

1 FOR PUBLICATION

CLERK OF COURT
SUPERIOR COURT
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DEPUTY CLERK OF COURT

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

7 COMMONWEALTH OF THE)
8 NORTHERN MARIANA ISLANDS,)

CRIMINAL CASE NO. 15-0055
DPS CASE NO. 13-003795/1796

9 Plaintiff,)

ORDER DENYING DEFENDANT
OGUMORO'S MOTION TO COMPEL IN
PART; GRANTING IN PART

10 v.)

11 AMBROSIO TAGABUEL OGUMORO,)
12 D.O.B. 05/21/1958)

13 KATHERINE M. MANGLONA,)
14 D.O.B. 02/18/1972)

15 HERMAN M. MANGLONA, and)
16 D.O.B. 10/06/1970)

17 Defendants.)

18 I. INTRODUCTION

19 THIS MATTER came before the Court on November 5, 2015, at 1:30 p.m. in Courtroom 223A.
20 Plaintiff, the Commonwealth, was represented by Assistant Attorney General Matthew C. Baisley.
21 Defendant, Ambrosio T. Ogumoro, was represented by Attorney Mark B. Hanson. Defendant, Katherine M.
22 Manglona, was represented by Attorney Colin M. Thompson.

23 This Order concerns Ogumoro's Motion to Compel Production of Discovery Materials.

24 Based upon the written briefs, oral arguments, and applicable law, the Court hereby **DENIES**
25 Ogumoro's motion in part and **GRANTS** in part.

AGD
PDD
M. Hanson
C. Thompson

1 **II. BACKGROUND**

2 Ogunoro is charged with ten counts: one count of Theft by Deception, pursuant to 6 CMC § 1603
3 (Count I); one count of Conspiracy to Commit Theft by Deception (Count III), as defined in 6 CMC § 1603
4 and pursuant to 6 CMC § 303(a); two counts of Removal of Government Property, pursuant to 6 CMC §
5 3401 (Counts VI and XI); one count of Theft by Unlawful Taking or Disposition, pursuant to 6 CMC §
6 1602(a) (Count VII); four counts of Misconduct in Public Office, pursuant to 6 CMC § 3202 (Counts II, IV,
7 VIII, and X); and one count of Removal of Government Property, pursuant to 6 CMC § 3401 (Count IX).

8 In this matter, Ogunoro filed a motion to compel discovery under Rule 16 of the Commonwealth
9 Rules of Criminal Procedure, *Brady*,¹ *Giglio*,² *Henthorn*,³ the Fifth, Sixth, and Fourteenth Amendments of
10 the U.S. Constitution, and Article I, §§ 4, 5, 6 of the Commonwealth Constitution. Ogunoro seeks an order
11 requiring the Commonwealth to provide him the following items: (1) statements of witnesses pursuant to
12 Rule 26.2; (2) *Henthorn* material as to thirteen of the Commonwealth's potential witnesses; (3) documents
13 and tangible objects pursuant to Rule 16(a)(1)(C); and (4) Defendant's statements pursuant to Rule
14 16(a)(1)(A). The Commonwealth opposes Ogunoro's motion in its entirety.

15 After the hearing, on November 10, 2015, the Court issued an interim order. The Court ordered
16 Procurement & Supply and the Bureau of Motor Vehicles to comply with two of Ogunoro's subpoenas
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19 ¹ *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (requiring prosecutors to disclose materially exculpatory evidence in the
20 government's possession to the defense); *Commonwealth v. Campbell*, 4 NMI 11, 15 (1993) (explaining that *Brady* material
21 includes evidence that bears on the credibility of a significant witness in the case); *contra Commonwealth v. Guerrero*, 2014 MP
22 2 ¶ 7 (holding that NMI R. Crim. P. 16(a)(2) exempts the prosecution from disclosing internal governments that were authored
23 by a government attorney prepared in connection with the investigation or prosecution of a case).

22 ² *Giglio v. United States*, 405 U.S. 150, 154 (1972) (explaining that when the reliability of a witness is determinative
23 of a defendant's guilt or innocence, non-disclosure of impeachment evidence violates *Brady* and *Napue v. Illinois*, 360 U.S. 264
(1959)); *Commonwealth v. Guerrero*, Crim. No. 12-0111D (NMI Super. Ct. Feb. 24, 2014) (Order on Remand from Supreme
24 Court at 3) (applying *Giglio*).

24 ³ *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991); *contra Commonwealth v. Inabangan*, Crim. No. 98-0248 (NMI
25 Super. Ct. Dec. 2, 1999) (Order Denying Mot. to Suppress and Denying Mot. for Discovery at 5) (denying defendant's request
for review of law enforcement personnel files).

1 duces tucem included as part of the requested relief in this instant motion.⁴

2 III. DISCUSSION

3 As a preliminary matter, the Court notes that Ogumoro purports that the Commonwealth provided
4 107 pages of discovery prior to the filing of his motion. In its brief, the Commonwealth explained that it
5 since supplied Ogumoro with 158 pages of additional discovery. Ogumoro acknowledged receipt of such
6 material. Additional discovery appears to be on-going.⁵ Accordingly, the Court is aware of only four issues
7 that require further resolution: (1) Ogumoro's request for witness statements under Rule 26.2; (2) whether
8 the Commonwealth should provide a list of cell phone numbers listed and paid under the Department of
9 Public Safety; (3) whether the Commonwealth should conduct a *Henthorn* review of George Sablan Jr.'s
10 personnel file; and (4) whether the Commonwealth should provide to Ogumoro Detective Melissa
11 Bauleong's *Henthorn* material.

12 Here, the Court finds that Ogumoro's request for witness statements pursuant to Rule 26.2 is
13 premature. The Court also finds that the Commonwealth is not required to provide to Ogumoro DPS's list
14 of relevant cell phone numbers. In addition, the Court finds that the Commonwealth shall conduct a
15 *Henthorn* review of Mr. Sablan's personnel file. The Court also finds that the Commonwealth shall provide
16 Detective Bauleong's *Henthorn* material to Ogumoro.

17 **A. Ogumoro's Request for Rule 26.2 Statements is Premature.**

18 The Commonwealth complains that Ogumoro's motion is vague, pointing to language such as
19 Ogumoro's request for "previous professional or personal experiences by OPA, OAG or Department of
20 Safety (DPS) personnel with Mr. Ogumoro which may give rise to a bias" Ogumoro's Mot. at 3. The

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22 ⁴ *Commonwealth v. Ogumoro*, Crim. No. 15-0055 (NMI Super. Ct. Nov. 6, 2015) (Interim Order on Discovery Motions)
23 ("Based upon oral arguments heard at the hearing, the Court hereby **ORDERS** the subpoenaed parties to comply with Ogumoro's
24 subpoenas duces tucem on or before November 18, 2015. The subpoenaed parties may file written objections on or before
25 November 16, 2015.)

⁵ The Commonwealth explained that, in response to Ogumoro's request for discovery material related to search warrants
issued against IT&E, it issued its own subpoena against IT&E for the same documents. The Commonwealth also explained that
it will produce the results once IT&E complies with the Commonwealth's subpoena.

1 Court shares the Commonwealth's concern. It appears that Ogumoro's motion contains some boiler plate
2 assertions of criminal discovery jurisprudence.

3 The Commonwealth Supreme Court's preferred practice of motions to compel discovery may be
4 found under *Campbell*, which explains that *Brady* disputes should be submitted by an accompanying
5 affidavit "to the extent known, the substance, nature and materiality of the disputed evidence. Also, the
6 parties should submit declarations establishing their good faith attempt to resolve the matter amongst
7 themselves before judicial intervention." 4 NMI at 17–18. Ogumoro's motion does not follow the procedure
8 as described in *Campbell*. Neither party filed a declaration showing a good faith attempt to resolve the matter
9 amongst themselves.

10 Nonetheless, the Court addresses Ogumoro's request for statements under Rule 26.2. This rule allows
11 a party who did not call a witness to move for disclosure of the witness's statements in the possession of the
12 party who called the witness to the stand, provided that the statements relate to the subject matter of the
13 testimony. NMI R. Crim. P. 26.2(a). This rule "inherently restricts the timing of such discovery to after the
14 witness has testified on direct examination." *Commonwealth v. Kaipat*, Crim. No. 05-0268 (NMI Super. Ct.
15 Dec. 21, 2005) (Order Denying Defendant's Mot. to Compel Advance Production of Witness Statements
16 Pursuant to Rules 12(i) and 26.2 at 2–3). In *Kaipat*, this Court held that a request for pre-testimony discovery
17 of witness statements under Rule 26.2 was "premature and overly burdensome" when "based wholly on
18 Defendant's anticipation or hunches as to who may testify for the Commonwealth." *Id.*; *cf. United States v.*
19 *Blais*, 98 F.3d 647, 651 (1st Cir. 1996) (holding that the Jencks Act and Rule 26.2 of the Federal Rules of
20 Criminal Procedure is not applicable where the declarant was never called a witness). Ogumoro has not
21 identified or specified a witness who has given direct testimony in this matter. Therefore, Ogumoro's request
22 to compel witness statements under Rule 26.2 is denied.

23 **B. 17-Years of DPS's Record of Cell Phone Numbers is excessive and likely to contain sensitive**
24 **information.**

25 Ogumoro requests that the Court order the Commonwealth to provide DPS's list of cell phone

1 numbers spanning for the relevant time period of 17-years.⁶ Here, the Court is persuaded that such a list
2 would likely reveal sensitive government information. In addition, in the Court's view, a request for 17-years
3 worth of records from any agency in any form is extremely excessive. Accordingly, the Court enters a
4 protective order for the requested record of cell phone numbers under Rule 16(d)(1). NMI R. Crim. P.
5 16(d)(1) ("Upon a sufficient showing the court may at any time order that the discovery or inspection be
6 denied, restricted or deferred, or make such other order as appropriate."); cf. *United States v. Fort*, 478 F.3d
7 1099, 1101 (9th Cir. 2007) (Wardlaw, K. dissenting) (explaining that the trial court entered a protective
8 order under Rule 16(d) of the Federal Rules of Criminal Procedure to ensure witness safety).

9 The Court notes with caution that it does not suggest an ironclad rule when it comes to extensive
10 discovery of government records. If, for example, the party requesting discovery shows with sufficient
11 specificity that the probative value of the requested evidence outweighs the logistical, security, or practical
12 concerns in connection with evaluating 17-years worth of government records, the Court may grant a
13 defendant's motion to compel. Here, Ogumoro did not so. Therefore, the Commonwealth need not produce
14 DPS's record of cell phone numbers. Ogumoro's motion to compel discovery on this issue is denied.

15 **C. The Commonwealth should conduct a *Henthorn* review of George Sablan Jr.**

16 The Commonwealth states that a *Henthorn* review had been conducted on all the identified
17 witnesses—except for that of Mr. Sablan, an employee of the Department of Corrections. Thus, the Court
18 construes Ogumoro's request as one that seeks *Henthorn* review of Mr. Sablan's personnel file. *Henthorn*
19 provides the procedure that the prosecution must follow when confronted with a request by a defendant for
20 a *Brady* material review of personnel files as to testifying officers. *Henthorn*, 931 F.2d at 30. As to the
21 timing, *Henthorn* review obligations trigger when a defendant requests for such a review. *See id.*

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23 ⁶ Ogumoro's Ex. B at 1 ("• A list of cell phone numbers listed and paid under Department of Public Safety ("DPS") (See
24 Bates 026);"). Bates 026 was not included in Ogumoro's filings. The Court notes that Ogumoro did not object to the
25 Commonwealth's characterization of his request at oral arguments. While the Commonwealth explains that Ogumoro specifically
requested a time span of 13-years (17-years being for Katherine M. Manglona), the Court finds no substantial or material
distinction between the two spans of time.

1 **1. Applicability of *Henthorn* to discovery disputes before this Court.**

2 The Court first addresses the applicability of *Henthorn* to this matter. The Commonwealth objects
3 to the application of *Henthorn* to this case, arguing that its holding has not been explicitly adopted by the
4 Commonwealth Supreme Court. The Commonwealth also points out that federal appellate courts other than
5 the Ninth Circuit have rejected the *Henthorn* review doctrine. *E.g.*, *United States v. Driscoll*, 970 F.2d 1472,
6 1482 (6th Cir. 1992) (declining to find that the prosecution had an obligation under *Brady* to give defendant
7 access to a testifying officer's personnel files); *e.g.*, *United States v. Andrus*, 775 F.2d 825, 843 (7th Cir.
8 1985) (holding that the defendant "was not entitled to the personnel files of the law enforcement witnesses
9 without even a hint that impeaching material was contained therein.").

10 In the Commonwealth, our Supreme Court explained in *Campbell* that, "While there is no duty to
11 provide the defense unlimited discovery, if a general request is material or if a substantial basis for claiming
12 materiality exists, then the prosecutor should provide the information or submit the issue to the trial judge
13 for in camera determination." 4 NMI at 17. So long as the government intends to call forth government
14 witnesses to aid in its case-in-chief, the Court finds that a request for a review of personnel files for
15 *Brady* material is proper under *Campbell*. *See also* NMI R. Crim. P. 16(c) ("Upon request of the defendant
16 the government shall permit the defendant to inspect and copy or photograph . . . which are within the
17 possession, custody, or control of the government and which are material to the preparation of his/her
18 defense, or are intended for use by the government as evidence in chief at the trial . . ."). Accordingly, the
19 Court assumes that a prosecutor will comply with *Henthorn* review requests—but is only inclined to
20 judicially intervene in *Henthorn*-related discovery disputes on a case-by-case basis. Here, the Court does so
21 for the following reasons.

22 **2. Applicability of *Henthorn* to George Sablan, Jr.'s Personnel File**

23 The Commonwealth argues that where *Henthorn* applies, its application should be limited to
24 testifying law enforcement officers—and that Mr. Sablan, an employee of DOC, is not. However, because
25

1 the rationale for *Henthorn* review is rooted in the government's constitutional duty under *Brady*,⁷ the Court
2 finds that *Henthorn* reviews should generally be conducted where the defendant seeks discovery of any
3 personnel file within the possession, custody, or control of the government. *Cf. United States v. Deutsch*,
4 475 F.2d 55, 57 (5th Cir. 1973) ("We find no reference in *Brady* to an arm of the prosecution. It was a Post
5 Office employee who had been sought to be bribed. The government cannot compartmentalize the
6 Department of Justice and permit it to bring a charge affecting a government employee in the Post Office
7 and use him as its principal witness, but deny having access to the Post Office files.") *overruled on other*
8 *grounds by United States v. Henry*, 749 F.2d 203, 206 n.2 (5th Cir. 1984); *c.f. Carriger v. Stewart*, 132 F.3d
9 463, 479–82 (9th Cir. 1997) (explaining that the prosecution has a duty to learn of any exculpatory evidence
10 known to others acting on the government's behalf). Here, the Commonwealth's objection to reviewing Mr.
11 Sablan's personnel file appears to stem from its legal argument that *Henthorn* is limited to testifying
12 officers—not as to issues of materiality. Accordingly, the Court orders the Commonwealth to conduct a
13 *Henthorn* review of Mr. Sablan's personnel file.

14 **3. Detective Bauleong's *Henthorn* documents.**

15 After discussions heard at oral arguments, the Court issued an order for the Commonwealth to
16 produce *Henthorn* documents related to Detective Bauleong to Katherine M. Manglona.⁸ Ogunoro also
17 seeks access to this evidence. The Court noted, and the Commonwealth's counsel acknowledged, that the
18 existence and content of *Henthorn* documents previously-reviewed in camera⁹ was now part of the public
19 record. Therefore, the Commonwealth is also ordered to produce such documents to Ogunoro. On this issue,
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21 ⁷ *Brady*, 373 U.S. at 87 ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon
22 request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad
faith of the prosecution.").

23 ⁸ *Ogunoro*, Crim. No. 15-0055 (Nov. 6, 2015) (Order Granting in Part Defendant Katherine M. Manglona's Motion to
24 Compel).

25 ⁹ *Ogunoro*, Crim. No. 15-0055 (Oct. 29, 2015) (Order on Ex Parte Motion for In Camera Inspection of Potential
Henthorn Material).

1 Ogumoro's motion to compel discovery is granted.

2 The Court briefly addresses Ogumoro's request at oral arguments that it be provided Detective
3 Bauleong's entire personnel file. Because there are privacy interests at stake, only evidence material to the
4 preparation of the defendant's defense may be provided. *Cadet*, 727 F.2d at 1467. Therefore, Ogumoro's
5 request to be provided the entire personnel file is denied.

6 **CONCLUSION**

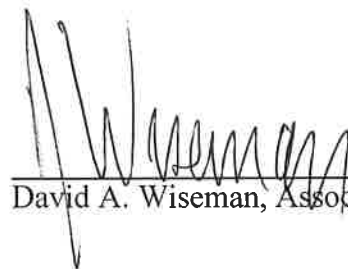
7 For the foregoing reasons, Ogumoro's motion to compel as to witness statements under Rule 26.2
8 is **DENIED**.

9 Ogumoro's motion to compel as to DPS's record of phone numbers for the span of 17-years is also
10 **DENIED**. In addition, the Court hereby **ENTERS** a protective order as to such evidence.

11 In addition, Ogumoro's motion to compel discovery as to *Henthorn* review of Mr. Sablan's personnel
12 files is **GRANTED**. The Commonwealth is hereby **ORDERED** to review Mr. Sablan's personnel file for
13 any appropriate *Brady* material.

14 Finally, Ogumoro's motion to compel discovery as to Detective Bauleong's *Henthorn* material is also
15 **GRANTED**. The Commonwealth is also hereby **ORDERED** to provide Ogumoro with *Henthorn* material
16 in connection with Detective Bauleong. Ogumoro's request to be provided Detective Bauleong's entire
17 personnel file is **DENIED**.

18
19 **SO ORDERED** this 16th day of November, 2015.

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22 _____
23 David A. Wiseman, Associate Judge
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25