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3 **FOR PUBLICATION**

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5 **IN THE SUPERIOR COURT**
6 **OF THE**
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

8 Commonwealth of the Northern Mariana
9 Islands,

10 Plaintiff,

11 v.

12 Zhang Wei

13 Defendant.

Criminal Case No. 03-0312

ORDER REGARDING
CONFIDENTIAL INFORMANT

14 **I. INTRODUCTION**

15 **THIS MATTER** came before this Court for a hearing on the Defendant's *Motion for*
16 *Disclosure of Confidential Informants* on December 17, 2003. Assistant Attorney General, Justin
17 Wolosz, represented the Commonwealth. The Defendant, Zhang Wei, was represented by Assistant
18 Public Defender Jennifer Ahnstedt. Co-Defendant Zhong Ping Lu, represented by Sean E. Frink,
19 and Co-Defendant Lian Khun Zhu, represented by Timothy MB Farrell, joined the motion. The
20 Court, having reviewed the arguments of counsel, having examined the evidence, having reviewed
21 the complete record, and being fully informed of the facts and premises of the current action, now
22 renders its decision.

23 **II. FACTS**

24 On October 1, 2003, Zhang Wei (hereafter "Defendant") along with the Co-Defendants were
25 arrested on charges relating to prostitution. Presiding Judge, Robert Naraja, issued a Case
26 Management order as to Defendant Wei Zhang on October 24, 2003. Pursuant to the order, the 45
27 day deadline for disclosure of discoverable information expired on December 9, 2003. The
28 Defendant provided the Attorney General's Office (hereafter "AGO") with a written discovery
demand on October 6, 2003. The AGO in turn provided discovery to the Defendant. Contained

1 within that discovery were the pseudonyms of two confidential informants, known as “Quiet
2 Hombre” and “Truck.” On November 19, 2003, the Defendant sought in writing from the AGO the
3 real names, and contact information of the confidential informants.

4 A plea offer was tendered by the AGO to the Defendant. On November 26, 2003, the
5 Defendant received a letter, through counsel, from the AGO, stating that the Commonwealth would
6 not disclose the confidential informant’s information at this preliminary stage.

7 **III. DISCUSSION**

8 This case perhaps presents not so much a question of whether the information should be
9 disclosed, as when it should be disclosed. The Defendant states that the confidential informants in
10 question are the sole witnesses to support the Commonwealths allegations. There exists a long
11 history providing the Commonwealth with a qualified privilege to protect the identity of confidential
12 informants. That qualified privilege exists to encourage citizens to come forward with information
13 to aid law enforcement without fear of public disclosure.

14 The United States Supreme Court's decision in, *Roviaro v. United States*, provides the basis
15 to which the Commonwealth may protect the identity of an informant and the circumstances under
16 which the informant's identity must be disclosed. 353 U.S. 53, 59-60, 77 S. Ct. 623, 627, 1 L. Ed.
17 2d 639, 644 (1957). In *Roviaro*, the defendant was charged with selling heroin to a confidential
18 informant. The defense sought disclosure of the informant’s name and address. Citing
19 confidentiality, the court denied the motion seeking disclosure. A renewed motion was again denied
20 during trial. The defendant was convicted, without the prosecution ever calling the informant. In
21 the exercise of its supervisory power, the Supreme Court reversed defendant's conviction, finding:

22 What is usually referred to as the informer's privilege is in reality the Government's
23 privilege to withhold from disclosure the identity of persons who furnish information
24 of violations of law to officers charged with enforcement of that law. The purpose
of the privilege is the furtherance and protection of the public interest in effective
law enforcement. . . .

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26 . . . [But w]here the disclosure of an informer's identity, or of the contents of his
27 communication, is relevant and helpful to the defense of an accused, or is essential
to a fair determination of a cause, the privilege must give way. In these situations the
28 trial court may require disclosure and, if the Government withholds the information,
dismiss the action. . . .

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2 We believe that no fixed rule with respect to disclosure is justifiable. The problem
3 is one that calls for balancing the public interest in protecting the flow of information
4 against the individual's right to prepare his defense. Whether a proper balance
5 renders nondisclosure erroneous must depend on the particular circumstances of each
6 case, taking into consideration the crime charged, the possible defenses, the possible
7 significance of the informer's testimony, and other relevant factors.

8

9 This is a case where the Government's informer was the sole participant, other than
10 the accused, in the transaction charged. The informer was the only witness in a
11 position to amplify or contradict the testimony of government witnesses. Moreover,
12 a government witness testified that Doe denied knowing petitioner or ever having
13 seen him before. We conclude that, under these circumstances, the trial court
14 committed prejudicial error in permitting the Government to withhold the identity
15 of its undercover employee in the face of repeated demands by the accused for his
16 disclosure.

17 353 U.S. 53, 59-65, 77 S. Ct. 623, 627-630 1 L. Ed. 2d 639, 644-647 (1957) (citations omitted).

18 To arrive at its conclusion then, the Court is presented with the following strain of analysis.
19 Because the Commonwealth has a qualified privilege in protecting the identity of confidential
20 informants, the Defendant has the burden of showing that disclosure would be both relevant and
21 helpful. *United States v. Henderson*, 241 F.3d 638, 645 (9th Cir. 2000). A mere suspicion that the
22 informant could provide relevant and helpful information is insufficient to warrant disclosure. *Id.*
23 If the Defendant is able to meet the burden establishing that disclosure would be both relevant and
24 helpful, then the Court must balance societal interests precluding disclosure against the Defendant's
25 interest in disclosure. In determining whether disclosure is required, a court must look to "the
26 particular circumstances of each case, taking into consideration the crime charged, the possible
27 defenses, the possible significance of the informer's testimony, and other relevant factors." *Roviaro*,
28 353 U.S. at 62, 77 S. Ct. at 629, 1 L. Ed. 2d at 646. As a subsidiary question to this analysis, the
Court must also consider, that if disclosure is warranted, that an in camera hearing be held at which
the Commonwealth produces the informants for interview.

There is no easy conclusion here, as both parties' arguments have merit. On one hand there
is a decided interest in protecting the identity of informants. There is authority standing for the
principle of preventing disclosure because an informant is involved in ongoing law enforcement

1 operations. *United States v. Aguirre*, 716 F.2d 293, 300 (5th Cir. 1983). Certainly, that possibility
2 was at least inferentially suggested during the hearing that this is likely the Commonwealth's
3 situation. Alternatively, the Defendant claims that the informants are the sole witnesses, and without
4 the ability to interview or determine the credibility of the witnesses, she cannot properly make an
5 informed determination of whether to accept the Commonwealth's proffered plea bargain.

6 The Commonwealth suggests that the early stages of this case are not the proper time for the
7 disclosure of confidential informant identities and information. Disclosure, if warranted, is more
8 appropriate as the case closes in on its trial date. As support for this principle, the Commonwealth
9 cites *McCray v. Illinois*, 386 U.S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967). The *McCray* Court
10 developed a distinction between disclosure as relevant to preliminary proceedings, and disclosure
11 as relevant to trial. *Id.* In our current case, the status is at a more evolved state, but still distant from
12 the trial date. This Court believes disclosure at this time to be premature. In the opinion of this
13 Court, protection of the identity of confidential informants protects the free flow of information
14 between individuals and law enforcement. As stated, this is a long standing principle, and one this
15 Court will honor.

16 The *Motion to Disclose Confidential Informant Information* will be denied at this time,
17 *without prejudice*. The Defense will be entitled to renew its motion one month prior to trial at which
18 time this Court, using the *Roviaro* analysis, will make a determination as to whether disclosure of
19 the witnesses is appropriate.

20 IV. ORDER

21 The Defendant's Motion to Disclose Confidential Informants is **DENIED** without prejudice.

22
23 **SO ORDERED** this 17th day of February 2004.

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25
26 /s/
27 David A. Wiseman
28 Associate Judge