

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS)	Criminal Case No. 99-072
)	DPS Case No. 98-13441
)	
Plaintiff,)	
)	
v.)	DECISION AND ORDER
)	GRANTING MOTION
PATRICK DOWAI and LINDA INGERKELI,)	TO QUASH
)	
Defendant.)	
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I. INTRODUCTION

The Commonwealth brings this motion to quash a subpoena duces tecum served on Vincent Attao (“Attao”) as Acting Director of the Board of Parole on April 15, 1999. Defendant Patrick Dowai (“Dowai”) argues that the materials he is entitled to obtain are: a document hand written by co-defendant Linda Ingerkeli (“Ingerkeli”) and a tape of a parole hearing at which witnesses testified on the same issues that are the subject of the criminal charges in this case. The court, having reviewed all briefs, declarations, exhibits, and having heard and considered the arguments of counsel, now renders its written decision.

II. FACTS

On April 15, 1999, Dowai issued and sent a subpoena duces tecum (“Subpoena”) to Attao as “Acting Director, Board of Parole.” The Subpoena requested “all reports, records, tapes, memoranda or documents in the possession of the Department of Parole regarding parolee Patrick Dowai from December 1, 1998 to present.” Attao is actually the Acting Chief Parole Officer.

[p. 2] The Commonwealth moved to quash the Subpoena pursuant to Rule 17(c) of the Commonwealth Rules of Civil Procedure. In his response, Dowai limited his request to the document written by Ingerkeli and the tapes of the parole hearing.

FOR PUBLICATION

III. ISSUE

Whether Dowai's subpoena duces tecum shall be quashed.

IV. ANALYSIS

A subpoena duces tecum is not for use as an additional means of discovery. Instead, its purpose is to expedite trials by allowing the parties to obtain and evaluate certain documentary evidence before trial. Charles E. Torcia, 2 Wharton's Criminal Procedure §335 (13th Ed. 1990).

If a defendant can show

(1) That the documents are evidentiary and relevant; (2) that they are not otherwise procurable by the defendant reasonably in advance of trial by exercise of due diligence; (3) that the defendant cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial; (4) that the application is made in good faith and is not intended as a general fishing expedition. U.S. v. Iozia, 13 F.R.D. 335, 338 (D.C.N.Y. 1952),

then advance production will be granted.

However, under Rule 17(h), "[s]tatements made by witnesses or prospective witnesses may not be subpoenaed for the government or the defendant under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2." If Dowai wants to obtain such statements from the Commonwealth, he must move under Rule 26.2. If there are any statements that Dowai is entitled to, then at the appropriate time, he may request relief.

The Commonwealth argues that the Open Government Act prevents Dowai from obtaining Board of Parole hearing tapes and Ingerkeli's statement. The only provisions that could possibly apply are as follows¹:

(4) Specific intelligence information and specific investigative records compiled by investigative law enforcement, the Attorney General's Office, penology agencies....

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(5) Information revealing the identity of persons who file complaints with or volunteer information to investigative agencies, law enforcement agencies, the Attorney General's Office, penology agencies, if disclosure would endanger the person's life, physical safety, or property, provided that if at the time the complaint is filed the complainant indicates a desire for disclosure or nondisclosure, such desire shall govern. 1 CMC §9918 (a)

¹ Section 8 does not apply because the Board of Parole is not a party and section 7 does not apply because Dowai does not request intra-agency memoranda or legal work product.

However, under 1 CMC §9918(c), the Superior Court may override these provisions if it finds that the exemption of such records is not necessary to protect “any individual’s right of privacy or any vital governmental function.” “Right of privacy” is defined as being violated when an intrusion is “beyond what is necessary to accomplish a compelling governmental interest in protecting the health, safety or welfare of the community....” 1 CMC §9903.

Nevertheless, none of these provisions prevents Dowai from moving the court under Rule 26.2 after a witness has testified. The Commonwealth has an ongoing obligation to provide Dowai with exculpatory evidence, if it exists, as well as information that could be used to impeach a government witness. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963); 85 Geo.L.J. Crim.Pro.Proj. 1089. Board of Parole information is considered to be within the possession of the Attorney General only insofar as the Attorney General has “knowledge of and access to” that information. U. S. v. Santiago, 46 F.3d 885, 894 (9th Cir. 1995) [quoting U.S. v. Bryan, 868 F.2d 1032, 1036 (9th Cir.), *cert denied*, 110 S.Ct. 167 (1989)].

Dowai has not made any arguments under the Iozia test that he is entitled to the document written by Ingerkeli. Instead, he asks for an in camera inspection of the document. If, after briefly viewing the document, Dowai was unable to formulate any argument for why the document is necessary to his case, then he cannot expect the court to formulate one for him. Without good reason, the court will not inspect Ingerkeli’s statement to make a determination whether or not it is the appropriate target of a subpoena deuces tecum.

All other arguments are not applicable or without merit.

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V. CONCLUSION

The Commonwealth’s motion to quash Dowai’s subpoena is granted.

So ordered this 6 day of May, 1999.

/s/ Edward Manibusan
EDWARD MANIBUSAN, Presiding Judge