By Order of the Court, *Judge PERRY B. INOS*

1 **FOR PUBLICATION**

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, **Plaintiff,** v. **JOSHUA MARTIN,** **Defendant.**	**CRIMINAL CASE NO. 12-0125D** **ORDER GRANTING DEFENDANT'S MOTION TO QUASH SUBPOENA**

I. INTRODUCTION

THIS MATTER came for a hearing on October 2, 2012 on Defendant Joshua Martin's Motion to Quash Subpoena. The Commonwealth of the Northern Mariana Islands ("Government") was represented by Assistant Attorney General James B. McAllister. Defendant Joshua Martin ("Defendant") was represented by Assistant Public Defender Douglas W. Hartig. The Court, after reviewing the pleadings and hearing oral arguments, granted Defendant's motion to quash from the bench and now enters this written Order.

II. BACKGROUND

The government filed a subpoena *duces tecum* seeking Defendant's educational and disciplinary records from Northern Marianas College ("NMC") on September 11, 2012. The subpoena required NMC to produce the records by 11:00 a.m. the following day, on September 12,

2012, to the Attorney General's office. The government admits that it sought these records in preparation for the September 12, 2012 hearing to determine whether a doctor should be appointed to report on Defendant's mental condition. After the hearing on September 12, 2012, the court ordered Dr. Reinhold Meister to examine Defendant's mental condition and to report his findings to the court.

The government did not receive the requested information on September 12, 2012, nor did it disclose that it had issued the NMC subpoena. Defendant learned of the subpoena on September 25, 2012 when NMC's counsel notified him. Defendant moved to quash the subpoena one day later.

Defendant contends that it is improper to use a subpoena *duces tecum* to procure his educational and disciplinary records and moves to quash the subpoena in accordance with NMI R. Crim. Pro. 17(c) because it is "unreasonable or oppressive". He argues that the government was not using the subpoena to expedite a trial but was instead going on a "fishing expedition" for documents it thought might be relevant to a competency determination before a doctor had even been appointed.

The government, on the other hand, asserts that the subpoena is neither unreasonable nor oppressive. It argues that while the records were originally requested in preparation for the September 12, 2012 hearing, Dr. Meister subsequently requested Defendant's school records, and therefore they should be released. The government argues that the school and disciplinary records are evidentiary and relevant because Defendant has placed his mental state at issue, and education is "essential" to determining competency. These records are not otherwise available, as the government previously sought them to no avail. The government also argues that only NMC, and not Defendant, has standing to quash the subpoena.

The court is thus tasked with determining (1) whether Defendant has standing to object to the subpoena and (2) whether the subpoena is valid.

III. LEGAL STANDARD

> "A subpoena may…command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

NMI R. Crim. P. 17(c).

The United States Supreme Court has set out a four-part test to determine the validity of a subpoena: (1) the documents are evidentiary and relevant, (2) they are not otherwise procurable reasonably in advance of trial by exercise of due diligence, (3) 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 (4) the application is made in good faith and is not intended as a general fishing expedition. *United States v. Nixon*, 418 U.S. 683, 699-700 (1974) (overruled on other grounds); *Commonwealth v. Castro*, No. 03-0407E (NMI Super. Ct. Aug. 17, 2004) (Order Granting Motion to Quash Defendant's Subpoena *Duces Tecum* at 2-3). The Supreme Court has further stated that a subpoena *duces tecum* is "not intended to provide an additional means of discovery" in a criminal trial but rather "to expedite the trial by providing a time and place *before* trial for the inspection of subpoenaed material." *Bowman Dairy Co.*, 341 U.S. at 220.

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IV. DISCUSSION

A. Standing to challenge the subpoena

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." *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). In this case, the government contends that Defendant does not have standing to object to the subpoena because (1) it was not served on him, (2) privilege is often waived when the subject matter of the privilege is the subject of litigation, and (3) the Open Government Act ("OGA") does not prohibit their disclosure.

1. Service of Subpoena on Defendant

The government has not produced any legal authority that personal service is a prerequisite to give Defendant standing to object to the subpoena. It is immaterial that the subpoena was not served on Defendant. A subpoena may be challenged by the person to whom it is directed or by a person whose property rights or privileges may be violated. Here the subpoena seeks protected property rights, Defendant's educational and disciplinary records. This protected right gives him standing to challenge the validity of the subpoena.

2. Defendant's waiver of privilege

Determining standing does not require this Court to determine whether Defendant has waived his privilege or whether the government has overcome its burden to receive privileged documents but simply whether Defendant has a privilege that may be violated by the government's request. "The right of individual privacy shall not be infringed except upon a showing of compelling interest." NMI Const. art. I § 10. Student records are considered private in the Commonwealth and not subject to public inspection. 1 CMC § 9918(a)(1); see also *CNMI v.*

Castro, Crim. No. 03-0407E (NMI Super. Ct. Aug. 17, 2004) (Order Granting Defendant's Subpoena *Duces Tecum* at 2). The federal government, too, looks at these types of records as being private and protects those privacy rights through legislation. 20 U.S.C. § 1232g.

In *Brown v. United States*, 567 A.2d 426 (D.C. 1989), the District of Colombia Court of Appeals was asked to review the trial court's exclusion of a victim's medical records obtained by the defendant's attorney pursuant to a subpoena and delivered directly to defense counsel's office. The court addressed 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.

Similarly, in this case, the records sought are considered private documents, and under the NMI Constitution cannot be disclosed without a showing of a "compelling interest". NMI Const. art. I § 10. The government must, therefore, make a showing to the court that it has overcome its burden *before* it can issue a subpoena for these types of records. As in *Brown*, such a determination is for the court to make, not the government. Therefore, it is clear to this Court that Defendant's education and disciplinary are privileged documents, thereby giving Defendant standing to challenge the subpoena.

3. Open Government Act

The government contends that the OGA does not prohibit disclosure of the requested records. It states that these records are exempt only from public inspection and that exemptions are construed in favor of public disclosure and only applies if disclosure would be highly offensive or not of legitimate concern to the public. *Memorandum in Opposition to Defendant's Motion to Quash Subpoena* at 4, citing 1 CMC 9918(a)(a), PL 8-41, 1 CMC 9101-9102. First, this argument

is without merit since the government readily admits that its demand for records was made pursuant to NMI R. Crim. P. 17(c) and not the OGA. Second, the government misconstrues the OGA. The OGA protects personal information in any files maintained for students in public schools. 1 CMC § 9919(a)(2). While the OGA seeks to promote openness within government agencies, it does not contemplate the violation of personal privacy interests of Commonwealth citizens guaranteed by our Constitution. Any request for school records must be accompanied by a compelling government interest in those records. NMI Const. art. I § 10; *Commonwealth v. Castro*, Crim. No. 03-0407E (NMI Super. Ct. Aug. 17, 2004) (Order Granting Motion to Quash Defendant's Supoena *Duces Tecum* at 2) (where the Commonwealth Superior Court determined that public school records are private and ultimately quashed a subpoena for those records).

4. The Family Educational Records Privacy Act

Defendant's NMC records are further protected under the Family Educational Records Privacy Act ("FERPA"). 20 USCA § 1232g. This law protects students' privacy rights by prohibiting federal funding to any educational institution that distributes students' records without the consent of his parents or the student himself if he is over the age of eighteen. The law provides an exception in that schools may turn over these records when acting in compliance with a judicial order or lawfully issued subpoena. However, they must first notify students about the issuance of said order or subpoena before they can release these records. 20 USCA § 1232g(b)(2)(B). The Court finds that one reason for this notice requirement is to provide students with the opportunity to object to such disclosures.

Further, courts have found that the issuance of a subpoena for these kinds of records requires prior court approval after the requesting party has showed its need for the requested documents. See, for example, *People v. Bachofer*, 192 P.3d 454, 460-61 (2008). For instance, in *People v. Wittrein*, the Supreme Court of Colorado ruled that a party seeking such records must

"articulate, in good faith, a specific need for the information contained in the records" before a subpoena for such records can be issued. *People v. Wittrein*, 221 P.3d 1076, 1085 (2009). Thereafter, the trial court must "balance the…need for the information with the privacy interests of the student". *Id*. See also *Bachofer* 192 P.3d at 192, *Zaal v. State*, 326 Md. 54, 72 (1991); *Krauss v. Nassau Community College*, 469 N.Y.S.2d 553, 555 (1983).

Thus, FERPA creates a privacy interest in these records, again giving Defendant standing to challenge the subpoena and also requiring the government to meet certain standards before a subpoena may be issued for these records.

B. Validity of the subpoena

The court now focuses on the validity of the subpoena. In deciding this issue, the court emphasizes that in a criminal case a subpoena *duces tecum* is not intended to be used as a means of discovery. *Bowman Dairy Co.* 341 U.S. at 220. Rather, its "chief purpose is to expedite the trial by providing a time and place before trial for the inspection of subpoenaed documents." *Id*.

1. The subpoena does not meet the standards as set out by *U.S v. Nixon*

In order for a subpoena *duces tecum* to be valid, the moving party must demonstrate that (1) the documents are evidentiary and relevant, (2) are not otherwise procurable reasonably in advance of trial by exercise of due diligence, (3) the party cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend to unreasonably delay the trial, and (4) the application is made in good faith and is not intended as a general fishing expedition. *Nixon*, 418 U.S. at 699-700. In this case, the government issued the subpoena without first making this showing. Given the statutorily protected nature of the documents sought, it is even more compelling that the government adheres to this requirement.

The government claims that the subpoenaed documents are evidentiary and relevant because Defendant has put his mental state at issue. Further, it states that Dr. Meister has requested this

information, and they are therefore necessary for Defendant's evaluation. The court does not agree. First, the purpose of the September hearing was to determine whether Defendant has provided reasonable cause or made a showing to appoint a psychiatrist to evaluate his mental condition pursuant to 6 CMC § 6604(a). In support of Defendant's request, his counsel stated in a declaration that he had limited ability to effectively communicate with his client and he believed that a psychological evaluation was necessary. The court, also, had first hand in-court observations of Defendant supporting an appointment of a psychiatrist under 6 CMC § 6604(a). The September hearing was not a competency hearing. Thus, Defendant's prior mental status, as may be revealed in NMC's education and disciplinary records, were irrelevant in the September 12, 2012 hearing.

Second, Dr. Meister's request for education records does not give reason for or extend the validity of the subpoena. The government originally requested this information ***before*** the court decided to appoint a doctor to evaluate Defendant's mental condition. This newly created purpose for the subpoena fails to show how this information is evidentiary. Moreover, the government has not shown whether the evaluation could be conducted without these records. Simply stating that Dr. Meister would like to review this information does not show how it falls within the scope of evidentiary or relevant material at trial. Rather, the claim pertains solely to the documents' relevance to the psychiatrist.

Next, the government must demonstrate that these records are not otherwise procurable. In this instance, the government says that it has made both informal and formal requests to no avail and a subpoena was its only recourse. To the contrary, it was Defendant who requested a psychiatric evaluation and the Defendant to whom the request for records was made by Dr. Meister. The government merely received a copy of the request which was directed to the defense. While the government may have had trouble procuring Defendant's school records, in large part because of the confidential nature of those documents, it is up to the defense – and not the government – to

gather this information for Dr. Meister. Moreover, the defense stated on record that it does have the ability to retrieve these records. They are, therefore, procurable by other means.

Third the government must show that it cannot properly prepare for trial without the requested information and that the failure to obtain such inspection may tend unreasonably to delay the trial. The government argues that this evidence is immediately necessary in order to aid Dr. Meister in his evaluation. However, it has not shown any discernable way in which the ***government*** needs this information in its trial preparation. Rather, it seems to be saying that while its original purpose in issuing the subpoena was to prepare for a pretrial hearing on whether the court should appoint a psychiatrist in this matter, it is now seeking to enforce the subpoena to assist Dr. Meister. Neither of these reasons is proper under NMI R. Crim. P. 17(c). Moreover, the government fails to show how the absence of this information will in any way delay the trial. The court has received no information stating that Defendant's evaluation would be incomplete without the school records, nor has it received any statement from the government that it would be unable to proceed with its case without them.

Lastly, the government must show that the application is made in good faith and is not intended as a general fishing expedition. Here again the court must point out that this subpoena was issued ***before*** an evaluation was ordered, and according to the subpoena, the information was required on the hearing date to determine whether an expert should be appointed. The government has admitted that its original purpose for issuing the subpoena was in gathering information to support its objection to the appointment of a psychiatrist for evaluative purposes. However, a psychiatrist has been appointed and an evaluation has been ordered; therefore, the government's original purpose is moot. Moreover, as stated in the previous order, the court was obliged to appoint a psychiatrist upon request of the defense. September 18, 2012 Order; *see also* 6 CMC § 6606(a). Thus, the government had no right to receive this information for the purpose of its

opposition. At this point, Dr. Meister has contacted the defense in an effort to obtain the requisite information. It is for the defense to collect and provide that information to Dr. Meister.

"A court is justified in quashing a subpoena *duces tecum* if production would be immaterial, unreasonable, oppressive, and irrelevant." *United States v. Komisaruk*, 885, F.2d 490, 495 (9th Cir. 1989). Moreover, "a pretrial subpoena for documents which a court order is required is to procure evidence which will be offered at trial." *United States v. Castaneda*, 571 F.2d 444, 446 (9th Cir. 1977). In this instance, the documents requested by the government are irrelevant for their originally intended purpose of having the court deny the defendant's request to appoint a doctor to conduct a competency evaluation. Further, the government has failed to show that they are necessary for its trial preparation, nor has it alleged that such evidence would even be admissible at trial.

2. Other defects in the Subpoena

a. Delivery of Requested Documents

The subpoena directed NMC to deliver the requested documents to the Office of the Attorney General, as opposed to the Court. The Court concludes that this was a procedural error that invalidates the subpoena, particularly in a situation such as this where the requested information is private. Rule 17(c) requires subpoenaed information to be delivered to the court for inspection at a specific date and time by both the government and defense. Documents should not be delivered to any party's office. Doing so would potentially preclude the opposing party from reviewing the evidence and could give an unfair advantage to the recipient, thereby violating the defendant's constitutional rights. This problem is particularly evident when the subject matter of the requested information is privileged. When a subpoena requests that information is delivered to a party's office, as opposed to the court, the party owning the privilege is effectively prevented

from bringing forth any argument to exclude those privileged documents.[1] If the defense was not entitled to make an objection to these kinds of procedural problems, it is likely they would go unchecked, and it is equally likely that privileged information would be used improperly. The government does not have such unfettered power to misapply procedural rules and the court finds that Defendant has standing to object based upon this procedural error.

b. Timing of Subpoena

When subpoenaing student records, the requesting party must give reasonable time to the requested individual or institution to come into compliance with the subpoena. The government could not have expected NMC to comply with the subpoena in less than a full day's notice. Under FERPA, NMC is required to first notify the student that his records have been requested. It is impracticable to comply in such limited time.

V. CONCLUSION

Based on the foregoing, Defendant's Motion to Quash Subpoena is **GRANTED**.

SO ORDERED this 31st day of October, 2012.

/s/
PERRY B. INOS
Associate Judge

[1] See *Brown*, 567 A.2d at 427, where the court admonishes defense counsel for having the records sent directly to his office instead of to the court. The court in that case dealt with medical records of a victim and stated that the victim has no means of vindicating her privacy rights when such records are delivered directly to an "attorney's office, instead of being delivered to the court under proper safeguards." *Id.* In this case, too, the defendant has a privacy right for which he has no recourse when his personal records are delivered directly to the government, particularly when the government has not proven to the court that its interests are compelling and outweigh the defendant's privacy rights.