

1 **FACTUAL BACKGROUND**

2 The Defendant in this criminal case, Edgardo Macabalo, served a subpoena on the Bank of Hawaii
3 demanding that it produce within 20 calendar days certain checking and savings account records for the
4 time period from November, 2004 to February, 2007, or for a period dating back over two years. The
5 requested records related to the accounts held in the name of Joseph Vincent Santos, a person who is not a
6 party to the pending criminal case. The Bank submits that Defendant has failed to comply with the
7 Commonwealth Banking Code of 1984 (P.L. 3-104), as codified at 4 CMC §§ 6453 (“Right to Privacy”)
8 and 6454 (“Financial Privacy Act Adopted”), which adopted the United States Right to Financial Privacy
9 Act of 1978 (12 U.S.C. § 3401 et seq.); as well as Rule 17(c) of the Commonwealth Rules of Criminal
10 Procedure, and therefore the subpoena should be quashed. In his opposition, the Defendant asserted facts
11 never previously presented to the Court to support justifying the issuance of the subpoena. Based on the
12 reasons stated on the record and that follow, this Court granted Bank of Hawaii’s motion to quash.

13 **ANALYSIS**

14 The CNMI’s statute specifically prohibits a bank from divulging its customer’s financial
15 information to “government authority” or to “any other person.” 4 CMC § 6453.² It also allows for specific
16 exceptions to this prohibition. *Id.* (“***except in full compliance with the provisions of 4 CMC § 6454***”)
17 Section 6454 adopts the United States Right to Privacy Act of 1978 in its entirety. The federal version of
18 the Privacy Act applies to “government authorities” only; it does not include “any other person.” This
19 federal law was intended to allow the government the power to intrude on a person’s financial privacy upon

20 _____
21 ² 4 CMC § 6453 provides as follows:

22 **The right to privacy and the right to financial privacy** protected by the Covenant, incorporating the terms of
23 **Constitution of the United States, and N.M.I. Const. art. I, § 10, of every customer of every bank shall be**
24 **respected** by each director, officer, agent, employee or any person employed or retained in any capacity by the
bank within or without the Commonwealth **and neither they nor any one of them disclose any financial**
record of any customer that may come into their possession to any governmental authority or any other
person, except in full compliance with the provisions of 4 CMC § 6454. However, nothing shall preclude a
bank from sharing credit information normally shared between lenders nor sharing information with its chosen
auditor as is necessary to conduct a bank audit according to generally accepted accounting principles.

1 meeting prescribed procedural safeguards, but then only if the inquiry is for a legitimate purpose of “law
2 enforcement.” 12 U.S.C. § 3402. The prerequisite for every possibility for the government to obtain such
3 documents is the “legitimate law enforcement inquiry.” There is an abundant federal caselaw allowing for
4 prosecutors and law enforcement officers to obtain this protected information. There is no caselaw
5 allowing a criminal defendant, as an individual, to obtain financial information under the provisions of the
6 federal Privacy Act. At the hearing, Defendant conceded this legal point. However, Defendant argues he
7 wants and needs the third-person’s bank records to establish his defense. In his opposition brief, he laid out
8 the factual assertions that support his argument for this need. The Commonwealth, at the hearing, did not
9 object to the Court’s reliance on the Defendant’s presentation of the facts asserted for the purpose of
10 justifying his claimed legal defense, nor did it object to the Defendant obtaining Mr. Santos’ Bank of
11 Hawaii records. However, the Commonwealth submits that it is not obligated to seek out the financial
12 statements for the Defendant to support *Defendant’s defense argument*, even under the mandate of *Bowie*,
13 243 F.3d at 1111 (9th Cir. 2001) (prosecutor’s failure to investigate letter violated defendant’s due process
14 rights).

15 **1. Defendant has failed to show full compliance with the provisions of 4 CMC § 6454, the**
16 **CNMI’s Privacy Act.**

17 This Court agrees with the Bank’s factual analysis that Defendant has failed to demonstrate full
18 compliance with Sections 3404, 3405, 3406, 3407, and 3408 of the federal Privacy Act, which has been
19 incorporated into the Commonwealth code. More important, the Privacy Act exceptions require a
20 “government authority” to be the party seeking the information, and "law enforcement inquiry" means a
21 lawful investigation or official proceeding inquiring into a violation of, or failure to comply with, any
22 criminal or civil statute or any regulation, rule, or order issued pursuant thereto. 12 USC § 3401(8).
23
24

1 In this case, Defendant himself acknowledged that he is not a government agency, even though he
2 is represented by the Office of the Public Defender. Opp'n to Mot. To Quash Subpoena at 3. Accordingly,
3 under the CNMI's Privacy Act, the subpoena must be quashed.

4 **2. Defendant failed to follow Com.R.Civ.P. 17(c).**

5 The Bank further argued that the subpoena must also be quashed for failing to comply with Rule 17
6 of the Commonwealth Rules of Criminal Procedure. Rule 17 addresses the issuance of a subpoena for
7 witnesses (*subpoenas ad testificandum*) and for production of documents and other tangible evidence
8 (*subpoenas duces tecum*). The Commonwealth's Rule 17(c) is substantially identical to the federal rule,
9 and the U.S. Supreme Court has stated:

10 Rule 17(c) was not intended to provide an additional means of discovery. Its chief
11 innovation was to expedite the trial by providing a time and place *before* trial for the
inspection of subpoenaed materials.

12 *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220, 71 S.Ct. 675, 95 L.Ed. 879 (1951) (citation
13 omitted). As Defendant has acknowledged, when seeking any subpoena *duces decum*, a party must show:

- 14 1) that the documents are evidentiary and relevant;
- 15 2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence;
- 16 3) that the party cannot properly prepare for trial without such production and inspection in advance of
trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and
- 17 4) that the application is made in good faith and is not intended as a "fishing expedition."

18 Opp'n at 4., *citing*, *United States v. Nixon*, 418 U.S. 683, 699-700, 94 S.Ct. 3090 (1974).

19 In this case, Defendant caused the subpoena to be issued *without* making this prior showing. Given
20 the statutorily protected privacy nature of the bank records, it is even more compelling for the Defendant to
21 adhere to this requirement. Furthermore, Defendant caused the *subpoenas duces tecum* to be issued against
22 the Bank and directed the Bank to produce the bank records to his counsel at his office, not to the court at a
23 specific date and time. This Court concludes that Defendant erred in directing the protected documents to
24

1 be produced directly to the attorney's office.³ Accordingly, based on this procedural deficiency, this Court
2 must grant the Bank's motion to quash under Rule 17.⁴

3 **3. Defendant's oral motion for an order directing Bank of Hawaii to produce documents.**

4 In the course of objecting to the Bank's motion to quash the subpoena, Defendant presented facts
5 that showed his entitlement to the bank records under the *Nixon* factors. Mr. Joseph V. Santos was the
6 Saipan branch manager of MARPAC and the Defendant's supervisor during the period he has been
7 accused of committing the charged crimes against MARPAC. Furthermore, Mr. Santos was arrested by the
8 CNMI police on charges of forgery and theft against the same victim, and was able to post \$50,000 cash
9 bail within hours after his arrest. At the hearing, the Chief Prosecutor disclosed that the CNMI Attorney
10 General's Office was declining prosecution of Mr. Santos because the U.S. Attorney's Office had already
11 indicted Mr. Santos and so it would yield to the federal prosecution. Based on these facts, Defendant
12 argued that the bank records could enable him to present a defense of third-party guilt as permitted in the
13 recent United States Supreme Court decision of *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727
14 (2006) (holding that exclusion of defense of third-party guilt denied defendant a fair trial). This Court
15 concludes that Defendant has produced sufficient evidence under the *Nixon* factors to demonstrate that he
16 is entitled to at least review Santos' bank records to determine if they would assist him in establishing his
17 asserted defense. Accordingly, the Court orally ordered the Bank to produce the requested documents to
18 the Defendant pursuant to Rule 17(c), with copies to the Commonwealth.

19
20 ³ In *Brown v. United States*, 567 A.2d 426 (D.C. 1989), the District of Columbia Court of Appeals was asked to review the trial
21 court's exclusion of a victim's medical records that had been obtained by defendant's counsel from the victim's hospital
22 pursuant to a Rule 17 subpoena and delivered directly to defense counsel's office. Although it was unnecessary to the issue
23 raised on appeal, the court chose to publish its opinion in order to address the misuse of subpoenas under Rule 17(c) as a means
of obtaining statutorily protected information. *Id.*, at 427. The court cited the *Nixon* factors and added that, when a privacy
statute imposes an additional showing, such as that any disclosure "is required in the interests of public justice" (D.C. Code § 14-
307(b)), the decision that the requirement is satisfied must be made by the court, not by the attorney, and must be made *prior* to
issuing the subpoena. *Id.*, at 428.

24 ⁴ Rule 17(c) has also been interpreted to implicitly allow the court to grant an *ex parte* application for a subpoena and a request
to seal produced materials. *United States v. Daniels*, 95 F.Supp.2d 1160, 1162-63 (D.Kan. 2000). The court must nevertheless
decide on a case-by-case basis whether to seal documents that allegedly reveal a party's trial strategy.

1 **CONCLUSION**

2 For the foregoing reasons, the Bank of Hawaii’s motion to quash the subpoena duces tecum issued
3 by the Defendant is GRANTED. However, based on the Defendant’s oral motion and showing of facts
4 establishing the *Nixon* factors, the Court orders the Bank of Hawaii to produce the requested bank records
5 to the Defendant and the Commonwealth.

6 SO ENTERED this 30th day of August, 2007.

7
8 /S/ _____
9 RAMONA V. MANGLONA, Associate Judge