demagogy (although **[*51]** I certainly cannot speculate as to whether this is such a case). We must not overlook that, although "democracy" and "demagogy" may have some phonetic similarities, they are certainly very different. Democracy is the root and the reason for the existence of the People's right to know, of which the First Amendment to the United States Constitution and our Bill of Rights are the guarantors. While demagogy, although protected by these same constitutional guarantees, is a terrible malignant germ for our democracy, which it would behoove us not to nurture.

To establish, as the respondent would have us do, that a draft that has not been sent to its recipient constitutes a public document in and of itself does not obey positive law and, worse yet, opens the door to situations that are in no way helpful to the proper undertaking of government. For this reason, I concur with the opinion issued by a majority of this Court.

II

A. *The Right of Citizens to Access "Public Documents"*

In a society such as our own, it is necessary to recognize "'the legal right [of all citizens] to examine and investigate the conduct of its affairs, subject only to those limitations imposed by the most urgent public necessity.'"[4] Thus, we have recognized the right to access public **[*52]** information as a necessary corollary of the exercise of the rights of freedom of speech, freedom of the press, and freedom of association enshrined in Article II, Section 4 of the Constitution of the Commonwealth of Puerto Rico, LPRA tit. 1.[5] The main purpose of this section is to guarantee the free discussion of government matters.[6] For this reason, it is necessary to afford all citizens of our country the right to examine the content of the records, reports, and documents gathered during the process of governing.[7] This is so because "if the People are not duly informed of the manner in which public work is conducted, their freedom to express through

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[3] ***3 LPRA § 1001***.

[4] ***Soto v. Srio. de Justicia, 112 DPR 477, 485 (12 PR Offic. Trans. 597, 608] (1982)*** (quoting *Dávila v. Gen'l Supervisor of Elections*, 82 PRR 257, 273-274 (1960)).

[5] *Ortiz v. Dir. Adm. de los Tribunales, 152 DPR 161, 175 [52 PR Offic. Trans. 11,]* (2000).

[6] *Id.*

[7] *Id.*

their vote or otherwise their satisfaction or dissatisfaction with the persons, rules, and processes that govern them will be curtailed."[8]

Although the right access to public information is a vital, because of its close ties to the rights of free speech, free association, and the right to petition the government for redress of grievances, it is not absolute or unrestricted.[9] This right may be restricted by the State if there is a compelling interest that justifies it.[10] For this reason, this Court has held that the right of access to certain information in the hands of the State *depends, first of all, on whether the* ***[*53]*** *requested information is in fact public information*.[11] To that end, our legal framework has provided several definitions of the term "public information." One of them is provided in Section 1(b) of Law No. 5 of December 8, 1955 (Law No. 5), as amended, known as the Puerto Rico Public Document Administration Act, 3 LPRA §§ 1001-1013.

Section 1 of Law No. 5 provides that the purpose of the statute is to "set[ ] up a systematic program for the *preservation of documents* which, because of their historic, legal, administrative, or informational value, merit their being preserved for a long time yet, and for the elimination of such documents as not only lack any permanent value but have furthermore already lost all their administrative usefulness." 1955-1956 PR Laws 79. (Emphasis added.)

Specifically, *Section 3(b) of Law No. 5 (3 LPRA § 1001(b)*) defines "public document" as follows:

> Any document which originates or is kept or received in any dependency of the Commonwealth of Puerto Rico according to the law or in relation to the management of public affairs and that pursuant to the provisions of § 1002 of this title is required to be permanently or temporarily preserved as evidence of transactions or for its legal value. It includes those documents produced electronically which meet the requirements established by law and regulations.

For its part, Section 1170 of the Civil Code, *31 LPRA § 3271*, provides that "[p]ublic instruments are those authenticated **[*54]** by a notary or by a competent public official, with the formalities required."

Therefore, when a document falls under the provisions of any of these definitions, ordinary citizens have the right to request access to the information, and the State may only validly deny access in a limited number of scenarios.[12]

Based on the above, when evaluating the controversy at bar, the first test is to determine whether a "draft" prepared by an official in the discharge of their functions and *that has not been sent to its intended recipient* constitutes, in and of itself, a public document.

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[8] *Ortiz v. Dir. Adm. de los Tribunales, 152 DPR, at 175 [52 PR Offic. Trans. 11, at __]*.

[9] *Id.* ***López Vives v. Policía de PR, 118 DPR 219, 228 [18 PR Offic. Trans. 264, 275] (1987)***; ***Soto v. Srio. de Justicia, 112 DPR, at 493 (12 PR Offic. Trans., at 617***].

[10] ***López Vives v. Policía de PR, 118 DPR, at 229 [18 PR Offic. Trans., at 275***].

[11] *Ortiz, 152 DPR, at 176 [52 PR Offic. Trans. 11, at __]*; *People v. Superior Court*, 96 PRR 728, 737 (1968).

[12] *Ortiz*, 152 DPR, at 176 [52 PR Offic. Trans. 11, at __].

In *People v. Superior Court*, 96 PRR 728 (1968), this Court entertained a controversy that, although in a different setting than the case at hand, undoubtedly helps us to illustrate the special nature of documents prepared and circulated during by an official in the discharge of their duties for internal use by the government entity concerned. In that case, the defendant was charged with three counts of infractions to the Income Tax Act. The defendant requested that the Court of First Instance order the Secretary of the Treasury to produce a copy of the reports prepared by the Income Tax Bureau Inspectors (inspectors) with regard to his case, since **[*55]** the Secretary of the Treasury had refused to furnish them.[13] The trial court denied the petition on the grounds that those documents were not in the custody of the prosecutor.[14]

Dissatisfied with this decision, the defendant filed a motion to reconsider through which he contended that the reports prepared by the Income Tax Bureau, which were a product of the administrative investigation of the case, were not part of the prosecutor's work, were not sworn statements, and were not protected under Criminal Procedure Rule 95 (34 LPRA App. II).[15] After evaluating the arguments of the parties, the trial court reconsidered its decision and ruled that the defendant should be provided with a copy of the report submitted by the inspectors to the Secretary of the Treasury or be allowed to examine or photograph it.[16]

In evaluating the nature and the purpose of the documents, this Court ruled that, in light of Section 1170 of the Civil Code, "*a report, memorandum, or writing prepared by an employee or officer in the exercise of the duties of his position or employment for his superior or for internal purposes of the departmental decisions and actions are not public documents which, pursuant to § 47 of the Law of Evidence, every citizen has a right to inspect* **[*56]** ."[17] (Emphasis added.)

In that regard, we concluded that, although the inspectors' report, which was prepared in the course of their work and submitted to their superior (the Secretary of the Treasury) for his own findings, could probably contain proper evidentiary materials that may be introduced at trial, there was no doubt that it also contained other materials that could not be introduced, among which included these officers' interpretations of certain facts, their subjective conclusions regarding such facts, as well as their conclusions pursuant to the tax law they administer, and, insofar as the criminal action is concerned, it could also contain the public officials' method of work or strategy to support the charges.[18]

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[13] *People v. Superior Court*, 96 PRR, at 730.

[14] *Id.*

[15] *Id.* at 731.

[16] *Id.*

[17] *People v. Superior Court*, 96 PRR, at 737-738. To illustrate, see also *Barr v. Matteo, 360 U.S. 564 (1959)*; *Howard v. Lyons, 360 U.S. 593 (1959)*; *Denman v. White, 316 F.2d 524 (1st Cir. 1963)*; *Pagano v. Martin, 275 F.Supp. 498 (1967)*. In these cases, documents arising in the course of the discharge of an office or employment and processed through official channels for official purposes were considered to have absolute privilege, the author of the documents enjoying full immunity against claims of libel or defamation, despite the fact that in some of these cases, the official made a disclosure that was outside the scope of their department.

[18] *People v. Superior Court*, 96 PRR, at 738-739.

Our decision in that case was based on public policy considerations and the possible implications that ruling otherwise might have on the effective operation of the government. Specifically, we held as follows:

> For reasons of public policy; because it *would affect the effective operation of the government and would preclude the officers from acting with complete freedom and integrity, without any fear or inhibition in the preparation of reports, memoranda or other expressions* ***[*57]*** *or communications in the course of the discharge of their duties*, for departmental purposes, we must conclude that the report sought herein, as such, is not subject to inspection under Rule 95 as a "document" or "paper" obtained by The People, from another person.[19]

(Emphasis added.)

The above shows that, in the criminal law context, in which one of the most important fundamental rights is involved—an individual's right to freedom—this Court did not allow the discovery of the documents prepared by an officer during the course of their work for internal agency purposes under Criminal Procedure Rule 95 as these were not public documents.

Additionally, the Secretary of Justice of Puerto Rico has issued opinions in response to consultations made to this office concerning the matter of "public documents."

In 1957, the then-governor of Puerto Rico, Hon. Luis Muñoz Marín, forwarded to the Secretary of Justice at that time, Hon. Juan B. Fernández Badillo, the question of whether it was proper to issue a certified copy (from the Police Commission, currently the Puerto Rico Police) of certain documents related to an administrative case against a police lieutenant.

Secretary Fernández Badillo stated that "[a] **[*58]** document by a public official made without statutory authorization or requirement is not considered a public document. The notes, memorandums, and correspondence of government officials that arise incidentally during the course of the administration of office affairs are likewise not of a public nature." Op. Sec. Just. No. 21-1957.

Moreover, the Secretary of Justice stated that "the State is not obligated to produce a copy of reports and letters that arise incidentally during the administration of an office, since, although they are related to public matters, they do not strictly constitute public record." *Id.* at 78.

In 1964, the then-Secretary of Labor, Hon. Frank Zorrilla, consulted the Secretary of Justice at the time, Hon. Hiram R. Cancio, regarding the public or nonpublic nature of worker insurance policies in the hands of the Department of Labor. He mentioned that Section 407 of the Code of Civil Procedure (32 LPRA § 1762) (repealed 1979) provided that all documents classified as such under Section 1170 of the Civil Code were public documents. As a result, he cited Spanish legal scholar José María Manresa y Navarro on Section 1170, who comments that the definition of "public document" includes three distinctive aspects: (1) the intervention of a notary or public official who **[*59]** provides authentication, (2) the competence of that notary or official, and (3) the inclusion in the document of the proper legal formalities. Op. Sec. Just. No. 5-1964.

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[19] *Id.* at 739.

On another occasion, and in response to a consultation from the former Superintendent of the Police, Hon. Salvador Rodríguez, on whether personal history of the citizens with whom the Police had intervened, and which were on record with the Police's Criminal Identification Division, constituted a public document. The Secretary of Justice at the time, Hon. Rafael Hernández Colón, determined that such a document was public and was subject to inspection by citizens. Nevertheless, he added that "since that right to inspect is not considered absolute, it is valid to require persons requesting such inspection or the issuance of certified copies of those records to have a legitimate interest in the matter." Op. Sec. Just. No. 46-1966, at 226.

Similarly, Secretary Hernández Colón has indicated that, on multiple occasions, the Department of Justice has emphasized that "the right to inspect guaranteed under the Law of Evidence does not extend to the notes, memorandums, or correspondence of government officials that arise incidentally **[*60]** from the administration of office affairs nor to confidential information, the disclosure of which could be detrimental to the proper functioning of the agency that possesses it." Op. Sec. Just. No. 46-1966, at 226.

B. *Executive Privilege*

Federal jurisprudence has recognized three main components of the executive privilege doctrine: (1) state and military secrets,[20] (2) criminal proceedings,[21] and (3) deliberative processes.[22] Regarding deliberative processes, federal courts have identified three grounds for sustaining the existence of a privilege as it pertains to a deliberative process:

> First, the privilege protects candid discussions within an agency. . . . Second, it prevents public confusion from premature disclosure of agency opinions before the agency establishes final policy. . . . Third, it protects the integrity of an agency's decision; the public should not judge officials based on information they considered prior to issuing their final decisions.[23]

Thus, privilege focuses on documents reflecting advisory opinions, recommendations, **[*61]** and deliberations comprising part of the process by which government decisions and public policies are formulated.[24] Its purpose is related to the public policy of protecting confidential exchanges of opinions and advice within the Executive Branch. That is, privilege is limited to protecting the exchange of documents containing opinions, recommendations, and deliberations that contribute to the decision-making process.[25] Nevertheless, an important detail that underlies all

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[20] See *United States v. Reynolds, 345 U.S. 1, 6-8 (1953)*; *C. & S. Air Lines v. Waterman Corp., 333 U.S. 103, 111 (1948)*; *Totten, Administrator v. United States, 92 U.S. 105, 106-107 (1875)*.

[21] See, *Roviaro v. United States, 353 U.S. 53, 59-61 & 77 (1957)*.

[22] *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 FRD 318, 324 (D. DC 1966)*, *affirmed in* ***384 F.2d 979 (DC Cir. 1967)***; *N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 151-153 (1975)*; *EPA v. MINK, 410 U.S. 73, 86-93 (1973)*. *See also*, Roberto Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*, *87 Iowa L. Rev. 1559 (2002)*.

[23] *Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 12 (D. DC 1995)*, *affirmed in 76 F.3d 1232 (DC Cir. 1996)*.

[24] See, *N.L.R.B. v. Sears, Roebuck & Co., 421 U.S., at 151-153*.

of the above is the logical conclusion that, *when we discuss so-called executive privilege in any of its three modalities, we are referring to final documents*. That is, a document that is directed to its intended recipient, whether external or internal, no matter how simple, complex, or lengthy the document may be and no matter the outcome of the action. Where this condition of finality is not met, we cannot speak of privilege, since the document has not even obtained the condition of public document.

C. *PROMESA*

Essentially, PROMESA establishes the Fiscal Oversight Board, the purpose of which is limited to providing a method for achieving fiscal responsibility and access to capital markets. *48 USCA § 2121*. Consequently, the provisions **[*62]** of PROMESA are geared toward the concession of powers and authority to the Fiscal Oversight Board to achieve this objective.

The respondent expects the Executive to hand over a copy of the proposed budget prepared by the governor and submitted to the Fiscal Oversight Board. Again, it is important to underscore that what the Executive sent the Fiscal Oversight Board is nothing more than a *draft*, as required under PROMESA.[26] Note that the provision refers to an imperfect document that is subject to multiple revisions, as indicated by the Fiscal Oversight Board, which generates a process in which the Executive modifies and sends several drafts to the Fiscal Oversight Board until it has been perfected in accordance with the required standards.[27]

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[25] See, *Corporación Insular de Seguros v. García, 709 F.Supp. 288, 295-296 (D. PR 1989)*.

[26] "§ 2142, Approval of Budgets.

"...

"(c) BUDGETS DEVELOPED BY GOVERNOR

"(1) GOVERNOR'S PROPOSED BUDGETS

"The Governor shall submit to the Oversight Board proposed Budgets by the time specified in the notice delivered under subsection (a). In consultation with the Governor in accordance with the process specified in the notice delivered under subsection (a), the Oversight Board shall determine in its sole discretion whether each proposed Budget is compliant with the applicable Fiscal Plan and—

"(A) if a proposed Budget is a compliant budget, the Oversight Board shall—

"(i) approve the Budget; and

"(ii) if the Budget is a Territory Budget, submit the Territory Budget to the Legislature; or

"(B) if the Oversight Board determines that the Budget is not a compliant budget, the Oversight Board shall provide to the Governor—

"(i) a notice of violation that includes a description of any necessary corrective action; and

"(ii) an opportunity to correct the violation in accordance with paragraph (2)." *48 USCA § 2142(c)(1)*.

[27] "(2)GOVERNOR'S REVISIONS

"The Governor may correct any violations identified by the Oversight Board and submit a revised proposed Budget to the Oversight Board in accordance with paragraph (1). The Governor may submit as many revised Budgets to the Oversight Board as the schedule established in the notice delivered under subsection (a) permits. If the Governor fails to develop a Budget that the Oversight Board determines is a compliant budget by the time specified in the notice delivered under subsection (a), the

Furthermore, this provision expressly imposes an obligation on the Executive towards the Fiscal Oversight Board. No part of PROMESA suggests, instructs, or binds the Executive to provide a citizen, in this case, the respondent, the draft of the budget in question. Nor does it turn it into a public document.

III

In short, the controversy in this case hinges on a *draft* of the budget **[*63]** prepared by the Executive in the exercise of that office, and which was sent to the Fiscal Oversight Board, in accordance with the provisions of PROMESA, with full awareness that the document *was not final*. That is, the document retained its nature as a *draft*. To my understanding, it is not until this document is received by the Legislative Assembly, the body for which the document was created (the intended recipient), that it is no longer considered a draft and becomes a final document. It is at that moment, and *at no time before*, that the document becomes public and, therefore, reviewable by any citizen. For the foregoing reasons, I concur with the opinion of the Court.

Dissent by: ORONOZ RODRÍGUEZ; RODRÍGUEZ RODRÍGUEZ; ESTRELLA MARTÍNEZ; COLÓN PÉREZ

Dissent

CHIEF JUSTICE ORONOZ RODRÍGUEZ, dissenting.

This is a case of access to public information and the State's opposition of the to the access requested. Specifically, this Court had to decide whether it was proper to dismiss the petition for mandamus filed by the Hon. Eduardo Bhatia Gautier because allegedly (1) he lacked standing, (2) the petition was moot, (3) he did not exhaust the available remedies prior to turning to the courts, and (4) the inappropriateness **[*64]** of the mandamus as a question of law due to, among other things, the applicability of executive privilege. The opinion of the Court correctly rules that there is no basis whatsoever for dismissing the petition for mandamus filed by the Hon. Eduardo Bhatia Gautier. The analysis should have ended there.

Unfortunately, a majority of this Court unnecessarily postpones the in camera inspection of the budget submitted by the Commonwealth of Puerto Rico (Commonwealth) to the Financial Oversight and Management Board for Puerto Rico (Board). Thus, it makes a peculiar leap and improvises a whole other controversy: What, if any, are the limitations that executive privilege places on an in camera inspection of a document to which this constitutional privilege purportedly applies? It then rules that the claim of executive privilege prevents the in-chambers inspection of the document in question before legal briefs are filed. Thus, the majority distances itself from the caselaw of this Court and of the United States Supreme Court without examining it properly. As the majority opinion precociously adjudicates the case, unnecessarily and excessively interferes with the judicial process, and denies **[*65]** the opportune, in camera inspection of a document of great importance, I emphatically dissent.

Oversight Board shall develop and submit to the Governor, in the case of an Instrumentality Budget, and to the Governor and the Legislature, in the case of a Territory Budget, a revised compliant budget." *48 USCA § 2142(c)(2)*.

I

The assignment of errors put forward by petitioners only question the lower court's failure to dismiss the petition for mandamus. Nevertheless, the opinion of the Court goes further and tacitly pre-adjudges the underlying controversy in establishing the scope of the privileges on governmental information, even though the Court is not in a position to apply the criteria it is recognizing.[1]

I voted against issuing the writ as it is evident that the trial judge did not commit any error of law or abuse of discretion, which prevents us from intervening at this juncture.[2] The majority not only issues the writ at an improper time, but it also makes numerous statements on access to public information and the privileges related to governmental information that, in my estimation, are mistaken. I am equally concerned that the parties were not afforded the opportunity to state their positions through briefs—the normal procedure when issuing a writ—which prevented the substantive issues involved from being analyzed with the depth and rigor that they warranted.[3] Having said this, let us see which legal concepts **[*66]** are applicable, as well as my concerns with the ruling of the Court.

A. *Access to Public Information*

The opinion of the Court recognizes how central access to public information is to any democratic society. Nevertheless, the Court reproduces the uncertainty that has persisted since we first recognized this constitutional right in *Soto v. Srio de Justicia, 112 DPR 477 [12 PR Offic. Trans. 597] (1982)*; which is, under what standard of judicial review are we to analyze the constitutionality of a law establishing the confidential nature of certain information. *See*, *José J. Álvarez González, Derecho constitucional de Puerto Rico y relaciones constitucionales con los Estados Unidos 1179, Bogatá, Ed. Temis (2009). In Soto v. Srio de Justicia, 112 DPR, at 493-494 [12 PR Offic. Trans., at 617]*, we discussed the balance of interests method recognized in *United States v. O'Brien, 391 U.S. 377 (1968)*.[4] However, we also recognized that "strict judicial scrutiny" must be applied in these cases. *Soto v. Srio de Justicia, 112 DPR, at 497 [12 PR Offic.*

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[1] For example, the opinion of the Court recognizes for the first time in our jurisdiction the privilege on decision-making information in deliberative processes, but the Court is clearly in no position to apply the law it has prescribed. Moreover, according to the majority's own reasoning, this discussion was unnecessary since ultimately it only remands the case to the trial court because it could not examine the document in chambers without evaluating additional arguments in writing. This demonstrates that this was not the time to issue the writ and enter into a discussion of the scope of the applicable privileges.

[2] Precisely for this reason, the Court of Appeals denied the petition since it did not meet the criteria for issuing the writ.

[3] In fact, the Hon. Eduardo Bhatia Gautier requested that, should the writ of certiorari be issued, he be provided the opportunity to file pleadings, which never occurred. Request for Order, at 2.

[4] ***Soto v. Srio de Justicia, 112 DPR, at 493-494 [12 PR Offic. Trans., at 617]*** ("In *United States v. O'Brien, 391 U.S. 367, 377 (1968)*, the court held that a government regulation is sufficiently justified: (1) if it is within the constitutional power of the government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.")

Trans., at 621]. These criteria are distinct; however, the Court fails to distinguish them, either in this case or in several subsequent cases.[5]

Clearly establishing the standard of judicial review makes it possible to resolve a case and reduces arbitrariness. *See*, José J. Álvarez González, *Derecho Constitucional*, 74 Rev. Jur. UPR 597, 628 (2005). Due to the fundamental nature of access to public information, I believe that the Court should have clarified, once and for all, that strict judicial scrutiny applies in these cases.[6] ("Once *Soto* ruled that there is a *constitutional* right to access governmental information, the search for this access **[*67]** becomes an exercise in freedom of speech and, therefore, any law that attempts to block it is a law directed against free speech and to which strict scrutiny should be applied.") *Id.* According to this standard, if a court determines that the requested document is a public document, the State must prove that it has compelling interests and that confidentiality necessarily promotes such objectives.[7] This rule would apply to any claim of privilege made by the State, including Evidence Rule 514 (32 LPRA App. VI) on official information.

B. *Privileges for Public Information*

Different situations prompt citizens to go through the courts to request information that is in the hands of the government. It could be the case, for example, that the requested information is essential to the main controversy. See, for example, *López Vives v. Policía de PR, 118 DPR 219 [18 PR Offic. Trans. 264] (1987)*. On other occasions, citizens may simply file a petition to access public information to adequately oversee the government's functions. See, for example, *Soto v. Srio. de Justicia*. Nevertheless, in both instances, the State may allege that it has a genuine interest in keeping the information confidential. To avoid having a court order the disclosure of a document, the State may raise constitutional **[*68]** executive privilege or any of the specific privileges established through legislation. *See*, Álvarez González, *Derecho constitucional de Puerto Rico y relaciones constitucionales, supra*, at 363.

Constitutional executive privilege is not recognized expressly neither in the Unites States Constitution nor in the Constitution of Puerto Rico. The reason for its validity stems from the doctrine of separation of powers, as it questions the scope of the power of the Judicial Branch with respect to the Executive Branch. In the seminal case of *United States v. Nixon, 418 U.S. 683, 706 (1974)*, the president of the United States contended that the independence of the

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[5] See, for example, *Colón Cabrera v. Caribbean Petroleum, 170 DPR 582 [70 PR Offic. Trans. 38] (2007)*; *Angueira v. J.L.B.P., 150 DPR 10 [50 PR Offic. Trans. 2] (2000)*; ***López Vives v. Policía de P.R., 118 DPR 219 [18 PR Offic. Trans. 264] (1987)***; ***Santiago v. Bobb y El Mundo, Inc., 117 DPR 153, 159 [17 PR Offic. Trans. 182, 190-191]*** (1986).

[6] The majority opinion holds that "As this is a fundamental right, in order to prevail, the restrictions imposed by the state apparatus must be in furtherance of a compelling government interest." Opinion of the Court, at 82 [English translation, at 16]. However, subsequently the Court indicates that the trial court must balance the interests involved to determine whether the privileges in question are in order. *Id. at 88-89* [English translation, at 18].

[7] *See*, José J. Álvarez González & Ana I. García Saúl, *Derecho Constitucional*, 65 Rev. Jur. UPR 799, 815 (1996) ("We should recall the different approaches laid down in the caselaw for the construction the free speech clause. Generally, to uphold the validity of a law or government action regulating the content of speech, the State must satisfy the so-called strict scrutiny standard and show that (1) there is a compelling state interest and (2) that the means chosen is necessary to achieve that interest.").

Executive Branch demanded the recognition of the rule that no court could order the disclosure of presidential communications. The United States Supreme Court categorically rejected the existence of an absolute executive privilege. It did recognize, however, a qualified executive privilege that emanates from the separation of powers. This privilege protects communications between the president and his advisors, but it falls to the Judicial Branch to define its limits. The Court did not clarify under which standard of judicial review the privilege should be examined. Nevertheless, **[*69]** it held, among other things, that "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *Id. at 709*.

Executive privilege in Puerto Rico is also derived from the separation powers established in our Constitution. *Peña Clos v. Cartagena Ortiz, 114 DPR 576, 598 [14 PR Offic. Trans. 744, 770] (1983)*. There, we also clarified that this power is not absolute. *Id.* Moreover, in the context of a case on the investigative power of the Legislative Assembly before the Executive Branch, we held that we would examine the controversy using "[t]he balancing of competing interests method." *Id.* Nevertheless, that standard does not apply to this controversy since this a claim of access to public information. *See*, I Ernesto L. Chiesa, *Tratado de derecho probatorio* 308-309, Dominican Republic, Ed. Corripio (1998) ("[T]he right of the people at large to obtain information on matters of public interest and to oversee the government is broad. One could say that when the controversy is between two branches of government, as in *Peña Clos v. Cartagena Ortiz*, the intervention of the Judicial Branch should be more modest; however, the right of the people to be well informed regarding governmental matters is always at stake.").

In *Peña Clos v. Cartagena Ortiz, 114 DPR, at 599 [14 PR Offic. Trans., at 772*], we ruled "that a naked allegation of public privilege, **[*70]** unsupported by adequate legislation, must be zealously scrutinized." This statement was criticized because it is baffling to speak of a constitutional privilege that requires a law for its viability. Álvarez González, *Derecho constitucional de Puerto Rico y relaciones constitucionales, supra*, at 364. I agree with this assessment. If there is no law on the confidentiality of public information, the Court must examine the constitutional aspect of the privilege without reservation. Nevertheless, if there is a law that recognizes a privilege for official information, the Court must focus its inquiry on that statute and avoid resorting to constitutional executive privilege.

Having set forth the above, it is necessary to examine how this privilege has been recognized statutorily. There is no doubt that "[t]he best recognized way to effectively protect sensitive information gathered by the State in its official capacity, [the] disclosure of which could harm the public interest, is through special legislation." *Santiago v. Bobb y El Mundo, Inc., 117 DPR 153, 160 [17 PR Offic. Trans. 182, 191] (1986)*. But "[a]bsent such statute, we can supplement it through Evidence Rule 31, concerning official information."[8] *Id.* This Rule defines "official information" as "information acquired in confidence **[*71]** by a public officer or employee in the course of [their] duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." Evidence Rule 514. To that end, that person may request that the official

[8] Rule 31 is currently Evidence Rule 514.

information not be disclosed. The court shall consider whether disclosure is barred by law or whether discovery is against government interests.[9]

Considering the relationship between constitutional executive privilege and the above-referenced rule, it is questionable, if not out of order, to discuss these privileges in isolation as the opinion of the Court has done. In doing so, it would seem that the majority gives more substantive weight to executive privilege. However, as I see it, Rule 514, as is pertains to executive privilege, only has the effect of incorporating it statutorily.[10] Therefore, I believe that there is no reason for the scope of constitutional executive privilege to be greater than that of the privilege for official information, much less in a controversy where access to public information is claimed.

Part II-F discusses the privilege on decision-making information in deliberative processes pertaining to **[*72]** public policy. I do not question the normative merits of this privilege. However, the manner in which the opinion of the Court incorporates the so-called deliberative process privilege into our legal framework is troublesome. First of all, the majority seems to suggest that this privilege is part of Rule 514 on official information. Nevertheless, in acting thus, it fails to recognize the singularities of our evidentiary law, among these, that in Puerto Rico—as opposed to federal jurisdiction—privileges and their scope have been codified into law. Chiesa Aponte, *Reglas de Evidencia comentadas, supra*, at 189. In contrast, the deliberative process privilege, like so many other privileges, derives from common law. *Matthew W. Warnock, Stifling Gubernatorial Secrecy: Application of Executive Privilege to State Executive Officials, 35 Cap. U.L. Rev. 983, 986 (2007)*. Moreover, it has no constitutional basis whatsoever, contrary to presidential communications which are protected by constitutional executive privilege. *Id.* at 1012. ("The deliberative process privilege is a 'common sense-common law privilege' that is 'shorn of any constitutional overtones of separation of powers.'") See, *Vaughn v. Rosen, 523 F.2d 1136, 1146 (DC Cir. 1975)*.

Consequently, it is problematic that the Court has snuck in the common law deliberative process privilege through Rule 514, which does not expressly adopt this privilege or demarcate its contours. As Professor Chiesa acknowledges, "privileges **[*73]** must be provided by law, whether the Constitution, the rules of evidence, or special legislation. These are public policy considerations that entail a delicate balancing of social interests, which is an area that appertains to the Legislative Branch." Chiesa Aponte, *Reglas de Evidencia comentadas, supra*, at 188.[11] On this occasion, this delicate balancing of interests demanded that it be the

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[9] For a critique of this rule, *see*, Ernesto L. Chiesa Aponte, *Reglas de Evidencia comentadas* 164, San Juan, Eds. Situm (2016) ("Under Rule 514(B), the privilege is recognized if the court determines that 'disclosure of such information in the proceeding is against government interests.' But this has very little meaning since the prejudice that the government may invoke would have to be balanced against the party's need to have the information admitted and, above all, against the constitutional right of the People to access information on what goes on in the government.").

[10] *See*, Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 303. ("It seems that it is preferable to maintain that, in Puerto Rico, any privilege invoked by the government (governmental information) must be analyzed under Evidence Rule 31 [on official information], except as it concerns the privilege for the identity of informants, which must be examined under Rule 32.") *See also*, Álvarez González, *supra*, at 363. ("Besides this executive privilege of constitutional origin, the legislation may recognize additional and more specific privileges. . . . To understand the relationship between these two types of privileges, we should ask whether the Executive Branch would be devoid of relief, for example, if Evidence Rule 31 were repealed.")

Legislative Assembly that define the boundaries of the deliberative process privilege. Nevertheless, the majority decided to copy the common law nomenclature on deliberative processes without so much as questioning its role or the distinctive characteristics of either legal system.[12]

Each premise, each requirement, each conclusion in the opinion of the Court is presented as the result of the methodical study of the law and the application of the mythical legal reasoning. Nevertheless, by way of the apparent neutrality of the "applicable law," controversies of great significance for our constitutional and democratic framework have been substantively decided.[13] In light of the way in which such positions have been adopted, I have no choice but to express my deepest dissatisfaction with the course of action of the majority.

Finally, a majority of this Court has ruled **[*74]** that, at this time, executive privilege prevents the in camera examination of the budget that was submitted to the Board. It indicates that, when deciding a claim of executive privilege, courts must be very cautious when ordering an in camera inspection. This, as we will see below, contradicts the reasons for in-chambers inspection and both federal and local pronouncements on executive privilege. Moreover, even according to the majority's own logic, it is evident that, in this case, the Commonwealth had ample opportunity to justify the application of the privilege prior to the in camera inspection of the document.

The benefit of in-chambers examination has been recognized by multiple courts as an adequate procedural mechanism to determine the existence of a privilege. This is so because, as a rule, the in camera inspection of evidence does not affect the privilege in question; on the contrary, it allows the court to consider whether the privilege and the elements that sustain it in fact apply to the evidence at issue.[14] It also allows the court to distinguish between privileged and nonprivileged material in cases where a party claims a privilege in excess of what is necessary. See, for **[*75]** example, *Hamilton v. Verdow, 414 A.2d 914, 927 (1980)* ("[T]he in camera inspection may be utilized to determine whether the material is privileged [and] to sever privileged from non-privileged material if severability is feasible."). This is achieved with minimum intrusion from the judge into the matter in question to thereby balance the interests of the parties. *United States v. Zolin, 491 U.S. 554, 572 (1989)*. That is why the use of this mechanism is usually encouraged when claims of different types of privileges are raised.[15]

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[11] In fact, Exemption 5 of the Freedom of Information Act was adopted in the federal jurisdiction to solidify the deliberative process privilege within the federal government.

[12] Of course, when evaluating the privilege for official information in a specific case, we can examine, along with other elements of inquiry, state court rulings on deliberative process privilege. The problem is not researching these secondary sources, but rather to suggest that a privilege that has never been approved by the Legislative Assembly prevails in our legal system.

[13] For example, the majority casually mentions in a footnote that the deliberative process privilege has been extended to budgetary requirements. Is there any doubt that the Court has prejudged the merits of the case?

[14] *See, e.g.*, Callie Jennings, *Attorney-Client Privilege—Crime-Fraud Exception—Use of in Camera Review*, 82 Tenn. L. Rev. 663, 686 (2015) ("[T]he use of *in camera* review ensures [the] preservation of the policies behind the privilege.").

[15] *See, e.g.*, 2 Edward .J. Imwinkelried, *The New Wigmore: A Treatise on Evidence: Evidentiary Privileges* 1776 § 9.2.2, Maryland, Wolters Kluwer (3rd ed. 2016) (trade secrets); *Berens v. Berens, 785 S.E.2d 733 (2016)* (attorney-client privilege); *People v. Superior Court, 80 Cal. App. 4th 1305 (2000)* (official information).

However, when dealing with state secrets, that is, military or diplomatic secrets, the federal Supreme Court has held that the in-chambers inspection of presidential documents by courts affects executive prerogatives on national security. See, *United States v. Reynolds, 345 U.S. 1 (1953)*.[16] We should mention that in *United States v. Nixon*, the president alleged that the in camera inspection of presidential documents did not lie because the *Reynolds* standard extended to communications between the Chief Executive and his subordinates. The Supreme Court rejected this contention and ruled that:

> Absent a claim of need to protect military, diplomatic, **[*76]** or sensitive national security secrets, we find it difficult to accept the argument that even the very important interests in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protections that a district court will be obliged to provide.

United States v. Nixon, 418 U.S., at 706.

The Court concluded that in-chambers examination "is always a procedure calling for scrupulous protection against any release or publication of material not found by the court, at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought." *Id. at 714*. It is evident then that "in camera inspection is clearly permissible here." Chiesa Aponte, *supra*, at 296.

In Puerto Rico, since *Soto v. Srio. de Justicia*, we have validated in camera inspection, where the parties are not present, to adequately determine the privilege invoked by the State. In *Peña Clos v. Cartagena Ortiz, 114 DPR, at 581* [14 PR Offic. Trans., at 750-751], as part of the appellative process, we even remanded the case to the trial court as we believed that our intervention would be premature without it first reviewing the documents. Furthermore, in *Santiago v. Bobb y El Mundo, Inc., 117 DPR, at 162 [17 PR Offic. Trans., at 194]*, we held that "the court can make an in camera inspection of the documents or information **[*77]** that the State alleges is privileged" as a precondition for recognizing this privilege. As we can see, we have not afforded a broader scope to executive privilege. In contrast to state secrets, where once the application of the privilege is convincingly argued examination in chambers is not in order, in cases regarding executive privilege, in camera inspection is not only clearly permissible, but also desirable.

The argument of the opinion of the Court is sustained on the basis that in camera inspection does not contribute to the analysis because the nature of the document is already known. That expression is rather curious, since the Court has previously recognized that the Commonwealth had not shown that the document submitted to the Board was the same one that was submitted to the legislative bodies. Although we may be able to speculate on the content of the document, an examination of the same is necessary to determine whether it is justified to keeping it confidential; even more so when the argument is that it was part of a deliberative process. It is

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[16] The Court reasoned that, in circumstances such as these, "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone in chambers." *United States v. Reynolds, 345 U.S. 1, 10 (1953)*. We must highlight that, in Puerto Rico, it would be very difficult to invoke the state secret privilege. Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 302.

also problematic that this Court should ignore that the Commonwealth had already had the opportunity to file motions and argue the **[*78]** application of the privilege in court.[17] In fact, the Court of First Instance believed that "defendants did not specify in any way why the requested information qualifies for the application of executive privilege."[18] The above notwithstanding, in the Resolution and Order subject to review, the Court of First Instance even granted the Commonwealth a third opportunity to explain in detail why the information should be kept confidential. I have not found any sort of explanation or precedent whatsoever in our legal framework, or in any other, that would justify delaying the in camera inspection and granting the Commonwealth another turn at bat. I will keep looking.

The Wizard of Oz, hidden behind the curtain, seeks to influence his surroundings without been noticed. Let us not commit that same mistake. In times of crisis, citizen access to public information is more important than ever. This Court should have taken advantage of this historic moment, as it so courageously did following the events of El Cerro Maravilla, to broaden rather than limit such an important constitutional right for this daily experiment called democracy.

JUSTICE RODRÍGUEZ RODRÍGUEZ, dissenting.

Like the majority, I **[*79]** believe that the motion to dismiss filed by the governor is without merit. However, I am perplexed that this Court would vacate the decision of the trial court to perform an in camera review of the proposed budget. On numerous occasions we have endorsed the practice of examining a document in chambers when a party maintains that that the document is protected by a specified privilege. The facts of this case should not move us to change this position.

The Court seems to establish a new precedent for circumstances in which the need for in camera inspection of official documents is argued where the State has invoked a privilege in order to not hand them over to a citizen. When we begin to scrutinize the procedure, we notice that it is inconsistent and antithetical to our prior precedents and lacks objective standards that would facilitate and expedite the handling of these claims by courts. On the contrary, it adds to the fragmentation and delay of the proceedings.

Without a reasonable legal explanation, a majority of this Court has ordered the trial judge to adopt the additional legal briefs on the invoked privileges, when the record of this case shows that the parties already had the **[*80]** opportunity to argue their positions on the applicable privileges and had both submitted briefs.

I repeat, the procedure established by a majority *is not supported by any precedent of this Court or of other jurisdictions where the right of access to public information enjoys constitutional protection*. Worse yet, it has serious repercussions on our function as arbiters of controversies between the State and its citizens, and it contributes to opacity in governmental matters. Let there be no doubt, today we have taken a step back in our advancement of democracy.

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[17] *See*, Urgent Motion Reiterating Motion to Dismiss and Motion in Compliance with Order filed by the Commonwealth before the trial court.

[18] Resolution and Order of July 26, 2017, at 3.

In the interest of explaining my dissatisfaction with the Court's disposition of this controversy today, we must detail the background of this case to correctly apply our law as it pertains to the constitutional right of access to public information.

I

There is a threshold matter that we must discuss in this case, since I consider that the issue "decided" by this Court was not brought before us by the Solicitor General. Allow me to explain.

In his petition for certiorari, the Solicitor General posed two questions for our consideration: (1) that the trial court erred in not granting the motion to dismiss that the State filed with that **[*81]** court and (2) that it erred in entertaining the petition for mandamus filed by the respondent. Therefore, in his estimation, the requirements for the issuance of this extraordinary and privileged writ have not been met. *That is all*. In other words, the State did not question the ruling of the judge proposing the in camera inspection of the requested document. The majority does not explain why it has deviated from our prior rulings and goes on to decide something that was never argued.

That is to say, none of the errors assigned posits that ordering the in camera inspection of the document constituted an error made by the trial court. As we know, the Rules of the Supreme Court provides that all petitions for certiorari must contain a brief and concise assignment of errors made by the court a quo. *See*, Rules of the Supreme Court, 4 LPRA App. XXI-B. "The importance of this requirement is that the appellate court is obligated to consider only the errors that the appellant or petitioner has specifically assigned." Hiram Sánchez Martínez, *Práctica Jurídica de Puerto Rico* 294 § 1408, San Juan, LexisNexis (2001).

On this issue, in *Morán v. Martí, 165 DPR 356, 365 [65 PR Offic. Trans. 23,] (2005)*, we stated that:

> [o]ur appellate procedural law requires that the appeal that is filed contain a discussion **[*82]** of the errors made by the trial court, since no separate brief or memorandum of authorities shall be permitted after the appeal has been filed. The rule also clarifies that any assignment of error that is omitted or not discussed shall be deemed to have never been raised and shall not be considered by the intermediate appellate court.

Bear in mind that attorneys have the obligation and the duty to comply fully and rigorously with the requirements provided by law and regulation regarding the perfection of the appeals they file.

This requirement is no mere preciosity, but rather a requirement of due process of law and fair play. If a specific assignment on a specific matter is not included in a petition for judicial review, the opposing party would have never had the chance to state their position on that matter and the Court would have never heard their position prior to deciding the case. That, in my estimation, is patently unfair to say the least.

This principle is not an inescapable straitjacket since we have also provided that "[f]or the sake of doing justice, an appellate court has the inherent power to see and correct *patent errors* in an appeal even when these have not been raised **[*83]** by the parties." *Hernández v. Espinosa, 145 DPR 248, 264 [45 PR Offic. Trans. 20,] (1998)*. (Emphasis added.) Similarly, if the error is

not assigned but is discussed, the Court may consider it. *Vega v. Yiyi Motors, Inc., 146 DPR 373, 383 [46 PR Offic. Trans. 17, __] n.15 (1998)*.

Neither of these two circumstances is present in this case. Nowhere in his petition for certiorari does the Solicitor General challenge the order to submit the budgetary document to an in camera inspection. The Solicitor General referenced executive privilege when discussing why it was not proper to issue the writ of mandamus, but not to challenge the decision to review the proposed budget in chambers. In that regard, what is important is what the Solicitor General DID NOT say or argue. He did not contest the order for in camera review of the budget that was submitted to the Board precisely because the Solicitor General is aware of the frivolousness of that argument, as it is not justifiable in light of the applicable law. Nevertheless, it is this "unassigned error" that this Court has "decided."

The absence of a legal basis in this Court's "justification" of its course of action adds to the impression of arbitrariness. This reveals that what is important is to obtain a result, for which reason the legal underpinnings of the ruling issued are of no consequence. **[*84]** That is never what we want.

II

A

Access to information bolsters democratic systems since it contributes to the attainment of a diversity of fundamental rights. Knowledge of public matters fosters the formulation of informed opinions and, at the same time, promotes citizen participation in debates and better decision-making. More importantly, access to public information is the best antidote for corruption. As Justice Brandeis famously put it, "[s]unlight is said to be the best of disinfectants."

Bearing that in mind, access to information is unquestionably the cornerstone of governance and government oversight. Let us not forget that the state-citizenship relationship is based on a covenant through which the people—in the exercise of their sovereignty or authority—delegate to the State and government agents the power to administer public resources; design, administer, and implement solutions to the problems that ail society; and safeguard compliance with the legal order, among other matters. That delegation of sovereign authority *binds the State* "to be accountable [to the people] for the acts it carries out on their behalf." Rodolfo Vergara, *La transparencia como problema* 34 (2008), [in **[*85]** Spanish at] http://187.216.193.232/biblio-imdf/sites/default/archivos/00481Cuadernostrans-parenciaIFAI05.pdf . Otherwise, how can a society ensure that its government is acting in accordance with societal needs and interests and not interests that are antithetical to society itself, thereby undermining the foundations of the covenant of governance? Any limitation on this vital access would be equivalent to "[a]llow[ing] the government to manage public affairs under a shroud of *secrecy* [which] is to invite arbitrariness, bad administration, governmental indifference, public irresponsibility, and corruption." Efrén Rivera Ramos, *La libertad de información: necesidad de su reglamentación en Puerto Rico*, 44 Rev. Jur. UPR 67, 69 (1975). (Emphasis added.)

To put it another way, a singular demand for the disclosure of public information shines through from the above, since it is born of the fundamental principle of all governments: to serve the populace that constituted it. For this reason, as political authorities are representatives of the

people—and whose efforts should favor society in general—all their decisions and actions are imbued with a high degree of public interest that warrants transparency. It is precisely **[*86]** the government that controls the information necessary to evaluate the policies it establishes and executes, and this creates an asymmetry of information that has repercussions on the covenant of governance itself. In that context, transparency of government management is indispensable for exercising external control to oversee the government.

To that end, both the national legal frameworks and the international society have recognized the right to obtain and gather information as an essential and intrinsic element of the exercise of free speech. Frank La Rue, Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. A/68/362, par. 18 (Sept. 4, 2013). In this way, international agreements on this topic promoted the adoption of the International Covenant on Civil and Political Rights (Covenant) in 1966. Article 19(2) of the Covenant specifically provides that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." International Covenant **[*87]** on Civil and Political Rights, [G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A(XXI) (Dec. 16, 1966)], in English at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx].[1] In response, more than fifty nations have constitutional guarantees to protect the right to access information and more than ninety countries have adopted national laws to regulate the procedure for requesting public information. La Rue, *supra*, par. 70.

In the particular context of Puerto Rico, we do not currently have legislation that regulates access to public information, even though the first push towards recognizing its supremacy came as early as the 1960s. *Dávila v. Gen'l Supervisor of Elections*, 82 PRR 257 (1960). It was not until 1982 that we elevated the right to access information to constitutional rank as a connatural element of the effective exercise of free speech enshrined in Article II, Section 4 of the Constitution of Puerto Rico, LPRA tit. 1. *Soto v. Srio. de Justicia, 112 DPR 477 [12 PR Offic. Trans. 597] (1982)*. The reasoning behind this decision was explicitly outlined in the International Covenant on Civil and Political Rights: that free access to information is indispensable for the full realization of the right to freedom of speech. See, *id. at 497*.

B

The right to access information can be raised to request a document from the State when it is of a public nature. In Puerto Rico, a public document **[*88]** is defined as:

> [a]ny document which originates, or is kept or received in any dependency of the Commonwealth of Puerto Rico according to the law or in relation to the management of public affairs and that pursuant to the provisions of § 1002 of this title is required to be permanently or temporarily preserved as evidence of transactions or for its legal value. It includes those documents produced electronically which meet the requirements established by law and regulations.

3 LPRA § 1001.

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[1] As a matter of fact, the United States signed the Covenant on October 5, 1977, and ratified it on June 8, 1992, [in English at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=EN].

From the above we have reasoned that "a *public document* is that which a governmental department receives in the course of its procedures and is required to preserve." *Trans Ad de P.R. v. Junta de Subastas, 174 DPR 56, 69 [74 PR Offic. Trans. 8,] (2008)*. Of course, even when a document is public it may be protected by an evidentiary privilege; therefore, special caution is needed when considering a request for disclosure.

In situations such as these, it is proper to order an in camera inspection of the document to determine whether the alleged privilege applies in whole, in part, or is simply out of order. This type of finding demands an analysis of specific facts; thus, the need for in camera inspection. *In re Grand Jury Subpoena, 662 F.3d 65, 71 (1st Cir. 2011)* ("Determining whether documents are privileged demands a highly fact-specific analysis—one that most **[*89]** often requires the party seeking to validate the claim of privilege to do so document by document."). This document review exists to dispel any doubt as to whether the documents are in fact privileged documents and to reject any improper or frivolous claims. "Such review offers a check on the accuracy and honesty of governmental privilege assertions." Russel V. Weaver & James T. R. Jones, *The Deliberative Process Privilege*, 54 Mo. L. Rev. 279, 313 (1989).

Those of us who have previously litigated countless confidentiality claims such as the one currently before us are aware that, when the document requested is clearly privileged, its inspection is unnecessary; however, such instances are the exception and not the rule. Experience shows that, on the contrary, most of the time it is imperative that the judge see and study the document in chambers to evaluate the validity of the claim of privilege. We cannot establish a rigid rule—as the majority appears to have done—that we must first determine whether or not the privilege applies to then proceed to review the document in chambers. This proposal points to ignorance as to how these matters are handled in actual legal practice. The absence of standards in their opinion is made evident in this instance in light of the questions their ruling **[*90]** raises: What factors are used to determine whether or not the privilege applies? Who bears the burden of proof, the person who invokes the constitutional right to access public information or the party who opposes the exercise of that right? What happens with the document or documents when some of them or parts of them are privileged and others or parts of others are not? Or do we believe that a document is either entirely privileged or entirely not? If the judge is unsure of the arguments put forward by the government, is the court barred from reviewing the document? What the majority proposes is frankly nonsense.

To grant an in camera inspection is within the sound discretion of a trial judge and should be reviewed by applying the abuse of discretion standard. See, *Horowitz v. Peace Corps. 428 F.3d 271, 282 (DC Cir. 2005)*, *cert. denied*, *126 S.Ct. 1627, 164 L.Ed.2d 335* ("The decision of whether to conduct an in camera review of a document is within the trial court's 'broad discretion' and is reviewed only for abuse of discretion."). However, when a legitimate dispute arises regarding the document, in camera inspection is advisable. "When . . . the assertion of privilege is subject to legitimate dispute, the desirability of in camera review is heightened." *In re Grand Jury Subpoena, 662 F.3d, at 70*. As legal scholar **[*91]** José Julián Álvarez González explains, this Court has resorted to the interpretative caselaw of the Freedom of Information Act (FOIA) "as a persuasive source to lay down the standards to resolve cases under Puerto Rican law." José J. Álvarez González, *Derecho constitucional de Puerto Rico y relaciones constitucionales con los Estados Unidos* 1176, Bogotá, Ed. Temis (2009). And, according to FOIA's interpretative

caselaw, if the agency's opposition to the disclosure of the document does not satisfy the court, the judge must inspect the requested documents in chambers. 33 Wright & Koch, *Federal Practice & Procedure* § 8440 (2006) ("Should the original record and supporting agency affidavit not satisfy the court, it must inspect the document itself in camera.").

Since *Soto*, this Court has repeatedly resorted to in camera examination where the State has invoked a privilege. *Soto v. Srio. de Justicia*, 112 DPR, at 513 [12 PR Offic. Trans., at 639-640]. Thus, in *Santiago v. Bobb y El Mundo, Inc., 117 DPR 153, 162 [17 PR Offic. Trans. 182, 194] (1986)*, we clarified that "[w]e favor the legal approach that the confidentiality of the information is determined through an analysis of the totality of the circumstances surrounding the communication, and by its own nature." To aid this task, the judge "can make an in camera **[*92]** inspection of the documents or information that the State alleges is privileged" as a *precondition to the recognition of the privilege. Id.* (Emphasis added.) Subsequently, in *Pres. del Senado, 148 DPR 737 [48 PR Offic. Trans. 64] (1996)*, faced with a claim of privilege due to the legislative immunity of the Legislative Assembly, we discussed the benefits of in camera inspection:

> It allows the court to verify the claim of privilege to exercise, in an informed fashion, its constitutional task of determining what is or is not privileged material as the final arbiter of the controversy between the parties. It is also a response to the need to not allow the Legislative Assembly itself to be the absolute and final arbiter of what is privileged material.

Id. at 805 [48 PR Offic. Trans. 64, at __].

More recently, in *Colón Cabrera v. Caribbean Petroleum, 170 DPR 582 [70 PR Offic. Trans. 38] (2007)*, we held that, when facing a claim of access to a file on an investigation by the Department of Justice's Office of Monopolistic Affairs that had already concluded, in camera inspection was the most appropriate method for protecting the information obtained from private persons during the course of the investigation.[2] In short, our caselaw has constantly favored in camera examination as a procedure for determining the appropriateness of a privilege **[*93]** raised by the State. Unfortunately, the Court does not explain why these precedents do not apply or why they were ruled out.

Finally, it bears mentioning that this Court's propensity to adopt in its rulings the mechanisms designed for accessing public information under FOIA without noting the important nuances of the legal framework for which that act was approved is concerning. There is no doubt that that piece of legislation is an important anchor point in matters of access to information that is in the hands of the federal government. However, we cannot lose sight of that fact that, in the United States, access to information as a right of the people was recognized through legislation. This makes it perfectly clear that the foundations of such recognition are different than our own, since in Puerto Rico—as was rightfully pointed out—access to public information is of constitutional rank. In proper adjudicative practice, the limitations imposed by FOIA are *statutory limitations*,

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[2] The Court of Appeals reached the same conclusion through a decision delivered by Judge Martínez Torres, now Associate Justice of this Court, reasoning that in camera inspection was necessary as a precautionary measure to protect the privileged information of private persons and companies, even though the generalized claim for official information privilege alleged by the State was superseded by the right to access public information. *Colón Cabrera v. Caribbean Petroleum*, KLCE050998 (PR C. Appeals) (February 28, 2006).

and it is that legislative mandate that federal courts must construe. In our case, we construe the scope of a constitutional right. In that regard, when faced with a claim **[*94]** of this nature, an inquiry under the standard of strict scrutiny is in order. *Nieves v. Junta, 160 DPR 97, 108 [60 PR Offic. Trans. 3,] (2003)* (Hernández Denton, J., dissenting); *Angueira v. J.L.B.P., 150 DPR 10 [50 PR Offic. Trans. 2]* (2000).

Nevertheless, we recognize that the absence of legislation to assert the mechanisms for requesting and producing the information in the hands of the State is the main cause of the disparity in how these types of cases are handled. Although this absence of legislation is no bar for a court to comply with its adjudicative functions, the court—in its imperative of serving justice—cannot contravene or undermine the constitutional character of the right to access information, as we have done in the past. In this way, the opinion subscribed today by a majority of this Court is far from our duty as guarantors of the fundamental rights of the Puerto Rican people.

C

In this case, the governor invoked executive privilege before the courts to maintain the confidentiality of the proposed budget requested by the plaintiff. The petitioner argued in his petition for certiorari that this privilege, as recognized in state and federal courts of the United States, has two aspects: the privilege protecting the governor's communications[3] and the deliberative process privilege. *Matthew W. Warnock, Stifling Gubernatorial Secrecy: Application of Executive Privilege to State Executive Officials, 35 Cap. U.L. Rev. 983, 985 (2007)*. The courts **[*95]** of the Commonwealth of Puerto Rico have also recognized the validity of executive privilege. See, *Peña Clos v. Cartagena Ortiz, 114 DPR 576 [14 PR Offic. Trans. 744]* (1983).

One of the objectives of the deliberative process privilege rests on considerations of practical convenience regarding the proper operation of the government. Thus, it seeks to allow government officials to be able to honestly express their opinions on public policy proposals without having to worry about the public repercussions of their opinions in the attainment the common good. *See*, I Raúl Serrano Geyls, *El derecho constitucional de Estados Unidos y Puerto Rico* 652 *et seq.* See also, *United States v. Nixon, 418 U.S. 683, 705 (1974)*; *Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (DC Cir. 1980)*.

There are two essential requirements for the application of this privilege: the information must be pre-decisional and it must be deliberative. *In re Sealed Case, 121 F.3d 729, 738 (DC Cir. 1997)*. The reasoning behind this lies with the purpose of the privilege: It exists to ensure that the fear of public scrutiny does not affect the quality of a public policy decision. Therefore, it is not necessary to protect communications that are received after the decision has been made. *N.L.R.B. v. Sears Roebuck & Co., 421 U.S. 132, 151-152 (1975)*. Nor is it necessary to protect a communication that only contains data and not opinions since it is precisely the integrity of the opinion that the privilege seeks to **[*96]** protect. *In re Sealed Case, 121 F.3d, at 737*.

The privilege protecting the governor's communications is both broader than the deliberative process privilege and more limited with regard to whom it is applicable. This privilege applies not only to deliberative communications but also to pre-deliberative and post-decisional

[3] This privilege is derived from its federal counterpart—the presidential communications privilege.

communications. Warnock, *supra*, at 990. However, the privilege only applies to the communications that involve advising the Chief Executive. Specifically, the United States Court of Appeals for the District of Columbia Circuit has ruled that "[o]f course, the privilege only applies to communications that these [White House] advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters." *In re Sealed Case, 121 F.3d, at 752*.[4]

To determine whether one of the privileges asserted in this case applies, it is necessary to examine the process of formulating the budget from which the claim of access to information arose.

III

June 30, 2016, marked a step backward in the democratic progress of our political community. On that day, the president of the United States of America signed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA). *48 USC § 2101 et seq.* Due to the economic **[*97]** debacle we were facing and continue to face, relief—any relief—was absolutely necessary. In response to the crisis, the United States government opted to exacerbate our incapacity to steer the future that is ultimately ours to live. Time will tell the tale and assign blame.

The details of the new governmental structure created through PROMESA have repercussion on the case at bar. As Judge Flores García of the Court of Appeals recently wrote, PROMESA created a new model of political organization and a *sui generis* legal framework. *Palacios Rivera v. ELA*, KLAN201700183 (July 31, 2017) (Flores García, J., concurring).

Historically, the Constitution of the Commonwealth of Puerto Rico has guaranteed a republican system of government with three powers equally subordinate to the sovereignty of the People of Puerto Rico: the Executive Branch, the Legislative Branch, and the Judicial Branch. *PR Const. art. I, § 2, LPRA tit. 1*. We have repeatedly emphasized that the principle of separation of powers framed therein—of which we are zealous guardians—seeks to avoid the disproportionate concentration of power in one political body, thereby protecting the liberty of our citizens from a tyrannical entity. See, *Córdova y otros v. Cámara de Representantes, 171 DPR 789, 799 [71 PR Offic. Trans. 40,] (2007)*; *Colón Cortés v. Pesquera, 150 DPR 724, 752 [50 PR Offic. Trans. 59, _] (2000)*; *Pueblo v. Santiago Feliciano, 139 DPR 361, 419-420 [39 PR Offic. Trans. 41,]* (1995).

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[4] The analysis used by United States courts to examine whether the privilege applies clashes with our recognized constitutional right to information. Essentially, once the privilege is claimed by the State, the person making the request must establish a specific need for the document in question. This has been recognized in federal court and in several state courts that have recognized the governor's privileged communications. Warnock, *supra*, at 990-1009. That requirement however would be contrary to our liberal recognition of the constitutional right to access information that allows any citizen to inspect and copy public documents without having to demonstrate any "special interest" whatsoever. *Trans Ad de PR v. Junta de Subastas, 174 DPR 56, 70-71 [74 PR Offic. Trans. 8,] (2007)*; *Ortiz v. Dir. Adm. de los Tribunales, 152 DPR 161, 176-177 [52 PR Offic. Trans. 11,] (2000)*. *See*, Carlos F. Ramos Hernández, *Acceso a la Información, transparencia y participación política*, 85 Rev. Jur, UPR 1015, 1038 (2016).

Currently, **[*98]** PROMESA has placed a question mark on the republican nature of the Commonwealth of Puerto Rico.[5] To manage the government's fiscal situation, the act established a Fiscal Control and Management Board (the Board or FOMB). The Board, according to its own enabling act, was created as an entity of the Commonwealth[6] and *not* as an arm of the federal government. *48 USC § 2121(c)*. However, when reading the provisions of PROMESA, it is difficult to consider the Board as an entity of the Commonwealth.

All public entities of the Commonwealth have a defined place in our constitutional scheme, with limited powers and the appropriate checks and balances. This is not so for the Board. The Board is protected from any action of the governor or the Legislature that seeks to supervise or oversee its structure or activities. *48 USC § 2128*. Likewise, it is beyond the reach of our courts, as any action against it must be brought before a federal court. *48 USC § 2126*. Concretely, PROMESA has instituted a super branch of government that is legally of the Commonwealth, but for which the "the will of the people is [not] the source of [its] public power." PR Const., pmbl., LPRA tit. 1.[7]

Relevantly, PROMESA grants the Board a central role in the process of formulating the **[*99]** Commonwealth's budget. The law gives the Board "sole discretion" to establish a schedule for the development of the budget of the Commonwealth for the following fiscal year. *48 USC § 2142*. Under PROMESA, all budgets approved in Puerto Rico must substantially comply with the provisions of the Fiscal Plan approved by the Board. When presented with a proposed budget from the Executive, the Board may accept it and certify that it is in compliance with the Fiscal Plan, *after which it shall remit it to the Legislature*, or it may issue a notice of noncompliance and demand corrective measures. *Id.*[8]

And that is exactly what happened. On March 15, 2017, the Board sent the governor and leaders of the Legislative Assembly a letter establishing April 30, 2017, as the executive's due date for filing the proposed budget. FOMB, Letter to Governor Rosselló with the Final Certification of the Government of Puerto Rico Fiscal Plan (Mar. 15, 2017). Later, on March 22, 2017, the Board imposed a series of dates to regulate the entire process of developing the

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[5] We need but to cite one of the many examples. As we know, the members of the Fiscal Control and Management Board are appointed by the president of the United States in whose election the People of Puerto Rico cannot participate. So appointed, these officials have the power to, among other things, set aside decisions of officials elected by the People of Puerto Rico such as, for example, laws approved by the Legislative Assembly and endorsed by the Chief Executive. *48 USC § 2144*. In this way, an unelected body, and therefore not representative of the will expressed at the polls, may veto approved legislation and can itself "legislate" to substitute what it has "vetoed."

[6] Of the government of the Commonwealth of Puerto Rico, but not part of any of the three branches of government; that is why it is *sui generis*. It is like a government within a government.

[7] Regarding the laws of the Commonwealth, PROMESA states that its provisions shall prevail over any local law that is incompatible therewith. *48 USC § 2103*. However, that does not answer a very important question considering the local character of the Board. Does a local law that is not incompatible with PROMESA apply to the Board? This is a very important question for the Puerto Rican people, but, since we do not have jurisdiction over claims against the Board, it is not incumbent upon us to decide it.

[8] If the Legislative Assembly ultimately approves a budget that the Board deems is not in line with the Fiscal Plan, it may approve its own. *48 USC § 2142*.

budget. That letter established May 31 as the final day for the governor to implement corrective measures, were they necessary, and submit a proposed budget in compliance **[*100]** with the Fiscal Plan. FOMB, Letter to Governor Rosselló Regarding the Government of Puerto Rico Budget Timeline (Mar. 22, 2017).

After the governor's proposed budget was received, through a letter dated May 8, 2017, the Board granted the governor 14 more days to amend the budget before it made a decision on whether to issue a notice of noncompliance. FOMB, Letter to the Governor, Presidents of the Senate and House of Representatives Regarding the Budget (May 8, 2017). Finally, on June 2, 2017, after prolonged discussions regarding the governor's proposed budget, the Board finally filed it with the Legislature. FOMB, Letter to Governor Rosselló, Presidents of the Senate and the House of Representatives Regarding the FY2018 Budget (June 2, 2017).[9]

IV

On May 4, 2017, Senator Bhatia Gautier filed a petition before the Court of First Instance so that the Commonwealth would provide a copy of the proposed budget submitted to the Board on April 30, 2017. Among the arguments in opposition of the request, the governor invoked both the governor's communications privilege and the deliberative process privilege.

Having evaluated the process through which Governor Rosselló Nevares filed the proposed **[*101]** budget before the Board, we have a clearer picture of the stage at which Senator Bhatia Gautier made his request. The governor filed his proposed budget with the Board on April 30, 2017. This means two things. First of all, when Senator Bhatia requested the information on May 4, 2017, the proposed budget had been sent, not merely to another government agency, but to an entity that is entirely independent of the authority of the governor. It would be difficult, then, to situate the proposed budget in the realm of the communications that the governor's advisors sustain in the course of fulfilling their duties to advise him on official government business. When the proposed budget left the governor's mansion on April 30, 2017, it lost its protection under the governor's communications privilege.

Second, once the proposed budget had been submitted—and after the proper analysis had been performed—the Board could have certified that the budget was in compliance with the Fiscal Plan and forwarded it to the Legislative Assembly for consideration and eventual approval. That is, in accordance with the provisions of PROMESA, the governor knew that the document submitted on April 30 could have **[*102]** been the budget for the Commonwealth, if the Board had authorized it and the Legislative Assembly had subsequently approved it. Therefore, the proposed budget submitted to the Fiscal Control and Management Board on April 30, 2017, does not simply constitute a deliberative exercise, but rather it represented a concrete public policy decision about how the State's available treasury funds for the coming fiscal year would be distributed. Thus, when examining the process of preparing the very document in question, we can conclude that the deliberative process privilege cannot apply to its essence, that is, to the particular details of the allocation of public funds.

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[9] All the referenced communications are public and available at https://juntasupervision.pr.gov/index.php/en/documents/ (last visited Aug. 18, 2017).

Even so, the trial court acted in accordance with decades of caselaw standards regarding the right to access public information when it ordered the in camera inspection of the proposed budget. While we can deduce that the proposed budget is, for the most part, not protected by the privileges raised, we cannot be certain of the totality of the contents of the document submitted to the Board. It is entirely possible that, for example, there are memorandums attached, to which some privilege may apply. That is the benefit of in **[*103]** camera examination. It allows the trier to exercise the constitutional function of determining exactly which part of a document is protected by a privilege. For this reason, that was the appropriate course of action that should have been followed in the case at bar.

However, without much explanation that would substantiate its decision, a majority of this Court concluded that it was improper to order an in camera examination, since "[a]n examination of the final proposed budget suffices to know what the document at issue consists of." [Opinion of the Court, at 94.] [English translation, at 23.] It then went on to maintain that the trial court should have ordered the parties to submit legal briefs to determine whether the document was or was not of a public nature. The majority's course of action is problematic for several reasons.

First, as we have recounted, we do not know what was in the proposed budget document that the governor submitted to the Board. It is possible that it included other things beyond the specifics of the allocation of public funds for the following fiscal year. We do know, however, that *it is not the final proposed budget* because, if it were, the State would not **[*104]** be so vehemently opposed to the disclosure of a document that it had already made public. For this reason, the examination of the final proposed budget is not sufficient to determine the nature of the document requested.

Second, to prevent the in camera inspection of the document would be, to paraphrase *Pres. del Senado, 148 DPR, at 805* [48 PR Offic. Trans. 64, at __], to allow the Executive himself to be the absolute and final arbiter of what is privileged material. If the trier is not allowed to examine the document to determine its nature, should the judge then place their complete trust in the State's own representations of its contents? To respond yes, as the majority appears to have decided, has the effect of emasculating the Judicial Branch and subjecting it to the designs of the Chief Executive. This is contrary to basic rule of checks and balances and confers absolute power to control the process to the party opposing the disclosure of the document.

Third, in noting that the trial judge should have requested legal briefs on the nature of the document, the Court is signaling to the trial court to do something that it has already ordered. On July 17, 2017, the trial court ordered the parties to supplement their **[*105]** positions on several matters prior to the hearing scheduled for July 26, 2017. Among these, "both parties were ordered to come prepared to argue the nature of the information requested and the application of executive privilege." Appendix, at 233. On July 21, 2017, the parties filed their motions in compliance with the order and presented their positions. *Id.* Once the hearing was held and the alleged privileges and the nature of the document in question were discussed, the trial court concluded that "when questioned by the Court and pursuant to the applicable caselaw, the defendant did not provide any details as to why the requested information qualified for the application of executive privilege." Appendix, at 235. Likewise, the Executive "was unable to establish in detail at this time why the disclosure of the Proposed Budget submitted to the Board should not be allowed." *Id.* The judge of the Court of First Instance made it thus known through

her Resolution and Order, from which the governor takes appeal. The governor's inability to meet the appropriate burden of proof was sufficient reason to reject outright the privilege claimed out.

Nevertheless, the trial judge ordered the defendant **[*106]** to submit, along with the document for its in camera inspection, "a motion explaining in detail the reasons for which the requested information, or a portion thereof, qualified for the application of the privilege raised." Appendix, at 235. In other words, she gave the defendant another opportunity at bat. The foregoing shows that the trial court clearly allowed the parties to argue the nature of the document requested and the judge weighed the arguments for and against the application of the privilege prior to making her decision. Therefore, there is no reason to continue litigating a legal issue when the parties had ample opportunity state their positions on the matter.

To order the filing of additional briefs—a third opportunity at bat—would contribute very little to deciding matters of this nature diligently and expeditiously. More than anything it has the appearance of an attempt to micromanage trial court matters from our offices. Ultimately, where is the abuse of discretion committed by the trial judge in ordering the in camera inspection and additional legal briefs through which the State would have yet another chance to cure the deficiencies in their original arguments?

I would **[*107]** not like to think that the inarticulate position of the majority is that, once the State has made a confidentiality claim, the Judicial Branch is barred from reviewing the document to assess the veracity or correctness of the claim. This supposes a complete surrender of our power at the feet of the Executive Branch. Or at least at the feet of this Executive. Would the majority show this same deference and generosity in the future when they have less affinity for the Chief Executive? Only time will tell.

Let us recall that Puerto Rico's crisis is also a crisis of credibility. To overcome it, it is necessary to foster a culture in which all public servants see themselves as guarantors of the fundamental rights of the people. The law on paper is of little value if we do not bring it to life day to day. Proclaiming transparency to all who would listen is of little value if, when it is demanded of the government, it then resorts to opacity through procedural delays. What are they hiding? What are they afraid of?

JUSTICE ESTRELLA MARTÍNEZ, dissenting.

At a time when it is necessary to bolster access to information, this Court has unnecessarily diluted that constitutional guarantee and weakened **[*108]** the tools available to the citizenry for accessing public documents. For this reason, I once again dissent from their course of action in the controversy at bar. On this occasion, I disagree with the both the process and the outcome reached by a majority of this Court. Aware that, as a matter of law, they cannot grant any of the specific remedies the Government of Puerto Rico has requested, they opt to provide the State with another opportunity, even though the procedural course of the case reveals the multiplicity of failed chances that such party has had.

In its eagerness, this Court unfortunately decides to limit the resources available to the Court of First Instance to resolve the case pursuant to the law in a claim for information that is of high public interest. That is, the judicial role of the trial court is restricted, depriving it of the ability to

perform an in camera inspection of the document at issue and taking away a tool that may be used in conjunction with others to decide whether a privilege is applicable. With this, the ability to grant adequate, complete, and timely relief is undermined. To aggravate things further, the trial court is directed to act blindly, thereby **[*109]** delaying the proceedings and establishing pre-directed mechanisms on the course of action that the trial court is to follow. Therefore, I dissent.

I

This case began on May 2, 2017, when the Hon. Eduardo Bhatia Gautier (Senator Bhatia or the respondent), Minority Leader for the Popular Democratic Party in the Puerto Rico Senate, made a written request to the governor of Puerto Rico, Hon. Ricardo Rosselló Nevares, to make public the Proposed Budget for Fiscal Year 2017-2018 that was filed on April 30, 2017, with the Financial Oversight and Management Board for Puerto Rico (Board).[1]

As he did not receive the requested information, on May 4, 2017, Senator Bhatia filed a petition for a writ of mandamus with the Court of First Instance against the governor and the Government (jointly referred to as "petitioners"). Through this petition, he requested that petitioners be ordered to publish the Proposed Budget and make it available to the public. The basis of his petition was that the requested information is public and of high interest to the Puerto Rican people. He further argued that the information is necessary to keep the people informed of governmental matters and the oversight process. He **[*110]** also indicated that it is of great importance for the Legislative Assembly to be able to perform the appropriate analysis in the process of approving the budget. Moreover, he argued that the information is not protected by any privilege and is not confidential and that, similarly, it is not protected by any exemption to the right to access information. On the contrary, he contended that the refusal to publish the information injures such right of the citizenry, as well as the right to be informed.

Consequently, on that same date, May 4, 2017, the trial court issued an order to compel petitioners to respond within a five-day term. After several procedural incidents,[2] petitioners filed an Urgent Motion Reiterating Motion to Dismiss through which they essentially argued that the Proposed Budget was a working document, that is, that it was a draft protected by executive privilege; that the request should have been brought through the mechanisms provided in the Rules of the Senate; that Senator Bhatia did not have standing; and that the request was moot. They also claimed that the petition would force the Judicial Branch to intervene unduly with the functions of the Executive and Legislative **[*111]** Branches, in violation of the separation of powers.

Regarding executive privilege, specifically they maintained that "[t]he draft of the Proposed Budget filed before the Board was a working document, that is, a draft developed during the deliberative stage that was going through the steps established in PROMESA, the final

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[1] The Proposed Budget was filed pursuant to Section 202 of PROMESA, *48 USC § 2142*. In accordance therewith, the Financial Oversight and Management Board for Puerto Rico (Board) fixed April 30, 2017, as the due date for the governor of Puerto Rico, Hon. Ricardo Rosselló Nevares, to submit a Proposed Budget for its consideration. Accordingly, the governor did so on the date indicated. On May 8, 2017, the Board acknowledged receipt of the document filed.

[2] Among the procedural incidents, the governor filed a Notice of Removal with the federal District Court for the District of Puerto Rico. That court ruled to remand the case to state court.

document of the executive being the one that was remitted to the legislative bodies." Petition for Certiorari, Attachment VIII, Urgent Motion to Reiterate Motion to Dismiss, at 68. They also stated the following:

> This case meets [all] the requirements [of executive privilege] since it is the Governor who invokes the privilege over what was a draft under his evaluation and regarding which, at the stage that the petition was filed, the deliberative process had certainly not concluded such that it could be considered a Proposed Budget. Nevertheless, after this pre-decisional and pre-deliberative process had concluded, the Proposed Budget was presented to the legislative bodies and it was broadly disseminated.

Id. at 70.

Senator Bhatia, for his part, filed a motion to oppose the motion to dismiss. He contended that the governor has a ministerial duty to disclose public documents. **[*112]** Because of this, he argued that the Proposed Budget submitted to the Board should be published since it is a public document created by the Executive Branch. In failing to do so, the Government had affected his legislative prerogatives. Similarly, he affirmed that his constitutional right to access information had been affected by the governor's refusal to provide the Proposed Budget. Regarding executive privilege, the Senator maintained that petitioners failed to comply with the burden of showing that such protection applies. On the contrary, he stated that the document was neither internal, preparatory, nor pre-decisional.

As for standing, respondent mentioned that he has standing as a lawmaker and as an individual who holds a right to access information. He argued that he intended to vindicate his legislative prerogatives, as well as the constitutional right to access information to which he and every citizen are entitled.

Furthermore, the Senator refuted the allegations of mootness. Specifically, he stated that the State did not confirm that the document submitted to the Board was the same document that was presented to the Legislative Assembly. He also argued that the controversy **[*113]** is capable of repetition, yet evading judicial review. Likewise, respondent rejected the allegation that he had failed to exhaust the regulatory and statutory mechanisms, as those processes are parliamentary and, therefore, do not apply when a violation of the constitutional right to access information is alleged.

With this backdrop, the Court of First Instance took notice of the approval of the budget for Fiscal Year 2017-2018 and for this reason ordered respondent to state why the mandamus was not moot and whether he had standing based on an actual injury to his legislative prerogatives. He was further required to confirm that he had exhausted all the remedies at his disposal. Concerning petitioners, the court ordered them to state whether the requested information had already been disclosed. The court also scheduled a hearing for the parties to argue whether the requested information was public and whether executive privilege was applicable. Finally, the court advised the parties that it might require the requested information so it may review it in chambers to determine the applicability of the privilege.

Pursuant to the order of the court, both parties filed their briefs.[3] Senator **[*114]** Bhatia reproduced his arguments on mootness and added that the approval of the budget contributed to the materialization of the damages caused by the continuous denial of access to the information. Similarly, he affirmed that the Government's refusal prevents him from overseeing and performing an analysis of the fiscal public policy implemented by the governor, as this task is carried out throughout the entire fiscal year. Likewise, he averred that the right claimed can only be asserted through the disclosure of the document.

Regarding standing and the requirement to exhaust remedies, he reaffirmed his arguments and added that he did not intend to transfer the political debate to the courts. Respondent maintained that only the Judicial Branch has the power to adjudge the public nature of the requested document and issue a binding decision on the applicability of executive privilege. Finally, he emphasized that the Government did not confirm that the document submitted to the Board was the same document that was presented to the Legislative Assembly, and that it had not substantiated the applicability of the claim of executive privilege.

Petitioners, for their part, appeared and reiterated **[*115]** their allegations that respondent lacked standing since he had not suffered an injury to his legislative prerogatives. They also argued that the case was moot because the budget had been approved. Regarding the order of the trial court requiring them to state whether the information had already been disclosed, they submitted that the draft had not been made public because it was a working document for the Board to review and return to the governor who then was required to present it to the Legislative Assembly. Additionally, petitioners argued that e respondent should have followed the legislative processes to which he was bound. As he had not, he lacked standing to petition the courts.

Concerning executive privilege, and in addition to what was included in the motion to dismiss, petitioner stated that "[t]he document requested by the plaintiff is not a 'public document.' The information requested was a draft or working document prepared by the Executive as part of the deliberative stage. Therefore, its disclosure does not lie pursuant to executive privilege." Petition for Certiorari, Attachment XIII, Motion in Compliance with Order, at 156. Similarly, they based their allegation that **[*116]** the document was protected under executive privilege in the following manner:

> The initial draft submitted to the Board clearly constituted a working document that was subject to changes, that is, it was a draft developed during the deliberative process that was going through the steps established in PROMESA and which is protected by executive privilege. The plaintiff had and still has a right to request and examine the final version the Executive remitted to the legislative bodies. In the observance of this right, the plaintiff examined [it] and used his legislative prerogatives in casting his vote.

Id.

Not satisfied, they also argued the following:

> [T]he proposed budget requested by the plaintiff was filed with the Fiscal Control Board as part of a deliberation or in the stage of public policy formulation where both the government

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[3] Additionally, the parties filed a joint motion through which they stipulated facts and documents. They also defined the question of law at issue.

> officials designated to work on the budget and the Board—which under PROMESA is an entity within the Government—evaluated and modified it in the interest of obtaining the final proposed budget that was submitted to the Legislature.

Id. at 159.

After stating their respective positions in writing, on July 26, 2017, the court heard the parties' arguments. Initially, **[*117]** the trial court ruled that respondent had standing and that the controversy was not moot. Therefore, the court stated that it would only hear arguments concerning the nature of the information and whether executive privilege was applicable. At questions from the court, petitioners reaffirmed that the document was public as it was a draft or working document prepared by the Executive as part of the deliberative stage for the development of public policy. Moreover, they contended that the document was protected by executive privilege since it included the work product of the governor's advisors. Senator Bhatia, in turn, argued that his petition is only for the Proposed Budget, that is, the figures, amounts, or budget items for funds allocated, and not any supporting documents, recommendations, determinations, or statements made by the Government's staff or advisors. *See*, Petition for Certiorari, Attachments XV-XVI, at 231-235. Furthermore, he restated that petitioners had yet to confirm what opinions or analyses included with the Proposed Budget would make it a deliberative document.

After the hearing, the trial court held that the Government did not place the judge in a position to determine **[*118]** that executive privilege was applicable. Therefore, the court ordered the party to file the Proposed Budget in a sealed envelope for in camera inspection. The judge also granted the Government an additional opportunity to file another motion to detail the reasons for which the information requested was privileged because it constitutes a deliberative or public policy making process.[4]

Dissatisfied with the ruling of the court, petitioners filed a petition for certiorari and a motion for order in aid of jurisdiction with the Court of Appeals. First, they moved the court to stay the proceedings and set aside the order of the Court of First Instance. Second, they contended that it was proper to issue the writ and reverse the trial court, thereby dismissing the action. In support of this, they argued that the lower court erred in reasoning that Senator Bhatia had standing, that the case was not moot, and in not dismissing the case even though it was not in order according to law. On that same date, the intermediate appellate court issued a resolution denying the issuance of the writ.

Disagreeing, petitioners have come before us by way of a petition for certiorari and a motion for order in **[*119]** aid of jurisdiction. Essentially, they have reproduced the same assignment of errors that they put forward before the Court of Appeals. In response, a majority of this Court

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[4] On July 28, 2017, Senator Bhatia filed an amended petition for mandamus in which he clarified that he was appearing both in his capacity as a senator and in his personal and individual capacity. Disagreeing, the Government opposed his petition and, in sum, supported its position by indicating that the proceedings were at an advanced stage and that it had already filed a responsive pleading, and that therefore the authorization of the court was necessary. Eventually, the trial court allowed the amendment.

In that regard, we maintain that the majority granted the respondent standing in his capacity as legislator and, surprisingly, avoided the dimension through which this party also based his claim of access to the requested information as a citizen.

ordered the stay of the proceedings until otherwise provided. As a result, I dissented and I anticipated why granting the relief requested by the Government was impossible when I stated the following:

> Justice Estrella Martínez dissents from the course of action taken by a majority of this Court. Instead, he would deny both the Urgent Motion for Order in Aid of Jurisdiction and the Petition for Certiorari filed by the Government of Puerto Rico as he believes that this case does not present a request for privileged information that contains the recommendations, consultations, determinations, or statements of the governor or his support staff or advisors made during the deliberative process to prepare the Proposed Budget. Rather the request is to hand over and make public the document that contains the Proposed Budget itself as it was submitted to the Financial Oversight and Management Board for Puerto Rico (Board). The Government of Puerto Rico has not shown that it has a compelling state interest that would justify **[*120]** the nondisclosure of this document.
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> In this regard, it bears mentioning that the Board has even published a press release with the notice of the outcome of its analysis of the Proposed Budget subject to the controversy at bar. Consequently, I see no reason whatsoever to prevent the same access to the Proposed Budget pursuant to the right to access public information. Ultimately, what good is it to publish the Board's notice informing whether or not the Proposed Budget submitted complies with Fiscal Plan if access to the Proposed Budget is denied?

With this factual and procedural backdrop, I shall now set forth the applicable law in support of my dissent.

II

A. As we know, in Puerto Rico, on countless occasions, we have recognized access to information as a right associated with freedom of speech, the press, and association in accordance with Article II, Section 4 of our Constitution, LPRA tit. 1. See, *Trans Ad de P.R. v. Junta de Subastas, 174 DPR 56, 67 [74 PR Offic. Trans. 8,] (2008)*. Its purpose is to ensure and facilitate for all citizens the right to examine the contents of the records, reports, and documents gathered during the process of governing in the hands of government agencies. *Ortiz v. Dir. Adm. de los Tribunales, 152 DPR 161, 175 [52 PR Offic. Trans. 11,] (2000)*. It is founded on the right everyone has to know, which is a pillar of democratic society. Efrén Rivera Ramos, *La libertad **[*121]** de información: necesidad de su reglamentación en Puerto Rico*, 44 Rev. Jur. UPR 67, 68 (1975).

It also guarantees the right to freely discuss matters of government. *Ortiz v. Dir. Adm. de los Tribunales, 152 DPR, at 175 [52 PR Offic. Trans. 11,]*. "In a self-governing society, it is imperative to recognize that the average citizen has 'the legal right to examine and investigate the conduct of its affairs, subject only to those limitations imposed by the most urgent public necessity.'" *Id.* (quoting *Soto v. Srio. de Justicia, 112 DPR 477, 485 [12 PR Offic. Trans. 597, 608] (1982)*). Given that if the manner in which public affairs are managed is unknown, it is impossible to fully enjoy the freedom of expression of ideas regarding the government. *Id.* See also, *López Vives v. Policía de PR, 118 DPR 219, 227-228 [18 PR Offic. Trans. 264, 275]* (1987).

In Puerto Rico we have several statutory provisions that pertain to access to information. Section 409 of the Code of Civil Procedure, which establishes the right to inspect and copy public documents, provides as follows: "Every citizen has a right to inspect and take a copy of any public document of Puerto Rico, except as otherwise expressly provided by law." *32 LPRA § 1781*. Other provisions define what a public document is. Section 1170 of the Civil Code of Puerto Rico is limited to recognizing that "[p]ublic instruments are those authenticated by a notary or by a competent public official, with the formalities required." *31 LPRA § 3271*. In what is relevant hereto, the Puerto Rico Public Documents Administration Act, Law No. 5 of December 8, 1955, as amended, *3 LPRA § 1001(b)* defines *public document* in the following **[*122]** manner:

> Any document which originates, or is kept or received in any dependency of the Commonwealth of Puerto Rico according to the law or in relation to the management of public affairs and that pursuant to the provisions of § 1002 of this title is required to be permanently or temporarily preserved as evidence of transactions or for its legal value. It includes those documents produced electronically which meet the requirements established by law and regulations.

In terms of caselaw, the development of the right of access to information dates back to the middle of the 20th century, when we held that in order to assert the right to inspect a document, it need not arise expressly from the law, but rather it suffices that the plaintiff be entitled thereto. *Prensa Insular de P.R. v. Cordero, Auditor*, 67 PRR 83 (1947). Subsequently, we concluded that the sole justification for denying a citizen access to a public document is where a law has expressly so provided. *Dávila v. Gen'l Supervisor of Elections*, 82 PRR 257 (1960).

Finally, it was in *Soto v. Srio. de Justicia, 112 DPR 477 [12 PR Offic. Trans. 597] (1982)*, where we recognized that the right to access information is of a constitutional nature, classifying it as an implicit constitutional right. We emphasized that there is a close relationship between freedom of speech and the right to information since knowledge is a necessary **[*123]** condition of democratic system. *Id. at 485* [12 PR Offic. Trans., at 607-608]. However, we held that this right was not absolute or unlimited.

Stemming from this decision, there has been a gradual development of this right. We have ruled that the first step is to determine whether the information is public. *Colón Cabrera v. Caribbean Petroleum, 170 DPR 582, 589 [70 PR Offic. Trans. 38,] (2007)*. This is so because access to information is limited to information that is of a public nature. *Trans Ad de P.R. v. Junta de Subastas, 174 DPR, at 69 [74 PR Offic. Trans. 8, at]*.

Moreover, we have held that any claim of privilege must be justified by a compelling state interest that is not to restrict free speech. This is confirmed by our pronouncements in *Colón Cabrera v. Caribbean Petroleum, 170 DPR, at 590 [70 PR Offic. Trans. 38, at]*, where we underscored that "the State cannot capriciously and arbitrarily refuse to grant access." Insofar as "all citizens have the right to inspect any public document, the act of denying access, in and of itself, causes a clear, palpable, and real injury for the party requesting the information." *Ortiz v. Dir. Adm. de los Tribunales, 152 DPR, at 177 [52 PR Offic. Trans. 11, at]*. When the Government unjustifiably denies access to information, it injures the fundamental right to be informed, which confers standing on the party to question the validity of that government action. *Id.*

However, there are exceptional circumstances under which these rights may succumb to public interest imperatives, thereby **[*124]** justifying that the information remain confidential. *Trans Ad de P.R., 174 DPR, at 68 [74 PR Offic. Trans. 8, at]*. In line with the above, the caselaw is clear that that the State's claim of privilege may only prevail, exceptionally, in one of the following situations: (1) it is provided by law; (2) the communication is protected by any of the evidentiary privileges a citizen may assert, *Sierra, Sec. of Labor v. Superior Court*, 81 PRR 540 (1959); (3) disclosing the information may injure the fundamental rights of third parties, *E.L.A. v. P.R. Tel. Co., 114 DPR 394 [14 PR Offic. Trans. 505] (1983)*; (4) it has to do with an informant under Evidence Rule 515 (32 LPRA App. VI); and (5) the information is privileged under Evidence Rule 514 (32 LPRA App. VI). See, *Colón Cabrera v. Caribbean Petroleum, 170 DPR, at 591 [70 PR Offic. Trans. 38, at]*.

"Pursuant to these principles, the test that the courts must apply to all claims of privilege over public documents or information shall depend on the exemption raised by the State versus the request for information." *Nieves v. Junta, 160 DPR 97, 104 [60 PR Offic. Trans. 3,] (2003)*. See also, *Ortiz v. Dir. Adm. de los Tribunales, 152 DPR, at 178 [52 PR Offic. Trans. 11,]*; *Angueira v. J.L.B.P., 150 DPR 10, 24 [50 PR Offic. Trans. 2,] (2000)*. Between these two rights we have recognized that the balance must weigh in favor of the claimant making the request and against the privilege. *Nieves v. Junta; López Vives v. Policía de PR, 118 DPR, at 233 [18 PR Offic. Trans., at 280-281]*. That is, "[t]he balance must weigh in favor a broader recognition of the right to information." A.M. López Pérez, *El privilegio ejecutivo frente al derecho a la información pública*, 34 Rev. D. P. 345, 359 (1994).

Unfortunately, a majority of this Court intends to ignore this deep-rooted line of caselaw and, in doing **[*125]** so, it chooses not to strengthen the right to information or lay down clear rules so that the power of the State is not disproportionate when executive privilege is raised against claims of access to public documents. Rather, what this Court has done is to take away from the judge—and therefore from the People—tools to address both interests all together by depriving the court of the opportunity to perform an in camera inspection.

B. At the international level, several aspects of the right to access information have been recognized. First of all, the International Covenant on Civil and Political Rights provides, in what is relevant hereto, that:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, *receive and impart* information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A(XXI) (Dec. 16, 1966) [in English at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A(XXI)_civil.pdf]. (Emphasis **[*126]** added.)

The General Assembly of the United Nations approved Resolution 59(I) and held the International Conference on Freedom of Information. Call to an International Conference on Freedom of Information, G.A. Res. 59 (I), U.N. Doc. A/RES/59(I) (Dec. 14, 1946), [in English at https://undocs.org/en/A/RES/59(I)]. Although the Resolution is not binding, the parties thereto

agreed on important criteria for the recognition of this right, such as, that freedom of information is a fundamental human right, which entails gathering, transmitting, and publishing news without restrictions and requires the restraint to not use the information in an abusive manner. More relevantly, the same recognition was achieved with regard to the right to freedom of opinion enshrined in Article 19 of the Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), [in English at https://undocs.org/en/A/RES/217(III)]. Finally, in 2003, the General Assembly of the Organization of American States recognized the importance of access to public information and reaffirmed the declaration of Article 13 of the American Convention on Human Rights stating that everyone has the **[*127]** freedom to seek receive and impart information.

III

[A.] Executive privilege specifically is used in reference to confidential communications of the Chief Executive and their advisors. I Ernesto L. Chiesa Aponte, *Tratado de derecho probatorio: Reglas de Evidencia de Puerto Rico y federales* 296, Dominican Republic, Ed. Corripio (1998). In its broadest sense, which is the one most used in Puerto Rico, it refers to the general privilege for official information. *Id.* That is why it is defined as "the prerogative of the Executive or their representatives to retain and prevent the disclosure of information that has been formally requested in the course of a legislative investigation, a judicial proceeding, or by petition of a citizen." López Pérez, *supra*, at 347. Its basis is that widespread dissemination of governmental matters could affect its operation and jeopardize national security. *Id.* at 345.

In the United States, the federal Supreme Court in *United States v. Nixon, 418 U.S. 683 (1974)*, upheld and defined the scope of executive privilege for the first time. Specifically, the Court recognized the privilege within the constitutional context of the doctrine of separation of powers. Thus, the Chief Executive may refuse to disclose information deemed confidential. **[*128]** This "guarantees the free flow of ideas in the Executive Branch's process of public policy decision-making." Rolando Emmanuelli Jiménez, *Prontuario de derecho probatorio puertorriqueño* 316, San Juan, Eds. Situm (3rd ed. 2010). Nevertheless, the privilege is qualified and depends on the interests involved. *Id.*

In Puerto Rico, this privilege was similarly incorporated within the doctrine of separation of powers enshrined in our Constitution. *See*, *PR Const. art. I, § 2*; art. IV, §§ 1 & *4, LPRA tit. 1*. In that respect, in *Peña Clos v. Cartagena Ortiz, 114 DPR 576 [14 PR Offic. Trans. 744] (1983)*, this Court held that, pursuant to federal caselaw, executive privilege is not absolute. Thus, we also reaffirmed that it is incumbent upon the courts to define the limits and boundaries of executive privilege through an adequate balance of competing interests. *Id.* at 598 [14 PR Offic. Trans., at 770].

Currently, several instances have been recognized in which the Executive Branch may assert executive privilege. In *United States v. Nixon*, the federal Supreme Court established the following situations: (1) to protect the communications between the Chief Executive and their advisors, aides, and other officials who advise and assist in the discharge and formulation of public policy; (2) to protect information that should not be subject to review by the Judicial **[*129]** Branch under the doctrine of *separation of powers*; and (3) to protect military, diplomatic, or national security secrets. In addition to these, the doctrine is recognized to apply

to "information related to individuals who are under or have been subject to civil, criminal, or administrative investigation or the agents, informants, or officials related to said investigations." López Pérez, *supra*, at 353-354.

Scholars have asserted that executive privilege has two requirements. The first is to protect the Executive Branch's deliberations during the decision-making process. This aspect limits access to the documents or communications that constitute opinions or recommendations regarding the public policy decision-making process. Its purpose is that government officials have the freedom to have broad and frank discussions during the decision-making process without the pressure of knowing that these will be disclosed. Pursuant to the above, the first characteristic of this requirement is that information must be pre-decisional, that is, produced before the deliberative process has concluded. This is based on the fact that disclosure should not impact the quality of decision-making. Moreover, **[*130]** it has been said that the pre-decisional information adopted in a final decision may lose its privileged status since it does not affect decision-making. Matthew W. Warnock, *Stifling Gubernatorial Secrecy: Application of Executive Privilege to State Executive Officials*, 35 Cap. U.L. Rev. 983, 987 (2007).

The second characteristic of executive privilege in its deliberative aspect is that the material must in fact be deliberative. This means that it is a direct part of the deliberative process, as it provides recommendations and opinions on legal or policy matters. Consequently, purely factual information is not privileged unless it is inextricably intertwined with the deliberative process. Warnock, *supra*, at 988.

On the other hand, the second requirement of executive privilege protects executive communications. This prevents the publication of documents and communications directly related to the decisions of the Chief Executive. Its scope is greater since it includes final documents and post-decisional material. *Id.*

Regarding the Executive Branch's expectation of confidentiality, it has been said to exist with regard to the following matters: conversations between the governor and their aides, internal documents of agencies, interagency memorandums, **[*131]** medical and personnel files, and records on the civil, criminal, and administrative investigations conducted by security agencies. López Pérez, *supra*, 359.

B. Although executive privilege is not expressly recognized in the Constitution of the United States or of Puerto Rico, it does have constitutional ties. In accordance therewith, this Court has provided that, as privileged matters are concerned, the privileges established in the Rules of Evidence must be examined. *E.L.A. v. Casta, 162 DPR 1, 10 [62 PR Offic. Trans. 1, __] (2004)*. Specifically, as it pertains to the controversy at bar, we must refer to the privilege for official information because, absent a comprehensive statute that regulates requests for information, we must examine this privilege as suppletory law. *Angueira v J.L.B.P*. Furthermore, it is one of the situations recognized in *Colón Cabrera v. Caribbean Petroleum* as an exception to the right to access information. Evidence Rule 514 provides as follows:

> (a) As used in this Rule, "official information" means information acquired in confidence by a public officer or employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

> (b) A public officer or employee **[*132]** has the privilege to refuse to disclose any matter on the grounds that it constitutes official information. Evidence of such matter is not admissible if the court finds that said matter is official information and disclosure is forbidden by law, or that disclosure of such information in the proceeding is against government interests.

32 LPRA App. VI.

The privilege is grounded on the government's need to keep confidential certain information that would promote the proper performance of its responsibilities and would enable it to address the problems of the country. Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 292. As it stands, the privilege is recognized if the disclosure of the information were prejudicial to the interests of the government and the degree of prejudice is greater than what the party requesting the information would suffer. *Id.* However, that interest must be balanced with the constitutional right to access information. Ernesto L. Chiesa Aponte, *Reglas de Evidencia comentadas* 164, San Juan, Eds. Situm (2016). The State is the holder of the privilege. *Id.* "That is why the privilege only intends to protect documents the disclosure of which would be contrary to the government's best interests and not the interests of the executive official." **[*133]** I Ernesto L. Chiesa Aponte, *Práctica procesal puertorriqueña* 140, San Juan, Pubs. JTS (1984). That is, the privilege is for the welfare of the people and not for that of the official who claims it. See, for example, *Hamilton v. Verdow, 287 Md. 544, 414 A.2d 914, 10 A.L.R.4th 333 (1980)*.

In construing Rule 31 of the Rules of Evidence of 1979, which is essentially identical to the current rule, we held that "courts should be cautious when granting claims of confidentiality made by the State, *which must show, precisely and unequivocally, the applicability of the exception mentioned above*." *E.L.A. v. Casta, 162 DPR, at 11 [62 PR Offic. Trans. 1, at __]*. We were similarly emphatic in stating that "[t]oday, the secretiveness of public affairs is the exception and not the rule." *Santiago v. Bobb y El Mundo, Inc., 117 DPR 153, 159 [17 PR Offic. Trans. 182, 190] (1986)*. A baseless allegation of public privilege, unsupported by adequate legislation, must be carefully scrutinized since this absence of such support weakens the claim of confidentiality. *Peña Clos v. Cartagena Ortiz, 114 DPR, at 599 [14 PR Offic. Trans., at 772*]. The caselaw on privilege has not favored its recognition, owing to the primacy of the constitutional right to access information. Chiesa Aponte, *Reglas de Evidencia comentadas, supra* at 166.

In light of this, we reaffirm that the Government must make a great effort to present evidence that shows that there are interests that supersede the values protected by the citizens' right to freedom of information. **[*134]** *E.L.A. v. Casta, 162 DPR, at 12 [62 PR Offic. Trans. 1, at __]*. For this exercise, courts must evaluate whether the information or documents requested impacts the powers of the Executive Branch.

IV

Generally, it is favored that courts perform "an in camera review of the documents that the State claims are privileged before determining whether or not the State's position refusing to disclose relevant information should prevail." Chiesa Aponte, *Práctica procesal puertorriqueña, supra*, at 140-141. At the federal level, where executive privilege is alleged, the need for in camera inspection of the requested documents has been recognized. See, *United States v. Nixon*; *Black v. Sheraton Corp. of America, 564 F.2d 531 (DC Cir. 1977)*; *Soucie v. David, 488 F.2d 1067 (DC*

Cir. 1971). That is why courts have held that this inspection avoids the unnecessary disclosure of privileged information. *In re Sealed Case, 121 F.3d 729 (DC Cir. 1997)*. Courts are a filter between a citizen's request for public information and the State's claim of privilege. Hernán A. Vera Rodríguez & Elsie Ruiz Santana, *El derecho a la información de los ciudadanos como un instrumento de transparencia gubernamental en Puerto Rico: una agenda inconclusa*, *50 Rev. D. P. 265, 269 (2011)*.

Professor Chiesa, in examining the federal caselaw, makes an important distinction: when claiming a privilege, the issue must be examined in chambers. Specifically, in analyzing United States v. Reynolds, 345 U.S. 1 (1953), he pointed out that when the privilege is so strong, such as protecting **[*135]** national security from any danger, in camera inspection cannot be allowed. Chiesa Aponte, *Tratado de derecho probatorio, supra*, at 290. It is not the same when the request is for official information. In such cases, the court has the usual discretion to examine it and even issue protective orders. *Id.* at 297. Both have been recognized as measures for adjudicating controversies. But where inspection is not allowed, a showing of necessity by the to keep the information secret would suffice to prevent disclosure. Chiesa Aponte, *Práctica procesal puertorriqueña, supra*, at 140. Plaintiffs are at a disadvantage because they are often unaware of the nature of the documents and, therefore, are unable to argue with the appropriate legal precision for disclosure of the information. In camera inspection is available to compensate for this imbalance. See, Islamic Shura Council of Southern Cal. V. F.B.I., 635 F.3d 1160, 1165 (9th Cir. 2011).

Mathew W. Warnock concurs with this in establishing that the full evaluation of a claim of privilege must include an in camera inspection. Courts perform this inspection with clear guidelines to balance the public interest in disclosure and the government's interest in confidentiality. Warnock, *supra*, at 1016.

In Puerto Rico, it has been argued that where there is a claim of executive privilege, the court must review the documents in chambers. This is sustained by the fact **[*136]** that courts must be rigorously deferential to claims of confidentiality. *See*, López Pérez, *supra*, 358 & 360. Moreover, this Court, more than 30 years ago, favored the following:

> [T]he legal approach that the confidentiality of the information is determined through an analysis of the totality of the circumstances surrounding the communication, and by its own nature. In this task, the court can make an in camera inspection of the documents or information that the State alleges is privileged[, *as a precondition to the recognition of the privilege*].

Santiago v. Bobb y El Mundo, Inc., 117 DPR, at 162 [17 PR Offic. Trans., at 194]. (Emphasis added.)

We have been consistent in maintaining that in camera inspection is a highly-favored, appropriate, and useful tool for examining a confidentiality claim. See, Colón Cabrera v. Caribbean Petroleum; E.L.A. v. Casta; Pres. del Senado, 148 DPR 737 [48 PR Offic. Trans. 64] (1999); *Santiago v. Bobb y El Mundo, Inc.*; *Soto v. Srio. de Justicia*. See also, *Diócesis de Arecibo v. Srio. de Justicia*, 191 DPR [292], 401-402 [91 PR Offic. Trans. 19, __] (2014) (Estrella Martínez, J., dissenting.) It is no wonder, since, as we have indicated above, this is the

quintessential mechanism for weighing those interests. *See also*, Vivian Neptune Rivera, *Derecho probatorio*, 84 Rev. Jur. UPR 681, 688-703 (2015).

Having examined the applicable law, I proceed to explain the reasons for my dissent.

V

At the outset, I should reiterate that the State did not show, either the trial court or this Court, any **[*137]** reason whatsoever to deny the disclosure of the requested public document. Therefore, it followed to deny this petition. Since that did not happen, I shall now discuss the controversy at bar following the reasoning and method outlined by this Court.

First of all, I do not agree with the process followed by a majority in this case. Specifically, a high profile case was stayed to disturb unnecessarily an interlocutory order, to then run into the reality that none of the remedies the petitioners sought can be granted. Given the fact that this Court did not request briefs from the parties, it was sufficient to examine the record to go over the petitioners' repetitive arguments and deny their petition. That way, we would not have needlessly stayed the information claim and, worse yet, we would not have taken away such an essential tool as an in camera inspection.

Surprisingly and inexplicably, this Court also remands the case to the trial court after leaving it with less tools than it had before. That is, the decision of the majority limits the resources that the Court of First Instance has in cases such as this. Today, instead of providing the trial court with more tools to decide according **[*138]** to the law, instructions have been handed down blindly to remotely control the undertakings of the court. I cannot endorse such a course of action.

Certainly, the fact that the Court of First Instance ordered the Proposed Budget to be submitted in a sealed envelope for inspection in chambers does not mean that the information will be published. Inspection is a secure method to allow the trial court to determine whether executive privilege is applicable. Moreover, when the parties each filed their motions in that regard, the court heard oral arguments on that issue, and the State has been given another opportunity to place the court in a position to understand its claim of privilege. To order an in camera inspection does not imply that the information was mismanaged. It is not a threat to the privilege. The fact that a judge examines the information does not mean that said right has been infringed.

On the contrary, through the order of the Court of First Instance, that forum would have obtained better means to resolve the case as soon as possible and pursuant to the law, as opposed to the procedure outlined by this Court.

In this case, the trial court has given the petitioners multiple **[*139]** opportunities to demonstrate the applicability of executive privilege; nevertheless, they have not done so. Their allegations have been too general. They have not rebutted the right to information, which is of a constitutional nature. The Court of First Instance has made this clear. And that is why it has requested to inspect the Proposed Budget in chambers prior to definitively concluding that it is a public document that must be disclosed as executive privilege does not apply. That is, in response to a claim of executive privilege, the trial court has been more than cautious and, even

though the Government has not shown itself to be deserving of the privilege, the court has not ordered disclosure until it can examine the Proposed Budget and consider a new motion.

Despite this, through the majority's decision today, all parties are left at a disadvantage since the trial court is ordered to rely on the legal briefs and, based on them, decide the case. Bear in mind that the petitioners could have used the same information from the Proposed Budget as evidence that it was circumscribed to the deliberative phase, and they refused to do so. Even under the procedure outlined by the majority, **[*140]** there would be no concurrent in camera examination of the document and the new legal briefs; thus, we find ourselves in the same dead end without much headway. At the same time, Senator Bhatia's claim is disrupted since the Court of First Instance, which—in my estimation—is in a position to grant relief, would have to resort once again to the ineffective procedure of requiring legal briefs. Therefore, the adverse effects are multiple.

Faced with this, the question we must ask ourselves is the following: What other allegations could the Government have besides those that it already put forward in previous filings and those set forth in the hearing? I cannot see how new briefs might help *without examining the document itself* unless it is another forced opportunity as a consolation prize in lieu of the remedies requested by the State.

However, a majority of this Court has asked "what exactly could be found by inspecting the document in question in order to make a determination in this case?" Opinion of the Court, at 94 [English translation, at 23]. They reason that "[a]n examination of the final proposed budget suffices to know what the document at issue consists of." *Id.*[5] Nevertheless, **[*141]** the Government has itself clarified that they are two distinct documents. The appropriate question is then: Why defer the determination of whether it should be disclosed? The Government has not shown that it is deserving of the privilege. This case can stand no further delay. It must be resolved as soon as possible. However, with the decision rendered today, it is postponed further and further, and the constitutional right of access to information continues to be infringed.

In camera inspection, in addition to being supported by the deep-rooted line of caselaw discussed above, has also been endorsed on multiple occasions by federal caselaw, contrary to what the majority suggests. To that end, we must examine its treatment of camera inspections in claims under the *Freedom of Information Act (FOIA), 5 USC § 552 et seq.* While it is true that they are not automatic, in some circumstances they are necessary and appropriate. Specifically,

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[5] I must underscore that the nature-of-the-document criterion is not the only factor used in the federal sphere. Using the reasoning of a majority of this Court, pursuant to the Freedom of Information Act (FOIA), *5 USC § 552*, different factors that support in camera inspection have been recognized, to wit: judicial economy, the conclusive nature of the sworn statement of the agency, bad faith on the part of the agency, controversies related to the contents of the document, that the agency proposes the inspection in chambers, and *strong public interest in the disclosure*. Ronald M. Levin, *In Camera Inspections Under the Freedom of Information Act*, 41 U. Chi. L. Rev. 557 (1974). See, for example: *Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 543 (6th Cir. 2001)*; *Jones v. F.B.I., 41 F.3d 238, 243 (6th Cir. 1994)*; *Allen v. Central Intelligence Agency, 636 F.2d 1287 (DC Cir. 1980)*, reversed in part and disavowed in other aspects by *Founding Church of Scientology, Wash. D.C. v. Smith, 721 F.2d 828 (DC Cir. 1983)*; *Donovan v. F.B.I., 806 F.2d 55 (2nd Cir. 1986)*, *reversed in part and abrogated on other grounds by U.S. Dep't of Justice v. Landano, 508 U.S. 165, 170 (1993)*; *Ingle v. Department of Justice, 698 F.2d 259, 267 (6th Cir. 1983)*, *reversed in part and abrogated on other grounds by U.S. Dep't of Justice v. Landano; James v. Drug Enforcement Admin., 657 F.Supp.2d 202, 209 (D. DC 2009)*; *Physicians for Human Rights v. Dep't of Defense, 675 F.Supp.2d 149, 167 (D. DC 2009)*; *Dean v. F.D.I.C., 389 F.Supp.2d 780, 789 (E.D. Ky. 2005)*; *Ferguson v. F.B.I., 752 F.Supp. 634, 636 (S.D. N.Y. 1990)*.

Congress has indicated that it is incumbent upon the district court, in its sound discretion, to determine if **[*142]** in camera examination is necessary. H.R. Rep. No. 1380, 93rd Cong., 2nd Sess. 8 (1974). See also, *N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978)*; *Donovan v. F.B.I., 806 F.2d 55, 59 (2nd Cir. 1986)*, *abrogated on other grounds by Department of Justice v. Landano, 508 U.S. 165, 170 (1993)*. That is, the courts have analyzed the law, the legislative history, and the caselaw and have concluded that the decision lies with the trial judge. *Center for Auto Safety v. E.P.A., 731 F.2d 16, 20-21 (DC Cir. 1984)*. It is in that sound discretion that the court, having considered all relevant factors, may decide whether in camera inspection is appropriate. *Donovan v. F.B.I.; Church of Scientology of Cal. v. I.R.S., 729 F.2d 146, 153 (DC Cir. 1986)*; *Vaughn v. Rosen, 484 F.2d 820 (DC Cir. 1973)*.

Contrary to the position put forward by a majority of this Court, federal caselaw has not indicated that in camera inspection is disfavored in cases where certain governmental privileges are claimed. *See*, Opinion of the Court, at 90-91 [English translation, at 21-22]. What the caselaw has held is that it is disfavored when the State has adequately substantiated and proven its claim for exemption beforehand, *which has not occurred in the case at bar*. See: *Smith v. U.S. Marshals Service, 517 Fed.Appx. 542 (9th Cir. 2013)*; *Lion Raisins v. U.S. Dep't of Agriculture, 354 F.3d 1072, 1079 (9th Cir. 2004)*; *Lewis v. I.R.S., 823 F.2d 375, 378 (9th Cir. 1987)*. For this reason, in camera review has been recognized as appropriate when the government has decided to not disclose the entire document and prior to in camera inspection provides only vague and general explanations for its decision. *Associated Press v. U.S. Dep't of Justice, 549 F.3d 62, 67 (2nd Cir. 2008)*; *Local 3, I.B.E.W., AFL-CIO v. N.L.R.B., 845 F.2d 1177, 1180 (2nd Cir. 1988)*. That is, in order for the government to keep a document confidential and prevent a court order for **[*143]** an in camera inspection, it must furnish, specifically and in detail, all the relevant information on the document beforehand so that the judge may properly evaluate the issue without the need to examine the actual document, *which also did not occur in this case*. See, *Hamdan v. Dep't of Justice, 797 F.3d 759, 779-780 (2015)*; *Islamic Shura Council of Southern California v. F.B.I., 635 F.3d, at 1166*; *Ethyl Corp. v. U.S. E.P.A., 25 F.3d 1241, 1250 (4th Cir. 1994)*; *Lewis v. I.R.S., 823 F.2d, at 378*. In other words, rather than provide generalized allegations, the State *must describe the document in detail and present sufficient facts to show that the alleged exception exists. Lewis v. I.R.S*. The State cannot make general allegations and convincingly cite an exemption to the statute. It must provide a detailed justification, specifically identify the reasons for the exemption, and correlate those claims with specific sections of the document it intends to withhold. *Mead Data Cent. Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 251 (DC Cir. 1977)*. At the federal level, the government must effectively demonstrate the applicability of a FOIA exemption. If it fails to do so, the district court, at its discretion, may inspect the document. *Associated Press v. U.S. Dep't of Justice*. To that end, appellate courts must review whether the trial court abused its discretion pursuant to the parameters set forth.

Federal jurisprudence has consistently observed the discretion of the trial court following **[*144]** the parameters described above. In what concerns the controversy at hand, the procedural history described reveals that the State has had multiple opportunities to "justify and demonstrate its claim of confidentiality." Opinion of the Court, at 91 [English translation, at 22]. However, in accordance with the current applicable law, it has not done so. Nor has it done so under the FOIA standards that this Court has so erroneously construed and intends to apply, which restricts access to public information in Puerto Rico even more.

Finally, regarding the merits, we have to ask ourselves the following question: Would revealing the requested information injure any public or governmental interest? Were we to respond affirmatively, would any other governmental interest be affected? Have the reasons that would ordinarily justify keeping the requested information secret disappeared? What interests are cited in favor of withholding that specific information? Have they completely lost their raison d'être? See, *Santiago v. Bobb y El Mundo, Inc., 117 DPR, at 165-166 [17 PR Offic. Trans., at 197-198]*.

Having zealously scrutinized all the allegations and arguments brought forth by the parties, I conclude that the document is public. Therefore, the State should have proven that there **[*145]** was an exception that barred its disclosure. The petitioners did not demonstrate the applicability of any exception to the right to access public information. Moreover, they did not specify or substantiate their allegations that the confidentiality of the Proposed Budget furthers the public interest. That is, they did not show that the disclosure of the information would be prejudicial to the government interests. They also failed to establish that the disclosure of the information could affect the proper functioning of the government and jeopardize national security. Recall that it was incumbent upon the petitioners to prove and substantiate the privilege claimed. They had to precisely and unequivocally show that the exception to the constitutional right to access information was applicable since keeping information on public affairs secret is the exception and not the rule.

As is well-known, the State cannot capriciously and arbitrarily refuse access. Citizens have the right to examine the contents of public records, reports, and documents and investigate how matters are handled, subject only to the limitations imposed by the most urgent of public needs. And those exceptions to keeping **[*146]** information public are only justified in pursuit of the public interest.

In the above-captioned case, the only basis for the petitioners' arguments is that the Proposed Budget is a working document, *i.e.*, a draft produced during the deliberative stage that was undergoing the process established in PROMESA, the result of which is the Executive's final document that was delivered to the Legislative Assembly. That is not the reality of the procedure legislated in PROMESA. Therefore, that allegation is insufficient to defeat the fundamental constitutional right to access information.

Submission to the Board is mandated under the formal process provided in Section 202 of PROMESA, *48 USC § 2142*. What has happened here is that the Government has prepared a final budget proposal, which will be sent to the Board for approval instead of following the regular procedure of remitting it directly to the Legislative Assembly. If the Proposed Budget meets the parameters established by the Board, it will be approved, and the governor would then be able to forward it to the Legislative Assembly. That is why it cannot be considered a draft. The document, in accordance with the statutory procedure, must be final, the sole exception being **[*147]** the amendments that the Board recommends. I do not believe that the Board can approve a working document—as the Government alleges—as a certified budget. Rather we are faced with a congressional mandate in response to which the Government of Puerto Rico now has the double duty of filing the Proposed Budget first before the Board and eventually before the Legislative Assembly. In that sense we have a formal document filed before the Board with a particular process for its approval or amendment, which is analogous to

the eventual legislative process of approval. Therefore, at the formal submission stage of the Proposed Budget, it cannot be minimized as a deliberative document or a simple "draft."

Contrary to what the Government of Puerto Rico contends, it has been demonstrated as a question of law that, under the provisions of PROMESA, the Board cannot be considered a subordinate, advisor, or aide of the Executive. In that regard, Section 108 of PROMESA, which expressly establishes the autonomy of the Board, cannot be left out of this analysis. *48 USCA § 2128*. Although disgraceful, Puerto Rico's colonial situation cannot be concealed by attempting to create a fiction that intends to ignore the imperial role of the Board, **[*148]** reducing it to a subordinate, advisor, or aide to the Executive. That fiction is not Puerto Rico's reality. By keeping the information secret, that reality is made even more dire.

Furthermore, as has been rightly pointed out, the Proposed Budget does not contain conversations between the governor and his aides, internal documents of any agency, interagency memoranda, medical or personnel files, or records from any civil, criminal, or administrative investigation conducted by any security agency. It is not even an internal or preparatory document. The request in this case is not for recommendations, consultations, determinations, opinions, analysis, or statements of the governor or his support staff or advisors that are related to the deliberative process for the formulation of the Proposed Budget. The request is for the delivery and publication of the Proposed Budget as it was submitted to the Board. That is, the figures, amounts, and budget items for funds allocated. Consequently, I believe there was no impediment for the Court of First Instance to decree the public nature of the document and issue the corresponding order for its disclosure.

Therefore, as the applicable law rightly **[*149]** indicates, when facing a controversy over access to information, it falls to the State to demonstrate the existence of interests that supersede the values protected by our citizens' right to freedom of information. Moreover, it was their duty to prove that the public interest would be better served through confidentiality than through disclosure of the information. It did not do so.

VI

For the foregoing reasons, I dissent from the course of action followed by a majority of this Court. The public document should have been handed over long ago. The stay and the opinion issued today unnecessarily delay this act and create a state of uncertainty that would further postpone the resolution of this controversy. Worse yet, under the logic of the majority, the tools that judges need to pass on the people's claims of access to information with procedural agility have been needlessly limited.

JUSTICE COLÓN PÉREZ, dissenting.

> Access to information constitutes an essential tool to combat corruption, bring about real transparency in government and improve the quality of our democracies. Democracies, which are of themselves marked not only by a culture of secrecy and but by public bodies

> whose policies **[*150]** and practices for physically managing information are not designed to facilitate people's access to it.*

Today, a majority of this Court, faced with a controversy imbued with the highest public interest, has decided to interfere with the discretion afforded to the Court of First Instance to decide the manner in which it resolves the issues before it. It has done so in the absence of any basis whatsoever to justify such decision. In that regard, as I believe that this Court should not have undermined the trial court's discretion to request in camera inspection of certain public documents in dispute before deciding whether executive privilege claimed by the State in the case at bar should be recognized, I dissent from the course of action followed in this case.

I

The facts before us are not in dispute. On May 4, 2017, the Honorable Senator Eduardo Bhatia Gautier, Minority Leader for the Popular Democratic Party in the Puerto Rico Senate, filed a petition for mandamus against the governor of Puerto Rico, Hon. Ricardo Rosselló Nevares, and the Commonwealth of Puerto Rico (petitioners) before the Court of First Instance, whereby he **[*151]** requested that the governor make public a copy of the "Proposed Budget" filed on April 30, 2017 with the Puerto Rico Oversight Board created under the *Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 USCA §§ 2101 et seq.* Senator Bhatia Gautier based his petition on the argument that the referenced document was public and of high interest to the citizenry. He also alleged that, despite having made a prior request, the governor refused to provide the information requested on grounds that the information was not public.

After several procedural events we need not list in detail here, on June 26, 2017, petitioners filed a motion to dismiss, as they believed that the case was not justiciable. In essence, they contended that Senator Bhatia Gautier lacked standing to petition for the extraordinary remedy of mandamus, that he had not met the requirements for filing said cause of action, and that, furthermore, the case before the trial court had become moot because the budget proposal had been delivered to the Legislative Assembly for consideration and eventual approval and that, therefore, Senator Bhatia Gautier should have made his request at that time. Finally, petitioners alleged that to grant the requested relief would entail an undue intervention of the **[*152]** Judicial Branch with the powers of the Executive and Legislative Branches, thereby infringing the separation of powers that characterizes our democratic system of government.

Having evaluated the arguments of both parties, the Court of First Instance ordered a hearing for July 26, 2017. Specifically, and as is relevant hereto, the trial court provided that the parties should appear for the hearing prepared to discuss the following issues: (1) whether Senator Bhatia Gautier's request for information had become moot; (2) what were the damages sustained by the senator and the actual injury to "his specific legislative prerogatives of evaluating and overseeing the processes geared toward the approval of the country's budget" in

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* Inter-Am. Comm'n H.R., *Special Study on the Right of Access to Information* (2007) [*quoted in*, Inter-Am. Comm'n H.R. Press Release No. 175/07 (Sept. 12, 2007)].

[Translator's note: The text cited was taken from the official press release issued by the Office of the Special Rapporteur for Freedom of Expression as this report is only available in Spanish.]

not being provided that precise information; (3) whether the requested information had already been made public or if, on the contrary, that had not happened; (4) whether the petition for mandamus was a transfer of the legislative debate to the judicial forum; (5) whether Senator Bhatia Gautier exhausted all the remedies at his disposal for obtaining the requested information; and, finally, (6) whether the requested information was public or, on the contrary, it **[*153]** is information protected under executive privilege, pursuant to petitioners' allegations. Order of July 17, 2017, Appendix, at 135-136. In addition, the trial court granted the parties a term to file a joint motion along with their stipulations of fact, documents, or relevant evidence.

As we can see, the Court of First Instance—in the exercise of the discretion it has to manage the cases filed—established the questions to be argued and considered during the hearing, such that the court could be in a position to make an informed decision regarding the motion to dismiss.

The hearing in question was held on the scheduled date. As the record of hearing in the casefile attests, petitioners postulated that the document requested by Senator Bhatia Gautier could have been requested during the legislative procedure but was not. They also argued that the document was not public, as it was a document prepared by the Executive Branch and is protected by executive privilege since it was a draft that had been "prepared as part of the deliberative stage for the development of public policy."[1]

For his part, Senator Bhatia Gautier maintained that the governor and the Commonwealth of Puerto Rico were **[*154]** attempting to keep the requested document confidential, even though they had not demonstrated that it was protected by executive privilege. He also maintained that he did not wish to obtain copies of the documents that had been prepared by the advisors to the governor of Puerto Rico nor their subjective opinions, but rather that he wished to have access to the figures included in the above-referenced Proposed Draft as it had been submitted to the Fiscal Oversight Board.

After hearing the parties' arguments and having evaluated the documents and briefs on record, the Court of First Instance issued the Resolution and Order *a quo*. Therein, the Court of First Instance decided that Senator Bhatia Gautier had standing to file the petition for mandamus since his claim arose from his constitutional right to access information and that the controversy before the court was not moot. However, regarding the allegation that the document in dispute here was protected by executive privilege, the Court of First Instance, *after hearing the parties and having examined the documents in the casefile*, ruled that petitioners had failed to place the court in a position to determine whether executive privilege **[*155]** could, in fact, apply. Finally, in the exercise of its sound discretion, the trial court provided the following: (1) it granted the governor of Puerto Rico a 10-day term to submit, in a sealed envelope marked as confidential, the Proposed Budget remitted to the Fiscal Oversight Board on April 30, 2017, and (2) it ordered petitioners to explain in detail the reasons why the information at issue was protected under executive privilege.

Disagreeing with that course of action, petitioners filed for certiorari with the Court of Appeals and accompanied their petition with a motion for order in aid of jurisdiction. Nevertheless, the

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[1] *See*, Appendix, at 230.

intermediate appellate court denied the issuance of the writ. In doing so, it maintained that the trial court had not abused its discretion in deciding to privately inspect the information requested through the mandamus and thereby be better situated to decide whether or not the information in question was protected by executive privilege.

This being the state of affairs, and still not satisfied, petitioners have come before us through a petition for certiorari and a motion to stay the proceedings. In essence, they argue that the case should not be heard on its **[*156]** merits as it is not justiciable because Senator Bhatia Gautier lacks standing to bring suit and because his claim has become moot. They also maintain that the mandamus is not in order and that the senator did not exhaust the available remedies prior to making his request in court.

It is under this state of affairs—*where, as can be seen in the account of the facts related in the opinion of the Court, as well as our own, the trial court was actively, diligently, and correctly handling the controversies brought before it*—that a majority of this Court, in a mistaken and regrettable course of action, has decided to issue the writ, thus directly interfering with the discretion of the trial court and, consequently, dictating how it should conduct its proceedings. As I disagree with the course of action followed by a majority of this Court—*i.e.*, the issuance of the writ in this case—as has already been mentioned, we dissent. It is precisely for that very reason that I shall not pass judgment on those issues pertaining to the justiciability of this matter. Nevertheless, I shall outline the reasons for which, to my understanding, the writ should not have been issued in this case.

II

A. Access to **[*157]** public information is the cornerstone of our democratic system of government. The ability to access said information

> constitutes an essential tool to combat corruption, bring about real transparency in government and improve the quality of our democracies. Democracies, which are of themselves marked not only by a culture of secrecy and but by public bodies whose policies and practices for physically managing information are not designed to facilitate people's access to it.[*]

Inter-Am. Comm'n H.R., *Special Study on the Right of Access to Information* 6 (2007).

In that regard, and as it concerns *Puerto Rico, Section 1(b) of the Puerto Rico Public Document Administration Act, 3 LPRA § 1001(b)*, which is the statute that governs all matters relating to public information, defines a public document as

> [a]ny document which originates, or is kept or received in any dependency of the Commonwealth of Puerto Rico according to the law or in relation to the management of public affairs and that pursuant to the provisions of § 1002 of this title is required to be permanently or temporarily preserved as evidence of transactions or for its legal value.

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[*] Translator's note: The cited text was taken from the official press release issued by the Office of the Special Rapporteur for Freedom of Expression, Inter-Am. Comm'n H.R. Press Release No. 175/07 (Sept. 12, 2007), as this report is available only in Spanish.

Pursuant to the above, we have held that, in our country, custodians of public documents have "the duty to permit interested persons to inspect and copy those **[*158]** documents, even though the corresponding law does not expressly impose that duty." *Dávila v. Gen'l Supervisor of Elections*, 82 PRR 257, 272 (1960).[2] This is because our system recognizes the people's right to learn of what their government is doing. Therefore,

> [i]t is not enough merely to recognize the important political justification for freedom of information. Citizens of a self-governing society must possess the legal right to examine and investigate the conduct of its affairs, subject only to those limitations imposed by the most urgent public necessity. This right must be elevated to a position of highest sanctity if it is to constitute an effective bulwark against unresponsive leadership.

Id. at 274 n.9.

In light of the above, our legal framework recognizes a general right to access public information in the hands of the State in *Section 409 of the Code of Civil Procedure, 32 LPRA § 1781*. Said precept provides that "[e]very citizen has a right to inspect and take a copy of any public document of Puerto Rico, except as otherwise expressly provided by law." *Id.* But this right arises not only from the cited section of the Code of Civil Procedure; rather, in the past we have recognized that the right to access public information also arises as a corollary of freedom of speech. *Colón Cabrera v. Caribbean Petroleum, 170 DPR 582, 590 [70 PR Offic. Trans. 38,] (2007)*; *Soto v. Srio de Justicia, 112 DPR 477, 485 [12 PR Offic. Trans. 597, 608] (1982)* ("[T]here is a close **[*159]** relationship between the freedom of speech and the freedom of information.").

In that regard, we have also held that, in addition to the right to freedom of speech, the right of the citizens of our country to have access to public documents and information is in response to the fact that, as the people have deposited their sovereignty in the State, the latter then "cannot whimsically and without apparent justification deny access to information gathered through its public undertakings." *Soto v. Srio de Justicia, 112 DPR, at 489 [12 PR Offic. Trans., at 613]*. See also, *Colón Cabrera v. Caribbean Petroleum, 170 DPR, at 590 [70 PR Offic. Trans. 38, at]*; *Ortiz v. Dir. Adm. de los Tribunales, 152 DPR 161 [52 PR Offic. Trans. 11] (2000)*; *Silva Iglecia v. F.E.I., 137 DPR 821 [37 PR Offic. Trans. 47] (1995)*; *López Vives v. Policía de PR, 118 DPR 219 [18 PR Offic. Trans. 264]* (1987).

This being so, as a rule, the State has no discretion whatsoever to determine which documents resulting from its public undertakings are outside the realm of public scrutiny, as it is precisely the people who are the source of sovereign power. The sole limitation are those imposed by "the most urgent public necessity." *Soto v. Srio de Justicia, 112 DPR, at 485 [12 PR Offic. Trans., at 608*]. See, *Dávila v. Gen'l Supervisor of Elections*, 82 PRR, at 273. See also, *Colón Cabrera v. Caribbean Petroleum*. It is, then, by virtue of the above—*i.e.*, "the most urgent public

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[2] We must point out that it has been stated that public information "belongs to the people. The information is not the property of the State and access thereto is not owing to the grace or favor of the government. The State has this information only insofar as it is the representative of all individuals. The State and public institutions are bound to respect and guarantee access to information for all persons. . . . The State has an obligation to promote a culture of transparency in society and in the public sector, to act with due diligence in promoting access to information, to identify who must provide the information, and to prevent actions that would deny such access and to sanction its infractors. The conduct of officials who deny access to information or the existence of legislation that is contrary thereto, infringes this right." Inter-Am. Comm'n H.R., *Special Study*, at 34-35.

necessity"—that the Legislative Assembly has the authority to pass legislation with the purpose of "withhold[ing] from public scrutiny certain documents and reports" related to investigative or preventative stages that, by their very nature, **[*160]** may place the outcome of a current investigation, the life and safety of informants or witnesses or the State's own employees in jeopardy. *Soto v. Srio de Justicia, 112 DPR, at 495 [12 PR Offic. Trans., at 618*]. See also, *Angueira v. J.L.B.P., 150 DPR 10 [50 PR Offic. Trans. 2] (2000)*; *Noriega v. Gobernador, 130 DPR 919, 938 [30 PR Offic. Trans. 65,]* (1992).

Despite the above, it is well-known that in Puerto Rico there is no legislation that provides the specific exceptions for which the State may refuse to disclose public information or documents. That is why, to fill this void, we have established the scenarios in which the State may validly claim the confidentiality of a public document, namely when:

> (1) *it is provided by law*; (2) the communication is protected by any of the evidentiary privileges a citizen may assert; (3) disclosing the information may injure the fundamental rights of third parties; (4) the identity of an informant is involved; and (5) it is official information under Evidence Rule [514, 32 LPRA App. VI].

Colón Cabrera v. Caribbean Petroleum, 170 DPR, at 591 [70 PR Offic. Trans. 38,], citing *Angueira v. J.L.B.P., 150 DPR, at 24 [50 PR Offic. Trans. 2*,].

Therefore, where a document or certain information is intended to be kept confidential, "the State has the burden of proving that it satisfies one of the exceptions mentioned above." *Colón Cabrera v. Caribbean Petroleum. With the purpose of determining whether or not it is proper to maintain that confidentiality—as a majority of this Court has recognized today through its opinion* ***[*161]*** [3]*—courts may perform in camera inspections of the documents the government seeks to withhold or may even grant limited access thereto*. I Ernesto L. Chiesa Aponte, *Tratado de derecho probatorio* 310, Dominican Republic, Ed. Corripio (1998). This, without a doubt, places judges in a position to make more informed decisions, which is an essential element of these processes, especially where the act of denying access to public information or documents may cause the requesting party a "clear, palpable, and real injury." *Ortiz v. Dir. Adm. de los Tribunales, 152 DPR, at 177 [52 PR Offic. Trans. 11, at]*.

B. One of these limited instances where it is not tenable to grant access to public information is when the State raises and demonstrates the applicability of a privilege, such as executive privilege.

As developed in our doctrine, executive privilege stems from the separation of powers enshrined in Article I, Section 2 of the Constitution of the Commonwealth of Puerto Rico, as well as Article V, Sections 1 and 4 of the Constitution. *See*, *PR Const. art I, § 2, LPRA tit. 1*; *PR Const. art V, §§ 1 & 4, LPRA tit. 1*. The creation and adoption of this doctrine is a response to a fundamental principle of all democratic systems of government: "[j]ust as the Legislature's power of inquiry is not absolute, the executive branch's power to withhold information because of its alleged confidentiality, is not absolute either." *Peña Clos v. Cartagena Ortiz, 114 DPR 576, 598 [14 PR Offic. Trans. 744, 770] (1983)*, citing *United States v. Nixon, 418 U.S. 683, 706 (1974)*.

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[3] *See*, Opinion of the Court, at 86 [English translation, at 18-19].

Evidence Rule 514 (32 LPRA App. VI) establishes the official **[*162]** information privilege in our legal framework. Thus, the rule defines "official information" as information that has been "acquired in confidence by a public officer or employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." Evidence Rule 514(a). Nevertheless, that privilege does not apply automatically. On the contrary, as it is matter of great importance, when there is a right to access public information, that interest must be weighed against the State's need to keep the information in question confidential. Ernesto L. Chiesa Aponte, *Reglas de Evidencia comentadas* 164, San Juan, Eds. Situm (2016). A mere allegation by the State cannot sustain a claim of privilege. See, *Peña Clos v. Cartagena Ortiz, 114 DPR, at 599 [14 PR Offic. Trans., at 772*].

III

Having established the above, and prior to setting forth in detail what I believe should have been the correct course of action that this Court should have taken in this case, it is imperative that we briefly go over the standards we have laid down regarding the discretion afforded to the courts to manage their cases, as it is of particular importance for the correct disposition of the controversies before us.

It is fitting that we draw **[*163]** attention to the definition that, on more than one occasion, we have given the concept of "discretion," namely, that "power to decide one way or another; that is, to choose among one or several courses of action." *Ramírez v. Policía de P.R., 158 DPR 320, 340 [58 PR Offic. Trans. 34,] (2002)*. See, *Pueblo v. Ortega Santiago, 125 DPR 203, 211 [25 PR Offic. Trans. 18, 6] (1990)*. Specifically, in the judicial realm, we have established that this "[d]iscretion is, therefore, a way of reasonableness applied to the judicial discernment in order to reach a just conclusion." *Ramírez v. Policía de P.R. See, Bco. Popular de P.R. v. Mun. de Aguadilla, 144 DPR 651, 657 [44 PR Offic. Trans. 24,] (1997)*. See also, *Pueblo v. Dávila Delgado, 143 DPR 157, 171 [43 PR Offic. Trans. 15,] n.15 (1997)*; *Pueblo v. Ortega Santiago, 125 DPR, at 211* [25 PR Offic. Trans. 18, at 7].

Accordingly, in our legal system, trial courts have ample discretion to manage the procedural aspects of the cases before them. *Meléndez v. Caribbean Int'l News, 151 DPR 649, 664 [51 PR Offic. Trans. 38,] (2000)*. For this reason, on more than one occasion, we have been emphatic in our pronouncements that, "regarding discretionary interlocutory procedural determinations, as appellate courts, we must not substitute our criteria for the trial court's exercise of discretion, except where said court has acted arbitrarily or committed a gross abuse of its discretion." *Id.* See also, *Lluch v. España Service Sta., 117 DPR 729, 745 [17 PR Offic. Trans. 872, 891] (1986)*; *Valencia, Ex parte, 116 DPR 909, 913 [16 PR Offic. Trans. 1118, 1123-1124] (1986)*; *Ortiz Rivera v. Agostini*, 92 PRR 181, 186-187 (1965). *On the contrary, when the actions of a court are not devoid of a reasonable basis and are not detrimental to the substantial rights of a party, "the judgment of the trial judge who presided* [*over*] *the proceeding should prevail*." *Sierra, Sec. of Labor v. Superior Court*, 81 PRR 540, 557 (1959). **[*164]** (Emphasis added.)

On this subject, we must point out that the instances in which we have held that a trial court has acted arbitrarily or committed a gross abuse of its discretion are few and far between. None of those instances are present in this case. For example, we have indicated that a judge incurs this conduct when

> the judge, in rendering a judgment, does not weigh and ignores, without basis, an important material fact that could not be overlooked; when on the contrary the judge, without justification or grounds for it, grants great weight and value to an irrelevant and immaterial fact and bases his decision exclusively on it; or when, in spite of weighing and taking into account all the material and important facts and discarding the irrelevant ones, the judge trivially analyzes and calibrates them.

Ramírez v. Policía de P.R., 158 DPR, at 340-341 [58 PR Offic. Trans. 34,]; *Pueblo v. Ortega Santiago, 125 DPR, at 211-212* [25 PR Offic. Trans. 18, at 7].

It is precisely in light of the legal framework set forth above that we believe this Court should have acted.

IV

In this case, in response to a request by Senator Bhatia Gautier to obtain access to information in the hands of the Executive Branch and given the opposition of the governor of Puerto Rico under an alleged claim of executive privilege, the **[*165]** trial court held a hearing to discuss a series of legal questions regarding Senator Bhatia Gautier's standing, the appropriateness of the mandamus, *the public nature of the requested information*, and the alleged claim of executive privilege.

In anticipation of this hearing, both parties stipulated a series of facts and documents that were not in dispute. Subsequently, as the record of hearing in the casefile shows, both petitioners and respondent had the opportunity to set forth their positions before the trial judge during the hearing. Specifically, the parties outlined their positions regarding whether or not the requested information was of a public nature. Clearly, then, and contrary to what the opinion issued today by this Court may suggest, both Senator Bhatia Gautier and the State had the opportunity to argue their respective positions.

Thereafter, the Court of First Instance issued a Resolution and Order through which it ruled that, according to the allegations put forward by the parties in their filings, as well as the arguments made during the hearing, Senator Bhatia Gautier had standing to file a petition for mandamus both in his individual capacity and in his capacity as **[*166]** a senator. Moreover, the court decreed that the controversy was not moot. Finally, regarding petitioners' claim of executive privilege, the trial court, *after evaluating the allegations of the parties and the applicable caselaw*, determined that, at that time, said party had failed to establish why the requested information should not be disclosed.

Having reached that conclusion, the Court of First Instance, *fully exercising its discretion to manage this case*, ordered petitioners to file the Proposed Budget that had been remitted to the Fiscal Oversight Board for inspection in chambers. *It also ordered said party to once again file in writing the reasons for which the information requested by Senator Bhatia Gautier was protected by the above-referenced privilege*. As we can see, the trial judge, acting within her discretion to dispose of the matters before the court, afforded the parties not only one but *two opportunities* to state their positions regarding the controversy that today a majority has erroneously decided to "address." Did the above not comply with what this Court has prescribed today?

We do not see, neither in the petition for certiorari filed by the Commonwealth and the governor **[*167]** of Puerto Rico nor in the casefile, any allegation whatsoever of bias, prejudice, gross abuse of discretion, or error on the part of the trial court in managing this case that would move us to intervene in this matter. *Even more so when, here, in camera inspection was particularly necessary to determine whether or not executive privilege, as raised by the State, in fact exists. Moreover, as this is a situation in which the document in question was in the hands of the Executive Branch but was submitted to a different entity, i.e., the Fiscal Oversight Board, this could constitute a waiver of executive privilege, were it to exist*.

The above notwithstanding, in what is clearly a mistaken course of action, a majority concludes that, while the trial court acted correctly in denying petitioners' motion to dismiss, prior to examining the document at issue in chambers, "the parties must *first* place the court in a position to understand what the conflicting interests are." Opinion of the Court, at 94 [English translation, at 24]. That is, in the estimation of the majority, the trial court should have ordered the parties to submit their respective legal briefs on whether the requested information **[*168]** was or was not public.

A faithful reading of this position leads us to the absurdity of having to think that the only way a party may establish the existence or nonexistence of a privilege would be through the filing of legal briefs. To put it another way, trial courts would not be able to exercise their discretion to manage their cases pursuant to the allegations of the parties, the filings, or the facts at hand, but rather they would always be bound to require the filing of legal briefs even though such a requirement does not exist in our body of laws or in any precedent laid down by this Court. There is no room in our legal framework for this contention, and it threatens the governing principles of our legal system. It only seeks to afford the State another opportunity (in addition to the two already granted by the Court of First Instance) to do what, at the proper time, it had to do, but that for reasons unknown to us, it failed to do.

In short, today, with the course of action of a majority of this Court, the inherent powers of all judges to manage the proceedings before them—which have historically been recognized—have been undermined. The decision that a majority endorses allows **[*169]** for this court of last instance to be the one to arbitrarily and capriciously determine how the proceedings before trial courts are to be conducted or, worse yet, that at the end of the day it is either the Executive or Legislative Branch that shall determine as much.

It is for the foregoing reasons that I vigorously dissent from what has been erroneously decided today by a majority of this Court.
