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6 Attorney for the Judiciary of the Northern Mariana Islands

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8 **IN THE SUPERIOR COURT**  
9 **FOR THE**  
10 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

10 COMMONWEALTH OF THE NORTHERN  
11 MARIANA ISLANDS,

12 Plaintiff,

13 v.

14 WILLIAM ABRACZINSKAS,

15 Defendant.

CRIM. CASE NO. 23-0082

**MOTION TO QUASH SUBPOENA AND  
FOR A PROTECTIVE ORDER; OR IN  
THE ALTERNATIVE, MODIFY  
SUBPOENA AND MEMORANDUM IN  
SUPPORT THEREOF**

17 Comes now, Nonparty, the Judiciary of the Northern Mariana Islands (“Judiciary”), by  
18 and through their attorney, General Counsel Hyun Jae Lee, and hereby moves (a) to quash the  
19 Subpoena Ad Testificandum and Subpoena Duces Tecum issued by the Court on August 2, 2023  
20 (“Subpoena”); and (b) for a protective order; or (c) in the alternative, to modify the Subpoena.  
21 The Subpoena must be quashed because it is procedurally defective; does not provide reasonable  
22 time to comply; fails to satisfy the test set forth in *United States v. Nixon*, 418 U.S. 683 (1974);  
23 and seeks privileged materials.

24 **I. INTRODUCTION**

25  
26 On August 2, 2023, the Public Defender’s Office filed a Subpoena Ad Testificandum and  
27 Subpoena Duces Tecum with the Superior Court. In the Subpoena, the Defendant (“Moving  
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1 Party”) in this matter seeks the following documents and objects from the Judiciary Human  
2 Resources Officer Michelle V. Guerrero (“HR Officer”):

- 3
- 4 1. All records related to defendants (sic) employment at the  
5 superior court of the commonwealth of the Northern Mariana  
6 Islands;
- 7 2. All records, written reports, statements, oral recordings or  
8 other memorandum regarding a human resources/ EOC (sic)  
9 complaint defendant made at the Superior Court of the Northern  
10 Mariana Islands; any and all investigation reports made pursuant  
11 to the above-mentioned complaint including but not limited to:
- 12 3. Draft email on computer draft folder pertaining to the  
13 complaint filed by defendant and on the hard drive of the computer  
14 defendant used at the Commonwealth Court;
- 15 4. Interview of defendant by Jason Tarkong;
- 16 5. Interview of Daisy Mendiola;
- 17 6. Interviews of Pearlyn Blas;
- 18 7. Interviews of Rose Camacho;
- 19 8. Any and all other interviews.

20 *Amended Subpoena Ad Testificandum and Subpoena Duces Tecum* at 1–2. *See Exhibit A.*

21 The Subpoena further states to “bring the following items that are in your possession,  
22 custody or control, to the Public Defender’s Office, P. O. Box 10007, Saipan MP 96950, currently  
23 located at Located in Susupe, Civic Center Complex on Friday, August 4th 2023 at 1:00 pm.” *Id.*  
24 at 1. The HR Officer was served with the Subpoena on August 3, 2023. *Affidavit of HR Officer*  
25 *Michelle V. Guerrero.*<sup>1</sup>

## 26 **II. LEGAL STANDARD**

### 27 **A. Motion to Quash Subpoena.**

28 Rule 17(c) of the NMI Rules of Criminal Procedure provides a mechanism to quash or  
modify a subpoena. It states, in pertinent part, “[t]he court on motion made promptly may quash  
or modify the subpoena if compliance would be unreasonable or oppressive.” NMI R. Crim. P.

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<sup>1</sup> HR Officer was served with a subpoena on August 2, 2023, and with an amended subpoena on August 3, 2023. *See Affidavit of HR Officer Michelle V. Guerrero.* The Subpoena referenced and analyzed in this Motion is in regards to the amended subpoena.

1 17(c). The landmark United States Supreme Court case *United States v. Nixon* set forth a four-  
2 part test (“*Nixon* test”) to determine the validity of a subpoena under Rule 17(c):<sup>2</sup>

3  
4 (1) the documents are evidentiary and relevant, (2) they are not  
5 otherwise procurable reasonably in advance of trial by exercise of  
6 due diligence, (3) the party cannot properly prepare for trial without  
7 such production and inspection in advance of trial and that the  
8 failure to obtain such inspection may tend unreasonably to delay the  
9 trial, and (4) the application is made in good faith and is not intended  
10 as a general fishing expedition.

11 *United States v. Nixon*, 418 U.S. 683, 699–700 (1974) (overruled on other grounds). Under the  
12 *Nixon* test, the moving party must “clear three hurdles: (1) relevancy; (2) admissibility, and (3)  
13 specificity.” *Id.* at 700. The use of a subpoena is “not intended to provide a means of discovery for  
14 criminal cases . . . [but] to expedite the trial by providing a time and place before trial for the  
15 inspection of subpoenaed materials.” *Id.* at 698–99. A Rule 17(c) inquiry is a “discretionary, case-  
16 by-case inquiry. *United States v. Bergeson*, 425 F.3d 1221, 1225 (9th Cir. 2005). “The factors the  
17 . . . court must consider . . . - unreasonableness and oppressiveness - cannot sensibly be converted  
18 into a mechanical rule enabling an escape from case-by-case judgment.” *Id.*

19 “[T]he burden is on the moving party, as opposed to the subpoena recipient, to demonstrate  
20 that the subpoena should be enforced.” *Commonwealth v. Castro*, Criminal Case No. 03-0407E  
21 (Order Granting Mot. to Quash Def’s Subpoena Duces Tecum at 2) (Super. Ct. August 17, 2004)  
22 (citing *Nixon*, 418 U.S. at 699). This inquiry is the same whether the individual challenging the  
23 subpoena is a party or a non-party. *See* Fed. R. Crim. P. 17(c)(2) advisory committee’s note to  
24 2008 amendment. The decision of whether to enforce a pretrial subpoena duces tecum is  
25 “committed to the sound discretion of the trial court.” *Nixon*, 418 U.S. at 702.

26 <sup>2</sup> The NMI Rules of Criminal Procedure is patterned after the federal rules. Accordingly, it is “appropriate to consult  
27 . . . the federal rules when interpreting the Commonwealth Rules of Criminal Procedure.” *Commonwealth v. Laniyo*,  
28 2012 MP 1 ¶ 6 (internal quotation mark and citation omitted).

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### III. ANALYSIS

The Judiciary has standing to challenge the Subpoena and moves to quash it because it is procedurally defective; does not provide reasonable time to comply; fails to satisfy the *Nixon* test; and seeks privileged materials.

**A. The Judiciary Has Standing to Challenge the Subpoena Because the Documents, Objects, and Information Sought in the Subpoena Is Property of the Judiciary.**

A subpoena duces tecum “may be challenged by the person to whom it is directed or by a person whose property rights or privileges may be violated.” *Commonwealth v. Martin*, Crim. Case No. 12-0125D (Super Ct. Oct. 31, 2012) (Order Grant. Def’s Mot. Quash Subpoena at 4) (citing *Oncor Communications v. State*, 165 Misc. 2d 262, 264; 626 N.Y.S.2d 369 (Sup. Ct, Albany County 1995); *In re Doe v. Under Seal*, 584 F.3d 175, 184 n.14 (4th Cir. 2007); *Brown v. Braddick*, 595 F.2d 961, 967 (5th Cir. 1979)); *see also Nixon*, 418 U.S. at 698 (“A subpoena for documents may be quashed if their production would be ‘unreasonable or oppressive,’ but not otherwise.”); NMI R. Crim P. 17(c) (“[t]he court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.”).

The Judiciary has standing to challenge the Subpoena because the documents, objects, and information sought in the Subpoena are government property, some of which may be privileged or protected from discovery, including confidential records pertaining to personnel, information protected by attorney-client privilege, personally identifiable information, and information related to court administration. *See United States v. Raineri*, 670 F.2d 702, 712 (7th Cir. 1982) (“[a] party has standing to move to quash a subpoena addressed to another if the subpoena infringes upon the movant’s legitimate interests”); *Pleasant Gardens Realty Corp. v. H. Kohnstamm & Co.*, No. 08-5582(JHR/JS), 2009 U.S. Dist. LEXIS 82975, at \*6 (D.N.J. Sep. 10, 2009) (concluding that the government seeking to protect its property right has standing to object to the subpoena).

1                   **B. The Subpoena Must Be Quashed Because It Is Procedurally**  
2                   **Defective and Does Not Provide Reasonable Time to Comply.**

3                   1. *The Subpoena Directs HR Officer to Produce Records to the Public Defender’s*  
4                   *Office as Opposed to the Court, and Such Directive is Procedurally Deficient*  
5                   *Because It Does Not Comply with Rule 17(c).*

6                   Rule 17(c) governs subpoenas for the production of documentary evidence and of  
7                   objects. *See* NMI R. Crim. P. 17(c). It states, “[a] subpoena may also command the person to  
8                   whom it is directed to produce the books, papers, documents or other objects designated  
9                   therein. . . . The court may direct that books, papers, documents or objects designated in the  
10                  subpoena be produced **before the court** at a time prior to the trial or prior to the time when they  
11                  are to be offered in evidence and may upon their production permit the books, papers, documents  
12                  or objects or portions thereof to be **inspected by the parties and their attorneys.**” *Id.* (emphases  
13                  added).

14                  A subpoena that does not comply with Rule 17(c) is procedurally deficient, and therefore,  
15                  invalid. *See* NMI R. Crim. P. 17(c); *Commonwealth v. Martin*, Criminal Case No. 12-0125D  
16                  (Super Ct. Oct. 31, 2012) (Order Grant. Def’s Mot. Quash Subpoena at 10) (invalidating  
17                  subpoena which did not conform to Rule 17(c)). In *Commonwealth v. Martin*, the subpoena  
18                  directed a non-party to deliver subpoenaed documents to the Office of Attorney General, as  
19                  opposed to the court. The court in *Martin* stated that Rule 17(c) requires subpoenaed documents  
20                  to be delivered to the court, and concluded that the subpoena which directed delivery of  
21                  documents to the Office of Attorney General was procedurally defective and invalid. *Id.* at 10–

22                  11.  
23                  Similar to *Martin*, the Subpoena at bar directs the Judiciary’s HR Officer to produce  
24                  subpoenaed documents to a party’s office, namely the Public Defender’s Office, as opposed to  
25                  the court. Because the Subpoena directs delivery of documents to a location other than the court,  
26                  this Court must find the Subpoena as procedurally defective under Rule 17(c) and therefore  
27                  invalid. Thus, it must be quashed.  
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1                   2.    *The Subpoena Must Be Quashed Because It Provides Unreasonable Period of*  
2                    *Less than Full Two-Days for Compliance.*

3                   The Subpoena must also be further quashed because the Moving Party has not provided  
4 a reasonable time for compliance. The Judiciary’s HR Officer was first served with a subpoena  
5 on August 2, and later, with an amended Subpoena on August 3. *Affidavit of HR Officer Michelle*  
6 *V. Guerrero*. The Subpoena directs the production of documents by 1:00 p.m. on August 4th.  
7 This is less than a full two-days’ notice. Such short notice and deadline present an unreasonable  
8 and unfeasible time for compliance. *See Cris v. Fareri*, 2011 U.S. Dist. LEXIS 108362, \*7 (D.  
9 Conn. Sep. 22, 2011) (concluding that Federal Rules of Civil Procedure Rule 45 subpoena must  
10 be quashed because two days is not a reasonable time for compliance). Because the timeline to  
11 comply is unreasonable and oppressive, the Subpoena must be quashed.

12                   **C. The Subpoena Must Be Quashed Because It Fails to Satisfy the *Nixon* Test.**

13                   The Subpoena in question fails to satisfy all four parts of the *Nixon* test. While *Nixon*  
14 boils down the test to three parts: relevancy, admissibility, and specificity, all four factors as  
15 stated in Section II.A. of this Motion are analyzed below:

16                   1.    *The Materials Requested in the Subpoena are Not Specific and Irrelevant to the*  
17                    *Moving Party’s Criminal Case. Also, the Materials are Not Admissible.*

18                   “The materials requested [in the subpoena] must be identified with specificity so the court  
19 can identify relevance. Without specificity, the [c]ourt shall treat the request as a fishing  
20 expedition for discovery purposes.” *Commonwealth v. Castro*, Crim. Case no. 03-0407E (Order  
21 Grant. Mot. to Quash Def’s Subpoena Duces Tecum) (Super. Ct. August 17, 2004 at 2); *see e.g.*,  
22 *United States v. Morris*, 287 F.3d 985, 991 (10th Cir. 2002) (finding subpoena that references  
23 “all records, documents, and reports” surrounding an investigation does not meet the specificity  
24 requirement under the *Nixon* test); *United States v. Reed*, 726 F.2d 570, 577 (9th Cir. 1984)  
25 (finding that trial court erred when it failed to quash a subpoena which sought for all investigative  
26 files without being specific).

1 In *United States v. Morris*, defendant requested a Rule 17(c) subpoena for “all documents  
2 collected by the FBI during the course of its investigation.” *Morris*, 287 F.3d at 988. The district  
3 court quashed the defendant’s subpoena. On appeal, the Tenth Circuit Court of Appeals affirmed  
4 the district court’s ruling, holding that the defendant’s subpoena request to produce “all records,  
5 documents, and reports” of the investigation did not meet the specificity requirement under  
6 *Nixon. Id.* at 991. The *Morris* court stated, “*Nixon* mandates that the party requesting the  
7 information identify the item sought and what the item contains, among other things.” *Id.*  
8 (emphasis in original).

9 Here, similar to the subpoena in *Morris*, the Subpoena requests for “all” or “any and all”  
10 records related to the Moving Party’s employment and investigation reports, and fails to identify  
11 the item sought and what the item contains. Specifically, the Subpoena states:

12  
13 **all records** related to defendants (sic) employment at the superior  
14 court of the commonwealth of the Northern Mariana Island; **all**  
15 **records**, written reports, statements, oral recordings or other  
16 memorandum regarding a human resources/ EOC (sic) complaint  
17 defendant made at the Superior Court of the Northern Mariana  
18 Islands; **any and all** investigation reports made pursuant to the  
19 above-mentioned complaint including but not limited to: draft email  
on computer draft folder pertaining to the complaint filed by  
defendant and on the hard drive of the computer defendant used at  
the Commonwealth Court; interview of defendant by Jason  
Tarkong; interviews of Daisy Mendiola; Interviews of Pearlyn Blas;  
Interviews of Rose Camacho; **any and all** other interviews.

20 *Amended Subpoena Ad Testificandum and Subpoena Duces Tecum* at 1–2. (emphases added).

21 Under the *Nixon* test, the Subpoena fails to meet the specificity requirement.

22 Additionally, the Moving Party fails to demonstrate that the information they seek is  
23 relevant to the pending criminal case referenced in the Subpoena, *Commonwealth v.*  
24 *Abraczinskas*, Criminal Case 23-0082. Rule 17(c) requires a showing of relevancy. *Nixon*, 418  
25 U.S. at 700. In *United States v. Reed*, defendants were charged with crimes relating to the burning  
26 of a restaurant in the City of Anchorage. *Reed*, 726 F.2d 570. Defendants requested a Rule 17(c)  
27 subpoena, compelling the City to produce investigative reports concerning incidents of arson  
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1 around the same time the restaurant was burned. *Id.* at 576–77. The defendants argued that such  
2 a report would aid in proving that persons other than the defendants were responsible for the  
3 crime. *Id.* at 577. The trial court quashed the subpoena. On appeal, the Ninth Circuit Court of  
4 Appeals affirmed the trial court’s ruling holding that the defendants failed to demonstrate  
5 relevancy. *Id.* The court noted that defendants “have not pointed to any substantial foundation  
6 for believing that the investigative reports would furnish defensive matter, or even suggest that  
7 the fires charged in the indictment were probably set by others.” *Id.*

8         Similar to *Reed*, the Moving Party at bar has not pointed to any substantial foundation  
9 demonstrating that the Judiciary’s records would provide defensive evidence. On the contrary,  
10 records of the Moving Party’s employment and investigation reports of his complaint are  
11 irrelevant to his pending criminal case. Criminal Case 23-0082 involves an allegation of sexual  
12 assault which purportedly happened outside the workplace, outside work hours—action not  
13 taken within the course of his employment. The investigation records and documents sought by  
14 the Subpoena pertain to whether the Judiciary’s Equal Employment Opportunity Policy has been  
15 violated within the workplace and/or during work time. *Affidavit of HR Officer Michelle V.*  
16 *Guerrero*. Such records are irrelevant to the pending criminal case and have no bearing on the  
17 Moving Party’s innocence or guilt.

18         Moreover, under Rule 17(c), documents or objects may be subpoenaed if they would be  
19 “admissible in evidence at the trial . . .” *United States v. Carter*, 15 F.R.D. 367, 371 (1954).  
20 “Rule 17(c) does not extend broadly to statements of witnesses, since such statements are not  
21 admissible in evidence. While they may be invoked for impeachment purposes, such use may be  
22 made only in the event that the witness testifies at the trial.” *Id.* Here, the Subpoena directs HR  
23 Officer to produce recordings, statements, and interviews of various court employees. The  
24 Moving Party has not shown that the employees designated in the Subpoena will be testifying at  
25 trial and has not demonstrated that the recordings, statements, and interviews sought in the  
26 Subpoena will reasonably lead to admissible evidence. As such, to the extent the Subpoena seeks  
27 inadmissible materials, they do not meet the admissibility test under *Nixon*.

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2           2. *The Subpoenaed Materials Are Procurable Reasonably in Advance of Trial by*  
3           *Exercise of Due Diligence.*

4           The information sought through the Subpoena is procurable reasonably in advance of  
5 trial by exercise of due diligence. The jury trial for Criminal Case 23-0082 is currently set for  
6 October 16, 2023.<sup>3</sup> From the date of the filing of the Subpoena, the Public Defender’s Office has  
7 more than two months to conduct its own investigation and interview pertinent witnesses, the  
8 four employees named in the Subpoena, as well as Mr. Abraczinskas. Two months is sufficient  
9 time to gather relevant information in advance of trial.<sup>4</sup>

10           3. *The Moving Party Can Properly Prepare for Trial without Such Production and*  
11           *Inspection in Advance of Trial and that the Failure to Obtain Such Inspection*  
12           *Will Not Unreasonably Delay the Trial.*

13           As stated in Section C.1 of this Motion, Judiciary’s administrative records and reports  
14 pertaining to workplace harassment are irrelevant to the Moving Party’s pending criminal case.  
15 Additionally, no showing has been made to indicate the subpoenaed records are vital to his  
16 defense.

17           4. *The Application Is Intended as a General Fishing Expedition.*

18           “[The] specificity and relevance elements require more than the title of a document and  
19 conjecture as to its contents.” *Commonwealth v. Lazalita*, Traffic Case No. 99-2021 (Super Ct.  
20 1999) (Order Grant. Pl’s Mot. Quash & Den’y. Pl’s Request for Sanctions at 3) (citing *United*  
21 *States v. Arditti*, 955 F.2d 331, 345 (5th Cir. 1992)). “[R]equests for an entire file are evidence  
22 of an impermissible fishing expedition.” *Morris*, 287 F.3d at 991 (citing *Reed*, 726 F.2d at 577  
23 and *United States v. Hughes*, 931 F.2d 63 (10th Cir. 1991)); see also *State v. Booth*, No. 08-cr-

24  
25 <sup>3</sup>[https://www.mvariety.com/news/rape-defendant-turns-to-superior-court-for-stay-in-proceedings/article\\_9879c3b8-3056-11ee-ae4b-1724d37e90ce.html](https://www.mvariety.com/news/rape-defendant-turns-to-superior-court-for-stay-in-proceedings/article_9879c3b8-3056-11ee-ae4b-1724d37e90ce.html), last accessed August 3, 2023.

26 <sup>4</sup> The EEO complaint has been provided to the Moving Party on three, separate occasions, that is on May 26, June  
27 *Officer Michelle V. Guerrero*. To the extent the Subpoena seeks for the Moving Party’s EEO complaint, the  
28 Moving Party is already in possession.

1 00283, 2011 U.S. Dist. LEXIS 142205, 2011 WL 6139062 at \*2 (D. Nev. Dec. 9, 2011) (finding  
2 overbroad a subpoena using “the words ‘any,’ ‘all,’ and ‘any and all’ in many of the forty  
3 separate requests for broad categories of information”).

4 The Subpoena at bar requests for any and all records related to the Moving Party’s  
5 employment and complaint, and is, therefore, evidence of an impermissible fishing expedition.  
6 Further, compliance with such a vague and overbroad subpoena requesting for “all records” and  
7 “any and all interviews” is unreasonable and oppressive under Rule 17(c)(2).

8  
9 **D. The Subpoena Must Be Quashed Because It Seeks Privileged Materials.**

10 A Rule 17(c) subpoena “should be quashed or modified if it calls for privileged matter.”  
11 *United States v. Reyes*, 239 F.R.D. 591, 597 (E.D. Cal. 1997) (citing 2 Federal Practice &  
12 Procedure § 275, at 258; *United States v. Tomison*, 969 F. Supp. 587, 597 (E.D. Cal. 1997)).

13 The subpoenaed documents, objects, and information are protected under NMI Supreme  
14 Court Order No. 2007-ADM-0028-RUL, Policy on Public Access to Judicial Branch  
15 Administrative Records (“Policy in Public Access”). Section IV of Policy in Public Access  
16 provides a list of administrative records not open to the public. They include but are not limited  
17 to: personnel records other than names, dates of employment, offices assigned, position  
18 classifications, pay grades, and gross salaries of employees and records of employment  
19 investigations. *See NMI Supreme Court Order No. 2007-ADM-0028-RUL, Policy on Public*  
20 *Access to Judicial Branch Administrative Records*. In particular, EEO investigative reports and  
21 related records are protected by the NMI Judiciary EEO Policy and attorney-client privilege. *See*  
22 *Federal Trade Commission v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980) (“The attorney-  
23 client privilege can attach to reports of third parties made at the request of the attorney or the  
24 client where the purpose of the report was to put in usable form information obtained from the  
25 client.”); *Affidavit of HR Officer Michelle V. Guerrero*. Additionally, the Judiciary has an interest  
26 in protecting the confidential communications contained in the investigation files. Disclosure  
27 may violate the privacy rights of individuals who cooperated.

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**IV. CONCLUSION**

For the foregoing reasons, the Judiciary requests this Court to quash the Subpoena and issue a protective order to prevent the disclosure of Judiciary records. If the Court is not inclined to grant this request, the Judiciary moves this Court to modify the Subpoena so that privileged, protected, and irrelevant information and materials are not subject to Rule 17(c) subpoena. Additionally, if this Court does not quash the Subpoena, the Judiciary respectfully seeks at a minimum of 14 days to comply.

DATED: August 4, 2023

/s/ Hyun Jae Lee  
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Attorney for the  
Judiciary of the Northern Mariana Islands