IN THE SUPREME COURT OF GUAM

IN RE THE A.B. WON PAT INTERNATIONAL AIRPORT AUTHORITY, GUAM,
Petitioner-Appellee.

Supreme Court Case No.: CVA17-030
Superior Court Case No.: SP0102-15

DFS GUAM L.P.,
Plaintiff-Appellee/Cross-Appellant,

v.

THE A.B. WON PAT INTERNATIONAL AIRPORT AUTHORITY, GUAM,
Defendant-Appellant/Cross-Appellee.

Supreme Court Case No.: CVA18-001
Superior Court Case No.: CV0307-16

OPINION

Cite as: 2019 Guam 6

Appeal from the Superior Court of Guam
Argued and submitted on October 11, 2018
and October 12, 2018
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; JOSEPH N. CAMACHO, Justice *Pro Tempore*.

CARBULLIDO, J.:

[1] Before the court are two separately-filed appeals that involve the same parties but arise from different underlying cases in the Superior Court. In the first appeal, Supreme Court Case No. CVA17-030, Intervenor-Appellant DFS Guam L.P. ("DFS") appeals a final order denying DFS's motion to unseal certain transcripts of executive sessions conducted by Petitioner-Appellee A.B. Won Pat International Airport Authority, Guam ("GIAA"). In the second appeal, Supreme Court Case No. CVA18-001, GIAA challenges the grant of partial summary judgment in favor of DFS on DFS's claims arising under the Sunshine Reform Act of 1999 ("the Sunshine Act") and the Open Government Law ("OGL"). DFS cross-appeals from the portion of the Superior Court's decision and order that partially denied its motion for summary judgment.

[2] Following oral argument, we granted GIAA's motion to consolidate, solely to issue this joint Opinion. We hold that 7 GCA § 8117(c)(7) does not grant the trial court the authority to re-seal an executive session transcript once the initial statutory seal has lapsed without a government agency moving to further seal the transcript. We further hold that executive session transcripts are subject to the Sunshine Act and Open Government Law, which are not in irreconcilable conflict. The Sunshine Act permits GIAA to withhold the executive session transcripts from disclosure until the litigation between GIAA and DFS has concluded. We remand both cases for further proceedings not inconsistent with this Opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] The genesis of both cases pending on appeal is a disputed procurement contract that GIAA awarded in the Spring of 2013. *See DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*,

2014 Guam 12 ¶ 3. Shortly following this procurement award, the Board of Directors of GIAA engaged in the first of several dozen closed-door executive sessions to discuss the threatened or actual litigation initiated by DFS. Under the OGL, GIAA created verbatim transcripts of these closed-door executive sessions.

[4] On July 7, 2015, DFS sent GIAA a Sunshine Act request demanding various documents, including transcripts of executive sessions in which the procurement-related litigation was discussed with GIAA's attorneys. GIAA denied DFS's Sunshine Act request regarding the executive session transcripts on the basis that such documents were exempt from disclosure because they were privileged or related to pending litigation.

[5] Shortly after DFS's first Sunshine Act request, GIAA filed a non-adversarial Petition under Superior Court Case No. SP0102-15, seeking to seal certain executive session transcripts under the OGL, 5 GCA §§ 8101-8116 ("the Sealing Litigation"). *See* CVA17-030, RA, tab 1 (Pet., Aug. 6, 2015). GIAA sought to seal twenty-eight transcripts, dating from March 4, 2010, to January 29, 2015. Of these twenty-eight transcripts, thirteen related to matters concerning DFS and its challenge to the procurement award. After reviewing the transcripts *in camera*, the Superior Court issued an order sealing all twenty-eight transcripts for six months. *See* CVA17-030, RA, tab 7 (Order, Aug. 13, 2015). Several weeks later, GIAA supplemented its submission and sought sealing two additional executive session transcripts, both of which also concerned DFS-related matters. Again, the Superior Court issued an order sealing these transcripts for six months. *See* CVA17-030, RA, tab 9 (Order, Aug. 28, 2015).

[6] Throughout the next year and a half, GIAA filed several additional supplemental petitions in which it requested that executive session transcripts be sealed or that the court extend one of its previous sealing orders. The Superior Court in the Sealing Litigation granted some of

GIAA's requests. *See* CVA17-030, RA, tab 12 (Order, Dec. 15, 2015); CVA17-030, RA, tab 18 (Order, Mar. 14, 2016).

[7] As the Sealing Litigation was pending, DFS sent two additional Sunshine Act requests to GIAA seeking disclosure of executive session transcripts. In response, GIAA again denied these requests for transcripts on the basis that they were exempt from disclosure because they consisted of privileged attorney-client communications or were otherwise protected by law.

[8] DFS sued GIAA under Superior Court Case No. CV0307-16, asserting claims under the OGL and the Sunshine Act and seeking, among other things, to compel GIAA to disclose transcripts of certain executive sessions ("the Sunshine Act Litigation"). *See* CVA18-001, RA, tab 1 (Compl., Apr. 11, 2016); *see also* CVA18-001, RA, tab 20 (First Am. Compl., June 9, 2016). This case was heard by a judge different than the judge overseeing the Sealing Litigation. Both parties moved for summary judgment or partial summary judgment in the Sunshine Act Litigation. DFS argued for partial summary judgment that many of the executive session transcripts had become public records by operation of law under section 8111(c) of the OGL, and GIAA was therefore required to disclose these transcripts under the Sunshine Act. *See* CVA18-001, RA, tab 75 at 1-2 (DFS's Mot. Partial Summ. J., Mar. 8, 2017). In its motion for summary judgment, GIAA argued, among other things, that DFS was prohibited from obtaining the transcripts because they had been sealed by court order in the Sealing Litigation. *See* CVA18-001, RA, tab 68 (GIAA's Mot. Summ. J., Mar. 8, 2017).

[9] The Superior Court resolved the dueling motions for summary judgment in the Sunshine Act Litigation by Decision and Order. CVA18-001, RA, tab 85 (Dec. & Order, June 26, 2017). Here, the court found that "Section 8111 of the OGL provides a clear exception to the Sunshine Act's limitation on the right to inspect records pertaining to pending litigation." *Id.* at 11. In the

trial court's view, "to interpret Section 10108 of the Sunshine Act to prohibit the disclosure of *all* documents pertaining to pending litigation or containing attorney-client discussions . . . would render Section 8111 of the OGL meaningless." *Id.* The court further reasoned that because the six-month window for sealing under 5 GCA § 8111(c) had run by the time GIAA sought to seal certain transcripts, those transcripts were public documents by operation of law. *See id.* at 12. But because these transcripts were subsequently re-sealed as part of the Sealing Litigation, they were no longer public documents subject to disclosure. *See id.* at 12-13. On this basis, the court found that GIAA violated the Sunshine Act by failing to disclose the documents during the period in which they were public documents. *See id.* at 13. But because these documents were no longer public documents because of the re-sealing in the Sealing Litigation, the court also found it could not grant DFS the injunctive relief it requested. *See id.*

[10] Following the court's grant of partial summary judgment, DFS moved to enter judgment, to voluntarily dismiss certain of its remaining claims, and for additional relief. Judgment was entered in the Sunshine Act Litigation on January 10, 2018. Both GIAA's Notice of Appeal and DFS's Notice of Cross-Appeal timely followed, which resulted in the appeal filed under Supreme Court Case No. CVA18-001.

[11] In addition to seeking the entry of judgment in the Sunshine Act Litigation, DFS sought to intervene in the Sealing Litigation and moved to unseal a number of transcripts placed under a continuing seal by the Superior Court. *See* CVA17-030, RA, tab 36 (Mot. Intervene & Unseal Trs., July 26, 2018). The Superior Court granted DFS's motion to intervene in the Sealing Litigation but denied that portion seeking to unseal certain of the executive session transcripts ("the November 2017 Order"). *See* CVA17-030, RA, tab 61 (Dec. & Order, Nov. 9, 2017). The court rejected DFS's argument that once executive session transcripts had become public under 5

GCA § 8111(c), the court was without authority under that statute to re-seal them. *See id.* at 10. DFS timely filed a notice of appeal of this final order in the Sealing Litigation, which gave rise to the appeal filed under Supreme Court Case No. CVA17-030. GIAA did not cross-appeal from the court's order granting DFS permission to intervene.

[12] After hearing oral arguments on each appeal separately, we consolidated these appeals to issue this joint Opinion.

II. JURISDICTION

[13] We have appellate jurisdiction over both final orders and final judgments entered in the Superior Court of Guam. *See* 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-20 (2019)); 7 GCA §§ 3107, 3108(a) (2005).

III. STANDARD OF REVIEW

[14] We review both questions of standing and statutory interpretation *de novo*. *See Ada v. Guam Tel. Auth.*, 1999 Guam 10 ¶ 10; *Benavente v. Taitano*, 2006 Guam 15 ¶ 10.

IV. ANALYSIS

A. DFS Has Standing to Intervene in the Sealing Litigation

[15] At issue in each appeal is the extent to which the OGL and the Sunshine Act protect executive session transcripts from disclosure. Before addressing the interplay between these statutes, however, we must first determine whether DFS has standing to intervene and pursue its appeal in the Sealing Litigation. GIAA claims this court lacks jurisdiction over the appeal filed under CVA17-030 because DFS lacks both constitutional and prudential standing. *See* CVA17-030, Appellee's Br. at 19-36 (May 4, 2018). Upon review of GIAA's assertions, we find that DFS has constitutional standing to pursue this appeal. We adopt the United States Supreme Court's decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014),

regarding the doctrine of prudential standing. By presenting its arguments for the first time on appeal under a new legal theory of "standing," GIAA has waived its prudential standing arguments. In any event, we use our discretion to address GIAA's arguments on the merits and hold that the trial court did not err in finding that DFS has a protectable interest under the OGL that it is seeking to vindicate by intervening in the Sealing Litigation.

1. DFS Has Constitutional Standing

[16] Although we are "not bound by the standing requirements applicable to federal courts of limited jurisdiction under Article III of the United States Constitution," we have repeatedly found that the "traditional standing requirements" expressed in Article III nevertheless apply to claims asserted in Guam's courts.[1] *Guam Mem'l Hosp. Auth. v. Superior Court*, 2012 Guam 17 ¶ 9. In prior cases, we have referred to this doctrine, as applied in our courts, as either constitutional standing or common-law standing.[2] *Compare Pia Marine Homeowners Ass'n v. Kinoshita Corp. Guam*, 2013 Guam 6 ¶ 16 (referring to "constitutional" standing), *with Guam Mem'l Hosp. Auth.*, 2012 Guam 17 ¶ 12 (referencing "common-law" standing), *and Benavente*,

[1] We have applied a constitutional standing analysis or otherwise required a party to establish constitutional standing in a litany of cases. *See Teleguam Holdings LLC v. Guam*, 2018 Guam 5 ¶¶ 13-18; *United Pac. Islanders' Corp. v. Cyfred, Ltd.*, 2017 Guam 6 ¶¶ 14-19; *Hemlani v. Melwani*, 2016 Guam 33 ¶ 31; *Barrett-Anderson v. Camacho*, 2015 Guam 20 ¶¶ 16-20; *Pia Marine Homeowners Ass'n v. Kinoshita Corp. Guam*, 2013 Guam 6 ¶¶ 12-22; *Agana Beach Condo. Homeowners' Ass'n v. Mafnas*, 2013 Guam 9 ¶¶ 13-20; *Guam Resorts, Inc. v. G.C. Corp.*, 2013 Guam 18 ¶ 45; *Attorney Gen. of Guam v. Gutierrez*, 2011 Guam 10 ¶¶ 21-40; *Gov't of Guam v. 162.40 Square Meters of Land More or Less*, 2011 Guam 17 ¶¶ 9-13; *Duenas v. Guam Election Comm'n*, 2008 Guam 1 ¶ 14; *Pangelinan v. Camacho*, 2008 Guam 4 ¶¶ 4-5; *Macris v. Guam Mem'l Hosp. Auth.*, 2008 Guam 6 ¶ 9; *Tumon Partners, LLC v. Shin*, 2008 Guam 15 ¶¶ 31-35; *Guam Election Comm'n v. Responsible Choices for All Adults Coal.*, 2007 Guam 20 ¶¶ 26-30; *Taitano v. Lujan*, 2005 Guam 26 ¶¶ 15-25; *Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth.*, 2004 Guam 15 ¶¶ 17-20; *Guam Tai-Pan Dev. & Constr., Inc. v. Yigo Alta Estates, Inc.*, 2002 Guam 20 ¶¶ 16-18; *see also Santos v. Calvo*, D.C. Civ. No. 80-0223A, 1982 WL 30790, at *2 (D. Guam App. Div. Aug. 11, 1982) (discussing taxpayer standing).

[2] Although we have previously referred to this principle on occasion as common-law standing, we clarify today that the term "common-law standing" is not synonymous with the term "constitutional standing." Rather, "common-law standing" refers only to the source of injury—*i.e.*, whether a party is injured within the meaning of any particular common law cause of action. *Accord Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 18 (citing *Benavente* and other cases for proposition that "[t]he Guam Legislature has the power to modify the common law" (citing *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Mktg. Ass'n*, 276 U.S. 71, 89 (1928); *Benavente*, 2006 Guam 15 ¶ 19)).

2006 Guam 15 ¶¶ 18, 20 (same). Constitutional standing is jurisdictional and cannot be waived. *See Guam Mem'l Hosp. Auth.*, 2012 Guam 17 ¶ 8 ("Standing is a 'threshold jurisdictional matter,' and as such, this issue can be raised 'at any stage of the proceedings, including for the first time on appeal.'" (quoting *Taitano v. Lujan*, 2005 Guam 26 ¶ 15)). Moreover, "standing is not dispensed in gross" or wholesale over an entire case. *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *see also United Pac. Islanders' Corp. v. Cyfred, Ltd.*, 2017 Guam 6 ¶ 19 (finding corporate entity did not have standing and analyzing only those arguments raised by individual plaintiffs). Thus, "an intervenor of right must have [constitutional] standing in order to pursue relief that is different from that which is sought by a party with standing." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, -- U.S. --, 137 S. Ct. 1645, 1651 (2017). In the Sealing Litigation, because DFS seeks to unseal the transcripts and GIAA seeks to keep the transcripts under seal—*i.e.*, DFS seeks relief different than GIAA—DFS must independently establish that it has standing to proceed with the appeal filed under CVA17-030. DFS has met this burden.

a. Constitutional standing and legislatively imparted injury-in-fact

[17] To establish constitutional standing, a party must show: (1) "it has suffered an 'injury in fact'"; (2) "that the injury can be fairly traced to the challenged action taken by the defendant"; and (3) that "it is likely and beyond mere speculation that a favorable decision will remedy the injury sustained." *Guam Mem'l Hosp. Auth.*, 2012 Guam 17 ¶ 10 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000)). GIAA argues that DFS has failed to establish that it has suffered an injury in fact. *See* CVA17-030, Appellee's Br. at 19, 29-36.

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[18] In *Benavente v. Taitano*, we adopted what is known in our jurisdiction as the doctrine of "statutory standing."[3] *See* 2006 Guam 15 ¶¶ 18-19. There, we stated that "a party must adhere to the requirements of standing under Article III, *except* where standing is expressly conferred by statute." *Id.* ¶ 15 (emphasis added) (citing *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973)). We also stated that "because federal courts are courts of limited jurisdiction, a federal plaintiff must satisfy standing under Article III, *unless* standing is statutorily conferred." *Id.* (emphasis added). And finally, we stated: "[W]here standing is statutorily conferred, we look first to the language of the relevant statute to determine whether a party has statutory standing. Where standing is not conferred by statute, we turn to the common law principles of Article III to determine whether a litigant satisfies such standing requirements." *Id.* ¶ 20. These statements in *Benavente* suggest an "either-or" proposition—*i.e.*, a litigant must establish standing under the requirements of Article III (as adopted by, and applicable in, our courts), *or* the litigant must establish that he has standing under a statute. In subsequent cases, we have adhered to this formulation of standing. *See, e.g.*, *Teleguam Holdings LLC v. Guam*, 2018 Guam 5 ¶ 14; *United Pac. Islanders' Corp.*, 2017 Guam 6 ¶ 16; *Hemlani v. Melwani*, 2016 Guam 33 ¶ 18; *Pia Marine*, 2013 Guam 6 ¶ 13; *Guam Mem'l Hosp. Auth.*, 2012 Guam 17 ¶ 9; *Macris v. Guam Mem'l Hosp. Auth.*, 2008 Guam 6 ¶ 12; *Tumon Partners, LLC v. Shin*, 2008 Guam 15 ¶ 32. We clarify today that constitutional standing and finding a basis for establishing standing under a specific statute should not be thought of as distinctly separate inquiries.

[19] Constitutional standing is a necessary prerequisite to pursuing relief in *all* cases filed in the courts of Guam, and the legislature cannot remove the requirement of constitutional standing

[3] Under federal caselaw, the term "statutory standing" has historically referred to a similar but distinct concept from how we have used the term "statutory standing." *See Lexmark*, 572 U.S. at 128 n.4; *see also infra* Part IV.A.2.

by statute. "Injury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" *Spokeo, Inc. v. Robins*, -- U.S. --, 136 S. Ct. 1540, 1547-48 (2016) (alteration in original) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)); *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). In other words, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 555 U.S. at 497.

[20] In finding that the legislature may not remove the constitutional standing minima of an injury in fact, causality, and redressability, *see, e.g.*, *Guam Mem'l Hosp. Auth.*, 2012 Guam 17 ¶ 10, we do not suggest that our prior caselaw regarding "statutory standing" is no longer good law. Rather, we clarify that the doctrine we have referred to in our jurisdiction as "statutory standing" establishes that the legislature may impart a judicially-cognizable injury upon a particular class of persons to establish an injury in fact where one would otherwise have been too abstract under a constitutional-standing inquiry.[4] *See id.* ¶ 22. Put differently, the legislature may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992); *see also Warth v. Seldin*, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute."). But, "broadening the

[4] The legislature has imparted judicially-cognizable injury by statute in numerous instances. *See, e.g.*, 5 GCA § 10111(b) (2005). As just one example, under 7 GCA § 4104, the governor can seek a declaratory judgment "upon any question affecting the powers and duties of *I Maga'låhi* and the operation of the Executive Branch," and "interested parties" may be heard on the questions presented in such an action. 7 GCA § 4104 (2005); *accord In re: Request of Calvo Relative to Interpretation & Application of Organic Act Section 1423b & What Constitutes Affirmative Vote of Members of I Liheslaturan Guåhan*, 2017 Guam 14 ¶¶ 14-15 (finding review appropriate under 7 GCA § 4104 because question presented "necessarily impinge[d] on the operation of the executive branch, and the Governor's powers and duties").

categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." *Linda R.S.*, 410 U.S. at 617 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972)). As explained by the United States Supreme Court,

> Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one "who otherwise would be barred . . . ." In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered "a distinct and palpable injury to himself," that is likely to be redressed if the requested relief is granted.

Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 100 (1979) (first quoting *Warth*, 422 U.S. at 501, then quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)). The legislature's "role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo, Inc.*, -- U.S. --, 136 S. Ct. at 1549; *see also Macris*, 2008 Guam 6 ¶ 23. Rather, "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc.*, -- U.S. --, 136 S. Ct. at 1549.

[21] Though we have adhered to our formulation of standing in *Benavente* in numerous subsequent cases, we have also recognized that any attempt to statutorily impart constitutional standing is directly correlated to the injury prong of a standing analysis. In *Guam Mem'l Hosp. Auth.*, for example, we purported to formally adhere to the framework we adopted in *Benavente*. *See Guam Mem'l Hosp. Auth.*, 2012 Guam 17 ¶ 9. In our conclusion, however, we held that "absent a cognizable injury in fact that is beyond mere conjecture, and *without a tenable basis for statutory circumvention of the injury in fact requirement*, GMHA lacks common-law standing and statutory standing, respectively." *Id.* ¶ 22 (emphasis added); *accord Pia*

Marine, 2013 Guam 6 ¶ 13 ("The party seeking *to establish injury* has the burden of proving standing." (emphasis added) (citing *Guam Mem'l Hosp. Auth.*, 2012 Guam 17 ¶ 10)).

[22] Our clarification today is also broadly in accord with our decisions in *Macris* and *Tumon Partners*. In *Macris*, we looked to the specific statutory language of the Sunshine Act and determined that an undisclosed principal did not "attain rights under the Sunshine Act"—and, therefore, could not be injured—because he was not the "person making the request" within the meaning of the statute. 2008 Guam 6 ¶ 23. In *Tumon Partners*, we examined language granting appellate standing to any "party aggrieved" by a certain type of court order, where such an appeal would not otherwise be viable for lack of appellate jurisdiction. 2008 Guam 15 ¶ 33 (quoting 7 GCA § 25104 (2005)). In determining what the statute meant by the term "aggrieved party," we found that it meant "one who has 'suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power.'" *Id.* ¶ 34 (quoting *Federated Ins. Co. v. Oakland Cty. Rd. Comm'n*, 715 N.W.2d 846, 850 (Mich. 2006)). Viewed through the prism of our clarification today, we looked to constitutional standing requirements to implicitly find in that case that the legislature had established a statutory basis for finding a concrete injury. *Cf. Gladstone, Realtors*, 441 U.S. at 100. As indicated by these cases, and as we clarify today, injury in fact is a necessary prerequisite to all suits filed in our courts.

b. DFS Has Suffered an Injury in Fact

[23] DFS has constitutional standing in the Sealing Litigation, as DFS requested and was denied access to public records. The legislature has specifically provided that "[a]ny person shall have standing to sue for the enforcement of th[e] [OGL]." 5 GCA § 8115(a) (2005); *cf. Tumon Partners*, 2008 Guam 15 ¶ 33 (finding statute that stated, "[a]ny party aggrieved may appeal in the cases prescribed in this Chapter," provided standing for any party aggrieved within

meaning of statute). By including this provision, the legislature intended to "expand standing to the full extent permitted by" our constitutional standing precedent. *Gladstone, Realtors*, 441 U.S. at 100. This provision does not grant all citizens standing to sue under the OGL; a citizen must still establish that he or she has suffered a concrete injury. *See Spokeo, Inc.*, -- U.S. --, 136 S. Ct. at 1549; *accord Macris*, 2008 Guam 6 ¶ 23. "[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws"—lacks constitutional standing. *Lujan*, 504 U.S. at 573-74. "That an injury may be widely shared, however, does not automatically render it unsuitable for [establishing a party's constitutional] standing." *Doe v. Pub. Citizen*, 749 F.3d 246, 263 (4th Cir. 2014).

[24] Public records and open government laws are both common examples of statutes conferring sufficient injury to satisfy the injury-in-fact component of a constitutional-standing analysis. *See Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 617-18 (D.C. Cir. 2006). "Anyone whose request for specific information has been denied has standing to bring an action; the requester's circumstances—why he wants the information, what he plans to do with it, what harm he suffered from the failure to disclose—are irrelevant to his standing." *Id.* at 617; *see also Macris*, 2008 Guam 6 ¶ 23. "The requester is injured-in-fact for standing purposes because he did not get what the statute entitled him to receive." *Zivotofsky*, 444 F.3d at 617-18 (collecting cases); *see also Macris*, 2008 Guam 6 ¶ 23. In other words, "anyone who seeks and is denied access to [public] records sustains an injury" to establish constitutional standing. *Doe*, 749 F.3d at 263; *see also Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998) (holding that voters had standing to challenge ability to obtain donor- and campaign-related information required to be disclosed by law); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982) (holding

that litigants had standing where they sought information about housing availability); *Guam Publ'ns, Inc. v. Superior Court (People)*, 1996 Guam 6 ¶ 9 (finding, without discussion, that a newspaper publisher had "standing to seek review by writ of mandamus of orders denying [it] access to [court] proceedings or to sealed documents").

[25] As the Fourth Circuit stated in *Doe*, where a court has found that a party seeking access to public information had standing, "the plaintiffs (1) alleged a right of disclosure; (2) petitioned for access to the concealed information; and (3) were denied the material that they claimed a right to obtain." 749 F.3d at 264. These three commonalities closely parallel the three requirements for standing we have adopted—*i.e.*, an injury in fact, a causal connection between the injury and conduct of the defendant, and redressability. *See, e.g.*, *Guam Mem'l Hosp. Auth.*, 2012 Guam 17 ¶ 10. And each consideration is present in the Sealing Litigation. DFS petitioned GIAA for disclosure of the applicable transcripts under the Sunshine Act, claiming that the executive session transcripts were "public documents" by operation of law to which DFS has a right of access. *See* CVA17-030, RA, tab 34 at Exs. B-C (Decl. G. Patrick Civille, July 26, 2017). GIAA then denied DFS access to these records. *See id.*, Exs. D-E. We thus find that DFS has constitutional standing to proceed. *See generally Macris*, 2008 Guam 6 ¶¶ 9-30.

2. We Adopt the United States Supreme Court's Approach in *Lexmark* to the Doctrine of Prudential Standing

[26] Although we find that DFS has constitutional standing, this alone does not end our analysis. Previously at the federal level, "standing jurisprudence contain[ed] two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004) (citation omitted) (quoting

Allen v. Wright, 468 U.S. 737, 751 (1984)), *abrogated by Lexmark*, 572 U.S. 118. Under the doctrine of prudential standing, a court could refuse to adjudicate some claims even where the constitutional standing requirements had been satisfied. Thus, under this doctrine, "a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to . . . courts to those litigants best suited to assert a particular claim." *Gladstone, Realtors*, 441 U.S. at 99-100.

[27] While GIAA does not frame any of its assertions as "prudential standing" arguments (rather than constitutional standing arguments) on appeal, a number of its legal claims fall within this strand of standing jurisprudence. *See, e.g.*, CVA17-030, Appellee's Br. at 24. We have implicitly—though never explicitly—recognized the doctrine of prudential standing.[5] Recently, however, the United States Supreme Court in its unanimous opinion in *Lexmark*, reframed this doctrine as a question of whether a plaintiff has sufficiently stated a cause of action. We adopt the *Lexmark* approach today and find that GIAA has waived its arguments traditionally understood as falling under the "prudential" branch of a standing inquiry by failing to frame

[5] For example, in *Cho v. Fujita Kanko Guam, Inc.*, 2009 Guam 21, we stated: "We acknowledge that a party's lack of standing, *should it undermine subject matter jurisdiction*, may be raised at any stage of the proceedings, including for the first time on appeal." 2009 Guam 21 ¶ 36 (emphasis added). This statement, which suggests that not all standing doctrine relates to subject matter jurisdiction, is an implicit recognition of the non-jurisdictional doctrine of prudential standing. *See* discussion *infra*; *cf. People v. Tennessen*, 2010 Guam 12 ¶ 24 (not deciding question of standing under statute but addressing merits of claim).

More recently, in *Government of Guam v. Kim*, we adopted a prudential-standing analysis in determining that the Government of Guam was a "consumer" within the definition of that term under the Deceptive Trade Practices Act ("DTPA") and therefore had standing to pursue its claims. *See* 2015 Guam 15 ¶¶ 18-23. At no point in that opinion did we indicate that the standing requirement we referred to was jurisdictional in nature, and we did not discuss the three prongs necessary to establish constitutional standing. *See id.* Rather, we treated being a "consumer" as an element necessary to prove in order to establish a cause of action under the DTPA. This is a classic prudential-standing analysis. We do not suggest that our decision in *Kim* or any similar case was wrongly decided. Rather, in accordance with our adoption of the *Lexmark* approach, we find only that the issues in *Kim* are more appropriately thought of as whether a party had stated a valid claim for relief, not whether the court had subject matter jurisdiction to hear the dispute.

them as such in the court below. *See, e.g.*, *City of Oakland v. Lynch*, 798 F.3d 1159, 1163 n.1 (9th Cir. 2015) ("We will not consider the argument, because 'a party waives objections to nonconstitutional standing not properly raised before the [trial] court.'" (quoting *Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 899 (9th Cir. 2000))). To the extent that GIAA preserved these standing arguments even though they were framed differently below, we find DFS is seeking to vindicate its own rights granted by the OGL and therefore properly sought to intervene in the Sealing Litigation.

[28] Historically, the doctrine of prudential standing encompasses three broad principles: a prohibition on raising the grievances of others, a prohibition on raising generalized grievances that should be rectified in the representative branches, and a requirement that a party's claims be within the "zone of interest" protected by the statute sued under. *Allen*, 468 U.S. at 751, *abrogated by Lexmark*, 572 U.S. 118. The United States Supreme Court's decision in *Lexmark*, however, established that these considerations have nothing to do with a court's subject matter jurisdiction or standing.

[29] At issue in *Lexmark* was whether the plaintiff could sue Lexmark International, Inc. for false advertising under the Lanham Act. 572 U.S. at 120. It was not disputed, and the court accepted, that the plaintiff's "allegations of lost sales and damage to its business reputation give it standing under Article III to press its false-advertising claim." *Id.* at 125. But the court noted that "[i]n recent decades, . . . we have adverted to a 'prudential' branch of standing, a doctrine not derived from Article III and 'not exhaustively defined' but encompassing (we have said) at least" the three "broad principles" noted above. *Id.* at 126 (quoting *Elk Grove Unified Sch. Dist.*, 542 U.S. at 12).

[30] After recognizing that the Court had adopted the concept of prudential standing in prior cases, the Court effectively abandoned this doctrine going forward:

> Although we admittedly have placed [the zone of interests] test under the "prudential" rubric in the past, it does not belong there any more than [the federal doctrine of statutory standing] does. Whether a plaintiff comes within "the 'zone of interests'" is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim. As Judge Silberman of the D.C. Circuit recently observed, "'prudential standing' is a misnomer" as applied to the zone-of-interests analysis, which asks whether "this particular class of persons ha[s] a right to sue under this substantive statute."
>
> In sum, the question this case presents is whether [the plaintiff] falls within the class of plaintiffs whom Congress has authorized to sue under § 1125(a). In other words, we ask whether [the plaintiff] has a cause of action under the statute. That question requires us to determine the meaning of the congressionally enacted provision creating a cause of action. In doing so, we apply traditional principles of statutory interpretation. We do not ask whether in our judgment Congress *should* have authorized [the plaintiff's] suit, but whether Congress in fact did so. Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because "prudence" dictates.

Id. at 127-28 (third alteration in original) (footnotes and citations omitted). In a footnote, the Court further explained that while it had "on occasion referred to this inquiry as 'statutory standing' and treated it as effectively jurisdictional," that label was also "misleading, since 'the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case.'" *Id.* at 128 n.4 (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642-43 (2002)).

[31] The sea-change ushered in by *Lexmark* reframed the court's "prudential standing" analysis—including what it had called "statutory standing"[6]—as whether a party has stated a valid claim for relief under a specific statute, not whether a party has satisfied jurisdictionally-

[6] This should not be confused with what we have referred to in the past as "statutory standing," which, as clarified today, is statutorily-conferred injury for purposes of establishing constitutional standing.

based standing requirements. *See id.* at 131-32; *see also Bank of Am. Corp. v. City of Miami*, -- U.S. --, 137 S. Ct. 1296, 1302 (2017) ("In *Lexmark*, we said that the label 'prudential standing' was misleading, for the requirement at issue is in reality tied to a particular statute. The question is whether the statute grants the plaintiff the cause of action that he asserts." (citation omitted)). Thus, "a direct application of the zone-of-interests test and the proximate-cause requirement supplies the relevant limits on who may sue" under a specific statute. *Lexmark*, 572 U.S. at 134. "Proximate causation is not a requirement of [constitutional] standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct." *Id.* at 134 n.6. Rather, "[l]ike the zone-of-interests test, it is an element of the cause of action under the statute, and so is subject to the rule that 'the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction.'" *Id.* (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)). Accordingly, "[t]o the extent respondents would have us deem petitioners' claims nonjusticiable 'on grounds that are "prudential," rather than constitutional,' '[t]hat request is in some tension with our recent reaffirmation of the principle that "a . . . court's obligation to hear and decide" cases within its jurisdiction "is virtually unflagging."'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (second alteration in original) (quoting *Lexmark*, 572 U.S. at 125-26).

[32] We agree with the United States Supreme Court's approach adopted in *Lexmark*. Before *Lexmark*, there was a circuit split on whether prudential standing is jurisdictional in nature and thus may be waived. *See Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 938-39 (8th Cir. 2013) (noting circuit split). *Compare Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 674 (D.C. Cir. 2013) ("[T]his Circuit treats prudential standing as 'a jurisdictional issue which cannot be waived or conceded.'" (quoting *Animal Legal Def. Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2

(D.C. Cir. 1994))), *with Bd. of Miss. Levee Comm'rs v. U.S. EPA*, 674 F.3d 409, 417 (5th Cir. 2012) ("Unlike constitutional standing, prudential standing arguments may be waived."). In *Lexmark*, however, the Court found that considerations traditionally understood under the rubric of prudential standing are not jurisdictional in nature.

[33] On appeal, GIAA has attempted to reframe certain of its intervention-related arguments as "standing" arguments, which we view as prudential standing arguments under *Lexmark*. Because those arguments asserted by GIAA that are more traditionally understood as prudential standing arguments "do[] not implicate subject-matter jurisdiction," *Lexmark*, 572 U.S. at 128 n.4 (quoting *Verizon Md. Inc.*, 535 U.S. at 642-43), they may be waived like any other non-jurisdictional argument by a party's failure to raise the legal theory in the Superior Court, *see City of Oakland*, 798 F.3d at 1163 n.1; *Dumaliang v. Silan*, 2000 Guam 24 ¶ 12 ("[T]his court will not address arguments raised for the first time on appeal."). GIAA did not frame its arguments regarding the propriety of suit under the OGL as prudential standing arguments in the court below, and to the extent GIAA advances a new theory on appeal, arguments based upon that theory have been waived. *See Pluet v. Fraiser*, 355 F.3d 381, 385 n.2 (5th Cir. 2004) (finding that new legal theory presented on appeal regarding prudential standing under state statute was waived); *accord Huron v. Cobert*, 809 F.3d 1274, 1280 (D.C. Cir. 2016) (finding new theories of standing raised for first time on appeal were waived). Nevertheless, we use our discretion to address this issue and find that the legislature granted the public broad authority to vindicate any violation of the OGL—whether through filing a separate suit or by intervening in a pending suit. *See* 5 GCA § 8115(a) ("The Superior Court shall have jurisdiction to enforce any action brought as a result of a violation of this Chapter. Any person shall have standing to sue for the enforcement of this Chapter."). DFS is seeking to vindicate its own rights granted by the

OGL in seeking to intervene and has been injured within the meaning of the OGL. *Cf. Tumon Partners*, 2008 Guam 15 ¶ 33. Accordingly, the trial court did not err in finding that DFS has a protectable interest it is seeking to vindicate by intervening. *See* CVA17-030, RA, tab 61 at 8 (Dec. & Order).[7]

B. The Open Government Law Does Not Grant the Superior Court Authority to Re-Seal Executive Session Transcripts That Have Become "Public Documents" by Operation of Law

[34] Having determined that DFS's appeal in the Sealing Litigation is properly before us, we now turn to the main question DFS presents: does 7 GCA § 8111(c)(7) grant a trial court the authority to re-seal an executive session transcript once the initial six-month seal has lapsed without a government agency moving to further seal the transcript at issue? We find that the OGL does not grant the Superior Court that authority and reverse the portion of the November 2017 Order that denied DFS's motion to dissolve certain of the court's prior sealing orders.

[35] The OGL guarantees that the public's business is conducted in a forum open to the public. *See Sule v. Guam Bd. of Exam'rs for Dentistry*, 2011 Guam 5 ¶ 14. *See generally* 5 GCA § 8102 (2005). There are, however, important limits on the public's access to government meetings. One situation in which the government's business is restricted from broad public access is when the government, or one of its agencies, must seek legal advice. *Cf. Parkinson v. Gogue*, DCA Civ. No. 85-0068A, 1986 WL 68928, at *1-2 (D. Guam App. Div. July 7, 1986) (finding pre-amendment version of OGL was not meant as a waiver of attorney-client privilege).

[7] To intervene as of right, a party must establish that its motion was timely, that it has a "significantly protectable interest" in the property or transaction subject to dispute, that the litigation has potential to "impair or impede the applicant's ability to protect that interest," and that no existing parties adequately represent its interests. *Limtiaco v. Camacho*, 2009 Guam 7 ¶ 10 (collecting cases); *see also* Guam R. Civ. P. 24(a). GIAA does not separately argue on appeal that DFS failed to satisfy the requirements for intervention under Guam Rule of Civil Procedure 24. Nevertheless, GIAA's arguments could be viewed as a challenge to the trial court's finding that DFS has a protectable interest in the transcripts at issue. To the extent that GIAA has challenged the trial court's decision granting DFS the right to intervene, we find that the court did not err in granting this portion of DFS's motion.

See generally Guam R. Evid. 504(c) (providing that Government of Guam can maintain an attorney-client privilege). Section 8111(c) of the OGL provides that "[u]nder no circumstances shall a public agency hold an executive or closed meeting to discuss legal matters, impending legal matters or legal strategies with an attorney, except as herein provided below." 5 GCA § 8111(c) (2005). For such a closed-door executive session to remain confidential or privileged, and not open to the public, a list of stringent requirements must be complied with. *See id.* Among this list of requirements is that "[a] verbatim transcript by an authorized court reporter must be taken of all meetings which are closed to discuss litigation or possible litigation and such transcript shall promptly be reduced to writing." 5 GCA § 8111(c)(3). This transcript is then automatically sealed for six months, subject to renewal:

> The transcript of such meeting shall be sealed for a period of six (6) months, and shall thereafter be a public document unless there is a court order, further sealing the transcript. Before issuing such an order, the court must read the transcript in camera and determine that the Agency would be unduly prejudiced by the release of the transcript, taking into account the public's right to know. In such event, the court may order the transcript released and made public, or may order the transcript sealed for a period not exceeding six (6) months only if there is ongoing litigation over the matters discussed and release would prejudice the Agency, or if the court finds there is a strong likelihood of litigation concerning the subject matters within six (6) months. Unless the court orders otherwise all transcripts concerning litigation or potential litigation shall become public immediately upon the termination of litigation or the threat of litigation. Under no circumstances may a matter concerning litigation be sealed for more than three (3) months after the conclusion of the litigation. In the case of expected litigation, all such transcripts cannot be sealed for more than one (1) year after the closed hearing if no litigation results.

Id. § 8111(c)(7).

[36] GIAA did not seek to maintain a seal over a number of the executive session transcripts at issue in the Sealing Litigation before the expiration of the six-month automatic sealing period. DFS argues that once fourteen of these executive session transcripts became "public documents"

after the six-month window had lapsed, the trial court lacked authority to re-seal them. *See id.*[8] We agree.

[37] Our interpretation of a statute begins with the statutory text. *See Teleguam Holdings*, 2015 Guam 13 ¶ 18; *Macris v. Swavely*, 2008 Guam 18 ¶ 17. Under the first sentence of section 8111(c)(7), a closed-door executive session transcript becomes a "public document" by operation of law six months after its creation, unless a court order "further seal[s]" the transcript. 5 GCA § 8111(c)(7). The classification of a transcript as a non-sealed, public document under this provision is mandatory. *See* 1 GCA § 715(h)(9) (2005); *see also Enriquez v. Smith*, 2015 Guam 29 ¶ 26. The mandatory nature of this provision "creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *see also Richardson v. Richardson*, 2010 Guam 14 ¶ 48 (noting that "mandatory presumptions" are meant "to curb discretion").

[38] The plain text of the statute strongly favors an interpretation of the OGL that a trial court may not re-seal documents after the initial six-month sealing period has lapsed. Most persuasively, the verb tense and language used in section 8111(c)(7) establishes that the subsequent sealing order contemplated by the legislature must be issued (or at least sought by the appropriate agency[9]) before the lapsing of the initial seal. *See* 5 GCA § 8111(c)(7). Adopting the interpretation that a court can re-seal a transcript once an initial seal has lapsed would effectively replace the phrase "*unless* there is a court order" with the phrase "*until* there is a court

[8] Seven additional transcripts are related to DFS and became "public documents" by operation of 5 GCA § 8111(c)(7), but DFS did not specifically challenge the trial court's decision to re-seal these documents below. In addition, a number of other transcripts that became "public documents" under section 8111(c)(7) are not related to DFS.

[9] We express no opinion on whether an order issued after the initial six-month sealing period has lapsed would be valid where an application to further seal the transcript is filed prior to the expiration of that six-month period.

order" further sealing the transcript. The phrase "unless there is" uses the words "there is" in their present tense. The legislature's "use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992). Use of the term "unless there is an order" is effectively the same as "unless an order has been issued." *See Barrett v. United States*, 423 U.S. 212, 216 (1976); *see also Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1246 (5th Cir. 1983); *Lansing Pavilion, L.L.C. v. Eastwood, L.L.C.*, Docket Nos. 281811, 282332, 283071, 2009 WL 2424677, at *11 (Mich. Ct. App. Aug. 6, 2009) (noting that use of "the present tense, 'there exists'" means "conditions existing . . . as of" a specific date). Likewise, use of the word "thereafter" in the first sentence of subsection (c)(7) implies a forward-looking condition—*i.e.*, if a new sealing petition has not been filed within six months, the document must be considered a public document from that date forward. *See, e.g.*, *Day v. James Marine, Inc.*, 518 F.3d 411, 415 (6th Cir. 2008) ("'Thereafter' normally means 'after that' or 'from then on.'").

[39] In a similar vein, the second and third sentences of section 8111(c)(7) provide that "[b]efore issuing" an order "further sealing" the transcript referenced in the first sentence of the statute, the court must review the transcript and then "may order the transcript released and made public." 5 GCA § 8111(c)(7). The latter phrase would be superfluous if the transcript was already public by operation of the first sentence of this provision. *See Macris v. Richardson*, 2010 Guam 6 ¶ 15 ("A statute should be construed to give effect to all of its provisions so that no part would be superfluous or insignificant."). The plain meaning of the statute therefore provides that the "further sealing" order contemplated by the statute must be issued before the expiration of the initial six-month sealing period.

[40] Section 8111(c)(7) serves as an exception to the generally applicable rule that meetings of government agencies and records arising from such meetings are open to the public, *see* 5 GCA §§ 8103, 8111(c), and therefore we construe this exception narrowly, *accord State ex rel. Dispatch Printing Co. v. City of Columbus*, 734 N.E.2d 797, 799 (Ohio 2000) ("[T]he exceptions to [the open public records law] are limited, and the statute must be liberally construed to provide access unless access is clearly not provided by statute."); *see Carter-Hubbard Publ'g Co. v. WRMC Hosp. Operating Corp.*, 633 S.E.2d 682, 684 (N.C. Ct. App. 2006) (exceptions to public records law "must be construed narrowly"). Our narrow reading of section 8111(c)(7) is in line with the underlying policy of the OGL "that the formation of public policy and decisions is public and shall not be conducted in secret." 5 GCA § 8102. This policy counsels for an interpretation limiting permissible sealing to the greatest extent the language of the statute will allow.

[41] Adopting GIAA's position in the Sealing Litigation would effectively permit a government agency to sit on executive session transcripts and await a citizen's request for access before seeking a sealing order outside the initial six-month window. *See* CVA17-030, Appellant's Br. at 21-22 (Mar. 21, 2018); CVA17-030, Appellant's Reply Br. at 19-20 (June 4, 2018). This would have the practical result of indefinitely sealing a transcript until a court affirmatively rejects a sealing petition. We decline to adopt this interpretation because it reads section 8111(c)(7) in "a textually dubious [manner] that threatens to render the entire provision a nullity." *United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007); *Toves v. Guam Mem'l Hosp. Auth.*, D.C. Civ. No. 86-0060A, 1987 WL 109896, at *2 (D. Guam App. Div. June 22, 1987) ("[I]nterpretations of statutes which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

[42] We hold that the trial court did not have authority under section 8111(c)(7) to make a public document "unpublic," *see* CVA17-030, RA, tab 61 at 10 (Dec. & Order), by putting executive session transcripts under seal once the intial seal lapsed due to GIAA's failure to seek a continued sealing order within six months of the executive session. We therefore reverse that portion of the Superior Court's November 2017 Order in the Sealing Litigation and remand for further proceedings not inconsistent with this Opinion, and with specific instructions to vacate any portion of any sealing order that purported to re-seal the transcripts of the closed-door executive sessions that occurred on the following dates: (1) April 25, 2013; (2) May 30, 2013; (3) June 11, 2013; (4) September 19, 2013; (5) November 27, 2013; (6) December 27, 2013; (7) January 30, 2014; (8) February 27, 2014; (9) April 24, 2014; (10) June 26, 2014; (11) September 26, 2014; (12) December 23, 2014; (13) January 29, 2015; and (14) February 23, 2015.[10]

C. The Sunshine Act Protects Executive Session Transcripts from Disclosure Where One of the Statutory Exemptions of 5 GCA § 10108 Applies

[43] The final question we consider in these consolidated appeals is the extent to which executive session transcripts are protected from disclosure under the Sunshine Act. We hold that executive session transcripts are subject to the Sunshine Act, that the Sunshine Act and the OGL are not in irreconcilable conflict, and that the Sunshine Act therefore permits GIAA to withhold certain executive session transcripts from disclosure until the litigation between GIAA and DFS has concluded.

[10] In its underlying motion filed in the Superior Court, DFS sought to unseal all transcripts of closed-door executive sessions held by the Board of Directors of GIAA "during 2012, 2013 and 2014, and on January 29 and February 23, 2015." CVA17-030, RA, tab 36 at 1 (Mot. Intervene & Unseal Trs.). A number of these transcripts are unrelated to DFS and its procurement challenge. If DFS continues to pursue vacatur of any seal over these documents, the Superior Court should consider in the first instance whether DFS has standing to pursue that relief. *See Town of Chester*, 137 S. Ct. at 1650 ("[A party] must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)) (collecting cases)); *Macris*, 2008 Guam 6 ¶ 34. *See generally supra*, Part IV.A.1.

[44] The Sunshine Act provides that "[e]very person has the right to inspect and take a copy of any public document on Guam, except as otherwise expressly prohibited in law, and except as provided in § 10108 of this Chapter." 5 GCA § 10103(a) (2005). The term "public record," as used in the Sunshine Act, "includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency in any format, including electronic format; and any out-of-court settlement records." 5 GCA § 10102(d) (2005). Although the Sunshine Act does not separately define the term "public document" (the term used in section 8111(c)(7) of the OGL), both "public document" and "public record" are used interchangeably throughout the Sunshine Act. *See, e.g.*, 5 GCA § 10103 (entitled "Right of Inspection of Public Documents" and referring to both "public documents" and "public records"); 5 GCA § 10103(a). Documents that fall under the purview of the Sunshine Act are exempt from disclosure in a number of instances, including where "[r]ecords pertain[] to pending litigation to which the agency is a party, until the pending litigation has been finally adjudicated or otherwise settled." 5 GCA § 10108(a) (2005). Moreover, the Sunshine Act provides that "[a]ll existing privileges or confidential records or other information expressly protected under the law shall not be abrogated by this Act." *Id.* § 10108(i).

[45] Executive session transcripts undoubtedly meet the definition of "public records" under 5 GCA § 10102(d), and therefore these documents are subject to the Sunshine Act's disclosure obligations and protections. *Cf. Macris*, 2008 Guam 6 ¶ 20 n.2 ("The plain meaning rule for statutory interpretation provides that 'if the language of a statute is clear and there is no ambiguity, then there is no need to "interpret" the language by resorting to the legislative history or other extrinsic aids.'" (quoting *People v. Angoco*, 1998 Guam 10 ¶ 5)). Were the Sunshine

Act to stand alone, this would be the end of our analysis. Here, however, both judges below interpreted the provision of the OGL that provides for sealing of executive session transcripts, 5 GCA § 8111(c), to be in irreconcilable conflict with the portion of the Sunshine Act exempting certain documents from disclosure, 5 GCA § 10108. *See* CVA18-001, RA, tab 85 at 11-12 (Dec. & Order); CVA17-030, RA, tab 61 at 9 (Dec. & Order). On this basis, the trial court in the Sunshine Act Litigation determined that disclosure of executive session transcripts is exclusively governed by the OGL and such transcripts do not fall under any of the section 10108 exemptions from disclosure under the Sunshine Act, regardless of whether they relate to pending litigation or are otherwise privileged. *See* CVA18-001, RA, tab 85 at 11-12 (Dec. & Order). We find this to be in error.

[46] The OGL guarantees that the public's business is conducted in a forum open and accessible to the public. *See generally* 5 GCA § 8102. Beyond section 8111(c)(7), the OGL does not deal with public records or "public documents"; those words are not mentioned in any other provision of the OGL. *See* 5 GCA §§ 8101-8116. While the OGL is broadly focused on the accessibility of public meetings, it is the Sunshine Act that controls access to public documents. Both the Sunshine Act and the OGL can be read in harmony with one another as they apply to executive session transcripts. *See Pac. Rock Corp. v. Dep't of Educ.*, 2000 Guam 19 ¶ 25 ("[S]tatutes must be read together and harmonized, if possible . . . ."); *cf. Sumitomo Constr., Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 16 (stating that court must attempt to reconcile two statutes before finding one impliedly repeals the other).

[47] We find that executive session transcripts are subject to shifting protections under the applicable statutory regimes. Initially, executive session transcripts covered by section 8111(c)(7) are exempt from public disclosure under both the OGL and the Sunshine Act. A

government agency can initially avoid having to produce these transcripts under the Sunshine Act for any reason, regardless of whether litigation is pending, as they are expressly sealed from the public under the OGL. *See* 5 GCA § 8111(c)(7). These transcripts thus constitute or contain "other information expressly protected under the law" and are exempt from disclosure under 5 GCA § 10108(i). 5 GCA § 10108(i).

[48] This initial protection makes sense because privileges, such as the attorney-client privilege, are generally viewed as rules of evidence that must be asserted within the confines of a court proceeding. *See Privilege*, *Black's Law Dictionary* (10th ed. 2014) (providing one of the definitions of "privilege" as "*[a]n evidentiary rule* that gives a witness the option to not disclose the fact asked for, even though it might be relevant" (emphasis added)); *see also* Guam R. Evid. 503. Likewise, section 10108(a) of the Sunshine Act protects documents from disclosure where there is "pending litigation." 5 GCA § 10108(a). Section 8111(c) of the OGL thus acts to plug this potential gap in the law that might otherwise permit the disclosure of privileged executive session transcripts in the time before a lawsuit is filed and the protection of section 10108(a) can be properly asserted. *See Parkinson*, 1986 WL 68928, at *2; *Poway Unified Sch. Dist. v. Superior Court (Copley Press)*, 73 Cal. Rptr. 2d 777, 782 (Ct. App. 1998). The OGL is a first-line protection from the disclosure of privileged communications between government agencies and their counsel (as memorialized in a written transcript). Section 8111(c)(7) acts as an absolute protection from disclosure for a period of six months, with the opportunity to renew this protection if litigation is threatened but not yet commenced. *See* 5 GCA § 8111(c)(7); *accord Parkinson*, 1986 WL 68928, at *2 (finding that "[t]he privilege would be hollow indeed if government agencies were required to disclose outside the courtroom what they were privileged to withhold inside").

[49] Once a transcript has become an unsealed "public document" under section 8111(c)(7), the transcript may nevertheless be exempt from disclosure if it "pertain[s] to pending litigation to which the agency is a party." 5 GCA § 10108(a). Nothing in the text of the Sunshine Act or the OGL suggests otherwise.

[50] DFS argues that the OGL should act as an exception to the entire Sunshine Act regarding executive session transcripts or the exemption provisions of section 10108. This argument, however, cannot withstand scrutiny. First, and most fatally, this argument ignores that the current version of the Sunshine Act was passed in 1999—more than a decade after section 8111(c)(7) of the OGL was passed in its current iteration. *Compare* Guam Pub. L. 25-06 (May 12, 1999), *with* Guam Pub. L. 19-5:138 (Aug. 21, 1987). We find it dubious that the legislature would intend one statute to serve as an explicit exception to another statute that was not even in existence at the time of its passage. This is especially true here, where the documents at issue fall squarely within the definition of "public records" in the Sunshine Act with no hint in that definition that an entire category of documents is excluded from its reach. *See* 5 GCA § 10102(d).

[51] Second, the Sunshine Act provides an express remedial scheme that sets forth when and how a public document or record must be disclosed. *See generally* 5 GCA §§ 10103(b)-(e), 10111 (2005). The OGL does not. The OGL states that documents may be "made public." 5 GCA § 8111(c)(7). But even if we viewed this reference to the word "public" to mean "exposed to general view" rather than "of or relating to a government," *Public*, Merriam–Webster, http://www.merriam-webster.com/dictionary/public (last visited June 5, 2019), the OGL does not provide how a transcript should be exposed to general view. The OGL also states that upon a request for further sealing, the court may "release" the document. 5 GCA § 8111(c)(7). But use

of this word is ambiguous. Under its plain meaning, this word implies "to set free from restraint," or as applied to section 8111(c)(7), to be set free from a sealing order. *Release*, Merriam–Webster, http://www.merriam-webster.com/dictionary/release (last visited June 5, 2019). The word "release" is not the same as "disclose"—the word used throughout the Sunshine Act to signal that the government agency must provide a copy of the document to the requesting party. *See, e.g.*, 5 GCA § 10108. We find it doubtful that the legislature would use two different words in such closely-related statutes to mean the same thing. *Cf. People v. Cepeda*, DCA Crim. No. 86-00014A, 1986 WL 68898, at *3 (D. Guam App. Div. Nov. 19, 1986) (finding that "all statutes using the same words or phrases must be harmonized, both internally and within each other").

[52] Interpreting the terms "made public" and "release" as used in the OGL in the manner suggested by DFS would place an affirmative disclosure obligation on government agencies to make documents openly viewable to all but without directions on how to satisfy this obligation. In other words, a government agency could not simply hold copies of the transcripts and provide them on request, as they can with nearly all other public documents under the Sunshine Act. Rather, government agencies would have to determine how to satisfy this obligation to make documents openly viewable to all. But how would government agencies actually satisfy this obligation? Would a weekly public reading suffice? What about posting copies of the transcript on an obscure website? The OGL does not say. Without clear guidelines, were we to adopt the interpretation offered by DFS, the OGL could be used in a way to *limit* public disclosure and hide government malfeasance—two results contrary to the stated goals of the statute. *See* 5 GCA § 8102 ("The Legislature declares it is the policy of this Territory that the formation of public policy and decisions is public and shall not be conducted in secret. . . . The people, in delegating

authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know."). Without clear standards in place, it would be impossible for any gatekeeper, such as the courts, to adequately enforce compliance. We do not believe the legislature intended such a result and decline to adopt an interpretation we believe would be unworkable in practice, especially where a fair and reasonable alternative construction is otherwise possible. *Guam Resorts, Inc. v. G.C. Corp.*, 2012 Guam 13 ¶ 7.

[53] There is nothing inherently inconsistent with the provisions of 5 GCA § 8111(c)(7) and 5 GCA § 10108; each works harmoniously with the other to protect privileged communications of government agencies, while attempting to balance properly these protections with the public's right to know. *Accord United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801 (1984) ("[R]espondents' contention that they can obtain through the [Freedom of Information Act] material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. We have consistently rejected such a construction of the FOIA." (collecting cases)). This allows for the protection and disclosure of executive session transcripts to proceed at its own pace, tailored to the unique circumstances surrounding government-involved litigation, while preventing the OGL and the Sunshine Act from being used to shield government misconduct. The OGL and the Sunshine Act work hand-in-hand to permit the temporary withholding of attorney-client communications between a government agency and its counsel. We find that the trial court erred; the Sunshine Act permits GIAA to temporarily withhold executive session transcripts if they "pertain[] to pending litigation" and until such time as that litigation concludes. *See* 5 GCA § 10108(a).

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V. CONCLUSION

[54] For the reasons discussed above, we **REVERSE** that portion of the Superior Court's November 2017 Order in Superior Court Case No. SP0102-15 that denied DFS's motion to vacate prior sealing orders, with the specific instructions as set forth above. We also **VACATE** the judgment and **REVERSE** the Decision and Order, dated June 26, 2017, in Superior Court Case No. CV0307-16. We **REMAND** both cases for further proceedings not inconsistent with this Opinion. Because of our disposition on the issues addressed above, we need not address the other non-dispositive arguments raised by the parties.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
JOSEPH N. CAMACHO
Justice *Pro Tempore*

/s/
KATHERINE A. MARAMAN
Chief Justice