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**OFFICE OF PUBLIC ACCOUNTABILITY**
**PROCUREMENT APPEALS**

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| IN THE APPEAL OF<br><br>TAKECARE INSURANCE COMPANY, INC.,<br><br>Appellant | **APPEAL NO. OPA-PA-18-003**<br>**APPEAL NO. OPA-PA-18-005**<br><br>**TAKECARE'S REPLY IN SUPPORT OF SECOND MOTION TO COMPEL PRODUCTION OF AON DOCUMENTS** |

## INTRODUCTION

The Department of Administration (hereinafter "DOA") and the Negotiating Team (hereinafter "NT") do not maintain that the AON communications are irrelevant. Indeed they could not do so. Instead, they argue that the very relevant evidence of AON communications are privileged and cannot be produced at this time.

The assertion of an evidentiary privilege is "strictly construed" and a "conclusory allegation" that a communication is protected by a privilege is "inadequate to meet this burden." RLI Ins. Co. Conseco, Inc., 477 F.Supp. 2d 741, 750-751 (E.D. Va. 2007). The burden is on the proponent of an evidentiary privilege to "demonstrate its applicability."

ORIGINAL

U.S. v. Lentz, 419 F. Supp. 2d 820, 827 (E.D. Va. 2005). As shall be discussed herein, TakeCare Insurance Company Inc. (hereinafter "TakeCare") maintains that DOA and the NT cannot meet their heavy burden and establish that the withheld AON communications should be protected from disclosure.[1]

## DISCUSSION

### I. Legal Issues that DOA and the NT *Do Not* Dispute.

It is significant that neither DOA nor the NT have challenged the case holding that the "majority view and the better view . . . is that all things communicated to the expert and considered by the expert in forming an opinion must be disclosed even if it constitutes opinion otherwise protected as work product." Ass'n. of Irritated Residents v. Dairy, 2008 WL 2509735 at *1 (E.D. Cal. 2008). (Emphasis added).

Furthermore, neither DOA nor the NT have challenged the cases holding that the "[c]ourts disfavor assertions of evidentiary privilege because they shield evidence from the truth-seeking process." RLI Ins., *Id.* at 748; *See also*, Herbert v. Lando, 99 S. Ct. 1635, 60 (1979); In re Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984).

### II. Protecting the Integrity of the Procurement Process.

Guam's Procurement Law clearly states that it is intended to "provide for increased public confidence in the procedures followed in public procurement" and to allow "public access to all aspects of procurement consistent with the sealed bid procedure and integrity of the procurement process." 5 G.C.A. § 5001(b)(3) and 5001(b)(8)(Emphasis added). In

[1] Given the quickly approaching trial date, and the simplicity of matter in dispute in the Second Motion to Compel Production of Documents, TakeCare waives its right to request oral argument on this motion.

order to justify refusing to produce relevant AON communications, DOA and the NT have the heavy burden of showing that doing so will threaten the "sealed bid procedure and integrity of the procurement process." U.S. v. Lentz, *Id.* at 827. They have not met that heavy burden.

First of all, the reasons asserted by DOA and the NT for refusing to produce some AON communications are at best conclusory. For example, they argue that disclosure "could place DOA at a disadvantage with potential offerors if produced at this state of the procurement process." DOA Opposition Brief 10/19/18 at 2. However, they do not explain how or why it could do so. They also argue that the "objectives or strategy ideas in these emails could be used to determine the basis of an award." DOA Opposition Brief 10/19/18 at 2. Yet again they fail to identify or even discuss the emails that contain these "objectives and strategy." They also do not explain how discussing these "objectives or strategy" could possibly damage the procurement process. A "conclusory allegation" does not meet the "burden" of sustaining an evidentiary privilege. RLI Ins., *Id.* at 750-751.

Second, it is undisputed that DOA and the NT have already produced numerous communications between them and AON, many of which involve communications between Attorney Shannon Taitano and AON. *See, e.g.*, (1) Communications between AON and various health insurers about "network changes under consideration" (Bates Stamp 000940-000946); (2) Communications between AON and DOA about the exclusive/non-exclusive provisions in the RFP (Bates Stamp 000017); (3) Communications between AON and DOA about doing "a complete re-write to simplify the RFP" (Bates Stamp 000117); (4) Communications between AON and DOA about the "sole source"

provision, which implicates GRMC when it is a sole source provider (Bates Stamp 00961); (5) Communications between AON and Shannon Taitano about the "thoughts" on "updates to the RFP" (Bates Stamp 000273); (6) Communications between AON and DOA about the "most up-to-date versions" of the RFP "for the committee to review" (Bates Stamp 000389); (7) Communications between AON and Shannon Taitano about PL 34-83 (Bates Stamp 000977-000978); (8) Communication between AON and DOA (Bates Stamp 001259A); (9) Communication between AON and Shannon Taitano (Bates Stamp 001260); (10) Communication between Shannon Taitano and AON (Bates Stamp 001273); (11) Communication between Shannon Taitano and AON (Bates Stamp 001264); (12) Communication between Shannon Taitano and AON (Bates Stamp 001267); (13) Communication between Shannon Taitano and AON (Bates Stamp 001268-001269); (14) Communication between Shannon Taitano and AON (Bates Stamp 001275); (15) Communication between Shannon Taitano and AON (Bates Stamp 001291-001292); (16) Communication between Shannon Taitano and AON (Bates Stamp 001292A); (17) Communication between Shannon Taitano and AON (Bates Stamp 001295-001296); and, (18) Numerous communications between Shannon Taitano and AON dated January 13, 2018, January 15, 2018, February 12, 2018, February 14, 2018, which are attached to the Opposition Brief of DOA and AON, but which have no Bates Stamp number.

Given the fact that DOA and the NT have already produced numerous AON communications discussing the RFP and the bid process, they cannot credibly argue that producing a few AON emails referring to GRMC will threaten the bid process. So why are DOA and the NT really withholding AON emails referring GRMC? The answer is

obvious. They are refusing to produce AON communications referring to GRMC in order to prevent TakeCare from discovering relevant information that would be useful to TakeCare's claims and harmful to the defenses of DOA and the NT in this appeal.

## III. The Public Record of Procurement Actions.

Remarkably, DOA and the NT are so desperate to hide the AON communications referring to GRMC that they actually argue that they are not *really* public records at all, and, as a consequence, the production of them cannot be compelled. Thus, according to DOA and the NT, although they are required by law to maintain a "log of all communications . . . which is in any way related to procurement," and they have actually recorded the AON communications on that log, they do not have to actually produce the records referred to in that log if they are emails. To say that this argument strains credulity to its breaking point would be an understatement.

To begin with, had Guam's Legislature intended to allow DOA and the NT to shield from disclosure the emails of public officials involved in procurements it could have enacted express legislation allowing them to do so. Guam's Legislature instead enacted legislation stating that "public access" should be allowed to "all aspects of procurement." 5 G.C.A. § 5001(b)(3) and 5001(b)(8)(Emphasis added). All aspects of a procurement obviously include emails with government official discussing the procurement process. This is especially so in a day and age when most communications are via emails. DOA and the NT themselves apparently consider their emails to be public records, because they have already produced dozens of them as part of the procurement record in this case.

Moreover, OPA Rule 12105(e) requires that DOA and the NT produce to the OPA "[a]ny documents which are relevant to the protest." The Hearing Officer also has the express authority to "[r]require parties to produce for examination those relevant . . . documents under their control." OPA 12109(c). Neither DOA nor the NT have ever argued that AON documents referring to GRMC are irrelevant and it is the understanding of TakeCare that those emails have in fact been produced to the OPA. Any AON emails referring to GRMC are public records that should be produced to TakeCare because they are either relevant or potentially relevant to the issues in this appeal.

## IV. Confidentiality and Non-Disclosure Affidavit.

DOA and the NT argue that the AON emails referring to GRMC cannot be disclosed because a Confidentiality and Non-Disclosure Affidavit was executed by AON and NT members. The fatal flaw in this argument is that evidentiary privileges are created by statutes, not by contractual agreements. Guam Rule of Evidence 502(a) and (b) has codified this principal and states that "no person has a privilege to refuse to be a witness or refuse to disclose any matter," except as otherwise required by the Constitution, Organic Act, principles of common law, or by rules or laws of Guam.

In American Airlines v. Superior Court of California, 8 Cal. Rptr. 3d 146, (Cal. App.4th 2003), an employee argued that his communications with a fellow employee were confidential and privileged and the trial court erroneously agreed. On appeal, a California Appellate Court reversed the trial court and when interpreting an evidentiary statute very similar to Guam Rule of Evidence 502(a) and (b) held: "[E]videntiary privileges shall be available only as defined by statute. Courts may not add to the statutory privileges except

as required by state or federal constitutional law, nor may courts imply unwritten exceptions to existing statutory privileges." *Id.* at 150.

Other courts are in accord. Valley of Bank of Nevada v. Superior Court, 125 Cal. Rptr. 553 (Cal. App.3d 1975)(Privileges contained in Evidence Code are exclusive and courts are not free to create new privileges as a matter of judicial policy unless constitutionally compelled); and, Garstang v. Superior Court, 46 Cal.Rptr. 84 (Cal App.4th 1995) (In California there is no privilege to refuse to disclose any matter, or to refuse to produce any writing, object, or thing, unless the privilege is created by statute).

## V. AON Emails are not Protected by the Attorney/Client Privilege.

DOA and the NT argue that the AON emails referring to GRMC are protected by the attorney/client privilege under what is referred to as the "functional equivalent doctrine." This doctrine has not been codified in any Guam statute and has never been recognized by any Guam Court. As acknowledged by the United States Supreme Court in United States v. Nixon, 94 S.Ct. 3090 (1974), evidentiary privileges "are not lightly created nor expansively construed, for they are in derogation of the search for the truth." It is respectfully submitted that the OPA should not rely on a new evidentiary privilege that is not codified and has not been recognized by any Guam Court.

Additionally, the New York case relied upon by DOA and the NT actually refused to apply the "functional equivalent doctrine" and did so on grounds applicable to this proceeding. In William Tell Services LLC v. Capital Financial Planning LLC, 999 N.Y.S.2d 327 (2014), the Court held that the "functional equivalent doctrine" only applied

when the consultant had "primary responsibility for a key corporate job" in dispute in the litigation. *Id.* at 332.

The "key job" in dispute in this case was the vote of the NT members to include GRMC as a minimum requirement. As a matter of law, AON could not have performed the "key job" of voting on that decision because AON was not a member of the NT. Only the NT members were entitled to perform the "key job" of voting on whether to include GRMC as a minimum requirement. At most, AON could only have provided "business advice" to the NT members about whether to include GRMC as a minimum requirement, and, as noted in William Tell, the functional equivalent doctrine "does not extend to business advice, even when given by an attorney." *Id.* at 332.

The Court in William Tell also held that the "functional equivalent doctrine" did not apply "where the invasion of the privilege application is necessary to test the validity of a client's claim or defense." *Id.* at 333. Other courts have ruled likewise and refused to apply the "functional equivalent doctrine" when it was being used to deprive an adversary of information needed to respond to a "defense." Credit Suisse First Boston v. Ultrecht-America Fin. Co., 811 N.Y.S.2d 32 (2006); *See also*, Jakobleff v. Cerrato, Sweeney & Cohn, 468 N.Y.S.2d 895 (1983); Akwright Mut. Ins. Co. v. Natl. Union Fire Ins. Co. of Pittsburg, PA, 1994 WL 510043 (S.D.N.Y 1994); and, Chase Manhattan Bank N.A. v. Drysdale Sec. Corp., 587 F. Supp. 57, 58 (S.D.N.Y. 1984).

In this case, DOA and the NT are defending TakeCare's appeal by claiming to have valid reasons to include GRMC as a minimum requirement. In order to respond to this

defense, TakeCare must be allowed to respond to this defense by examining the AON communications with DOA and the NT referring to GRMC.

Lastly, even assuming, *arguendo*, that the AON emails referring to GRMC were privileged, that privilege was waived when DOA and the NT produced numerous AON communications relating to bid procedure and RFP. *See e.g.*, United States v. Jones, 696 F.2d 1069 , 1072 (4th Cir. 1982)(Any voluntary disclosure of communications waives the privilege not only as to the specific communication disclosed, but to all other communications relating to the same subject matter); In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982)(When a party reveals part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter); Edwards v. Whitaker, 868 F. Supp. 226, 229 (M.D. Tenn. 1994)(Voluntary disclosure of the content of a privileged communication constitutes waiver of the privilege as to all other such communications on the same subject).

DOA and the NT have even produced communications between them and AON that refer to requiring offerors to include GRMC in their bid. For instance, on January 31, 2018 AON sent an email to DOA saying: "With regard to the RFP, if we put in the scoring that a network must include both Guam hospitals in order to be considered for exclusive, and thus only two carriers meet the requirements, does that also mean that we can only consider those two carriers for non-exclusive?" Bates Stamp 000017. DOA and the NT cannot produce some emails from AON that refer to including GRMC as a minimum qualification that may be helpful to them, and then refuse to produce other emails that also refer to GRMC.

DOA and the NT have also produced numerous AON communications involving "legal advice." On January 13, 2018 AON sought advice from Ms. Taitano on "legal questions for RFP re-write," and Ms. Taitano responded on January 15, 2018. Bates Stamp 001268. On February 7, 2018 AON had legal questions for Ms. Taitano about the RFP, which Ms. Taitano promptly answered. Bates Stamp 001263-001264. On February 12, 2018 Ms. Taitano responded to an email AON entitled "legal question for RFP re-write." Bates Stamp 001267. On February 13, 2018 Ms. Taitano responded to an email inquiry from AON by providing the "governing law" relating to group health insurance. Bates Stamp 001263. DOA and the NT cannot produce AON communications discussing legal questions that may be helpful to them, and then refuse to produce others.

There are also other emails between AON and Ms. Taitano, which have been produced. *See e.g.*, Communications between AON and Shannon Taitano marked as Bates Stamp 000273, 000977-000978, 001260, 001273, 001264, 001267, 001268-001269, 001275, 001291-001292, 001292A, 001295-001296; and the numerous communications between Shannon Taitano and AON dated January 13, 2018, January 15, 2018, February 12, 2018, February 14, 2018, which are attached to the Opposition Brief of DOA and AON, but which have no Bates Stamp number.

A party cannot produce privileged communications that are helpful to its case, and then refuse to produce those that are harmful. In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982)(When a party reveals part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter).

## CONCLUSION

DOA and the NT have produced numerous communications with AON relating to the "revamping" of the RFP, including a communication that discusses including GRMC as a minimum requirement. Hence, they should be required to produce all the communications with AON, especially the ones that refer to GRMC. For this reason, as well as the others discussed in this Reply, DOA and the NT should be required to produce any of the communications with AON that refer to GRMC or the alleged reasons for including GRMC as minimum requirement. Otherwise, TakeCare will be denied due process and hampered in its ability to present its claims and defend the allegations of DOA and the NT.

Respectfully submitted this 26th day of October, 2018.

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By: _____
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