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1 Joyce C.H. Tang
2 Leslie A. Travis
3 **CIVILLE & TANG PLLC**
4 330 Hernan Cortez Avenue Ste. 200
5 Hagatna, Guam 96910
6 Tel: (671) 472-8868/9
7 Fax: (671) 477-2511

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6 **PROCUREMENT APPEAL**
7 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

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9 In the Appeal of

10 Core Tech International Corp.,
11 Appellant.

12 and

13
14 Guam Department of Public Works,
15 Purchasing Agency.

DOCKET NO. OPA-PA-16-007
DOCKET NO. OPA-PA-16-011

**CORE TECH INTERNATIONAL CORP.'S
OPPOSITION TO MOTION TO QUASH
SUBPOENA TO THE HONORABLE
JUDITH T. WON PAT**

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18 **I. INTRODUCTION**

19 Senator Won Pat has filed Motion to Quash Core Tech's subpoena requiring her attendance in
20 this proceeding to testify as a witness. Senator Won Pat affirmatively states under oath that she was
21 not served with the Subpoena. She also asserts that she is a "top official", and as such should be
22 given different treatment and need not testify unless extraordinary circumstances apply. As discussed
23 below, Senator Won Pat was served, and the laws of Guam do not entitle her to preferential treatment
24 when it comes to testifying before the Public Auditor or the courts of Guam.

25
26 **II. ARGUMENT**

27 On August 22, 2016, at the request of Core Tech, a party before the OPA, the Public Auditor
28 issued a subpoena to Judith T. Won Pat, Speaker of the Guam Legislature compelling her attendance

1 to give testimony before the OPA on September 7, 2016. As shown by the Declaration of Service
2 attached to Senator Won Pat's Motion to Quash, the subpoena was personally served on her on
3 August 23, 2016 at 9:20 a.m. Senator Won Pat initially ignored the subpoena; she did not contact
4 Core Tech's counsel to voice objection or discuss, she did not seek an accommodation for her
5 schedule, and she did not file a motion to quash. She simply did not appear. Core Tech's counsel
6 extended a courtesy to Senator Won Pat and sent her a letter reminding her of the subpoena, pointing
7 out that she had failed to obey the subpoena, and asking her to appear and give testimony on
8 September 15.

10 Yesterday afternoon, Senator Won Pat, through the Office of the Attorney General, moved to
11 Quash the subpoena. In her Declaration filed in support of the motion to quash, Senator Won Pat
12 stated that "I do not recall, and I do not believe I have ever been personally served with a subpoena in
13 this matter . . . [and] [p]rior to the September 7th hearing, I never saw such a subpoena." Core Tech
14 confesses that it was surprised that Senator Won Pat would take this position since it is so
15 demonstrably false. Senator Won Pat's statement is contradicted by the Declaration of Service of an
16 independent process server, Charlie Damian. Even more troubling, Core Tech is prepared to present
17 witnesses who will directly contradict the Senator's claim that she did not receive the subpoena.
18 While the Senator apparently has no problem seeking special treatment because she considers herself
19 a "high ranking government official," she should know that the penalties for false statements apply
20 equally to the high and the low among us.

23 As a second argument for quashing the subpoena, Won Pat claims that she is a high ranking
24 government officials and should not be required to appear for depositions or testify at trial absent
25 extraordinary circumstances. She also mischaracterizes the reasons she has been subpoenaed. As
26 discussed below, the authorities cited by Senator Won Pat do not reflect the law of Guam; she is not
27 entitled to special privilege. Senator Won Pat's characterizations of the reasons why Core Tech
28

1 seeks her testimony are also off the mark.

2 One of Core Tech's grounds for this appeal is that the Government violated the RFP by
3 providing for a total contract price in excess of the \$100,000,000.00 maximum specified in the RFP.
4 The Government disagrees with Core Tech. Core Tech wants to establish that the Government
5 intended to exceed the maximum or cap. One crucial piece of evidence on this issue is the
6 Department of Education's approach to Senator Won Pat in which it sought a rather extraordinary
7 opinion, a legal opinion for all intents and purposes, as to whether the \$100,000,000 cap was required
8 by the legislation authorizing this project.
9

10 Core Tech agrees with the Speaker's assertion that her "testimony regarding the enactment of
11 any legislation relevant to this procurement is unnecessary and improper." Mot. at 4. Of course, the
12 same principle applies to the Speaker's letter and, given its inefficacy, the question arises as to why
13 the Speaker issued the letter in the first place. Providing a legal interpretation of a statute to an
14 executive branch official or agency is a duty generally consigned to the Attorney General. Because
15 this letter is so unusual, Core Tech is entitled to find out who solicited the letter, the reasons given for
16 seeking the letter, and the use for which the letter was intended.
17

18 Core Tech does not seek to have Senator Won Pat testify as to the legal conclusions she came
19 to in her letter, which, as the government argues, are of no weight in this appeal. Rather, obtaining
20 evidence as to the reasons given when she was asked for the opinion bears on the question of the
21 government's intent with respect to the \$100,000,000 cap. Senator Won Pat has personal knowledge
22 of these facts. The Senator and the requesting Government official are, most likely, the only two
23 people who know why the opinion was requested.
24

25 The cases cited by the Government in the Motion are distinguishable insofar as they involved
26 attempts to compel the testimony of government officials who had no personal knowledge of the facts
27 relevant to the litigation. In *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586-87
28

1 (C.A.D.C.,1985), for example, the testimony of government officials was sought with respect to
2 general enforcement of the OSHA Act and as the court pointed out, the party seeking the subpoena
3 “has not suggested any information in the possession of these officials (regarding general
4 enforcement proceedings) that it could not obtain from published reports and available agency
5 documents.” *Id.* at 587. The court cited authority to the effect that other courts have refused to
6 allow examination of top government officials regarding decisions committed to their discretion. *See*
7 *id.* at 586-87. Writing opinion letters to executive branch agencies can hardly be characterized as an
8 official legislative act committed to the Senator’s discretion.

9
10 *In re Office of Inspector General, R.R. Retirement Bd.*, 933 F.2d 276 (5th Cir. 1991), involved
11 a discovery sought with respect to an administrative enforcement action and the authority of the
12 Inspector General to conduct a planned audit of the railroad. The Fifth Circuit noted that if the
13 district court permitted a limited, measured amount of discovery in the enforcement action,
14

15 it shall remain mindful of the requirement that exceptional
16 circumstances must exist before the involuntary depositions of high
17 agency officials are permitted. *EEOC v. K-Mart*, 694 F.2d at 1067–68.
18 We agree with our D.C. Circuit colleagues that “top executive
19 department officials should not, absent extraordinary circumstances, be
20 called to testify regarding their reasons for taking official actions.”
21 *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586
22 (D.C.Cir.1985) (citing *United States v. Morgan*, 313 U.S. 409, 422, 61
23 S.Ct. 999, 1004–05, 85 L.Ed. 1429 (1941)); *cf. Sweeney v. Bond*, 669
24 F.2d 542 (8th Cir.), *cert. denied*, 459 U.S. 878, 103 S.Ct. 174, 74
L.Ed.2d 143 (1982); *Kyle Eng’g Co. v. Kleppe*, 600 F.2d 226 (9th
Cir.1979); *United States Bd. of Parole v. Merhige*, 487 F.2d 25 (4th
Cir.1973), *cert. denied*, 417 U.S. 918, 94 S.Ct. 2625, 41 L.Ed.2d 224
(1974). Further, we have concluded that it is normally inappropriate to
“probe the mental processes and motives of the individual decision-
maker, rather than to question the objective legal validity of the
institutional decision.” *Kent Corp. v. NLRB*, 530 F.2d 612, 620 (5th
Cir.), *cert. denied*, 429 U.S. 920, 97 S.Ct. 316, 50 L.Ed.2d 287 (1976).

24 *Id.* at 278.

25 The Senator’s letter was certainly not an official action, and Core Tech is not seeking to probe
26 the Senator’s mental processes and motive for her action. Core Tech wants to know, among other
27 things, who made the request, the reasons given so as to engender the unusual legal opinion, and her
28 discussions and communications relating to the \$100 million cap issue.

1 The Government cites *State Board of Pharmacy v. Superior Court*, 144 Cal.Rptr. 320 (Cal.
2 Ct. App. 1978), for the proposition that the burden is on the proponent of the subpoena to
3 demonstrate the relevance and necessity of the testimony, and the prejudice, injustice or other
4 compelling reason why the testimony of a high ranking official should be taken. However, *State*
5 *Board of Pharmacy* was distinguished along with other cases involving subpoenas against high
6 government officials in *Detoy v. City and County of San Francisco*, 196 F.R.D. 362 (N.D. Cal. 2000),
7 the court stating:

9 In the case at bar, Plaintiff convincingly distinguishes the cases
10 cited by Defendants. **In those cases the high officials had no personal**
11 **knowledge of the events or decisions at issue.** Examples include the
12 director of the Small Business Administration regarding loans to a
13 corporation, the Governor of California regarding crowding at San
14 Quentin, the Attorney General of California [citing *State Board of*
Pharmacy in footnote] regarding attorneys' fees to be awarded to the
prevailing party in an action against the State Board of Pharmacy, a
State Governor, the Attorney General of the United States, and the
Commissioner of the Food and Drug Administration, all about matters
of which they had no personal knowledge.

15 *Id.* at 369 (footnotes emitted) (emphasis added).

16 Here, the information Core Tech seeks is limited to the identity of the person who requested
17 the opinion letter, the discussions and communications regarding that request and \$100 million cap,
18 and the reasons given for seeking the letter. This is all within the personal knowledge of the Senator,
19 it does not involve the performance of discretionary functions, and does not seek her motives for
20 issuing the letter.

22 We note that state senators and the like have been subject to subpoenas; there is no absolute
23 barrier. *See, e.g., Municipal Revenue Services, Inc. v. Xspamd., Inc.*, Civil Action No. 4:CV-05-
24 0671, 2007 WL 1074140 (M.D. Pa. April 4, 2007) (the district court rejected arguments of
25 legislative immunity and that the subpoenas would imposed an undue burden in denying the Majority
26 Leader of the Pennsylvania Senate's motion to quash).

1 Even assuming that Senator Won Pat qualifies under the definition of a “top official” and that
2 such an official should not be required to testify except in extraordinary circumstances, which is not
3 law of Guam, Core Tech contends that extraordinary circumstances exist as shown above. First,
4 Senator Won Pat’s testimony is necessary to obtain relevant information that is not available from
5 another source. Second, Senator Won Pat has first-hand information that could not be reasonably
6 obtained from other sources. Third, the testimony is essential to Core Tech’s case as it goes directly
7 to the issue relating to the \$100 million cap. Fourth, her testimony would not interfere with her
8 ability to perform her government duties.
9

10 **III. CONCLUSION**

11 For the forgoing reasons, the Government’s Motion to Quash the subpoena to Senator Won
12 Pat should be denied.
13

14 *Respectfully submitted* this 15th day of September, 2016.

15 **CIVILLE & TANG PLLC**

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17 By: 

18 Joyce C.H. Tang
19 Leslie A. Travis
20 Attorneys for Appellant
21 Core Tech International Corp.
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