

2020 SEP 10 PM 12:01

CLERK OF COURT

BY: _____

IN THE SUPERIOR COURT OF GUAM

THOMAS J. FISHER,

Petitioner,

v.

RORY J. RESPICIO, GENERAL MANAGER,
PORT AUTHORITY OF GUAM,

Respondent.

Special Proceeding SP0097-20

DECISION AND ORDER

This matter came before the Honorable Anita A. Sukola on August 3, 2020, upon Thomas J. Fisher’s (“Petitioner”) Verified Petition for a Writ of Mandamus. Petitioner appeared *pro se*. Assistant Attorney General James L. Canto II appeared on behalf of Respondent Rory J. Respicio. After reviewing the record, the parties’ arguments, and all applicable legal authorities, the court hereby issues the following Decision and Order **DENYING** Petitioner’s request for the Court to impose sanctions on Respondent.

BACKGROUND

Petitioner is a private attorney. Respondent is the General Manager of the Port Authority of Guam, which is an autonomous instrumentality of the Government of Guam. *See* 12 GCA § 10102. On July 1, 2020, Petitioner e-mailed Respondent to request documents pursuant to Guam’s Sunshine Reform Act of 1999 (“Sunshine Act”). Verified Petition (Jul. 15, 2020) Exh. A. Petitioner sought documentation regarding legal services rendered for the benefit of the Port Authority—specifically, “all memoranda, contracts, purchase orders, payment

1 applications, and payments for legal services,” as well as “all procurement records for legal
2 services” for the entire period between January 1, 2020, and July 1, 2020. *Id.* Later that same
3 day, Respondent sent an e-mail to Petitioner confirming that he received Petitioner’s request and
4 would respond accordingly. *Id.*

5 On July 15, 2020, Petitioner filed a Verified Petition for Writ of Mandamus, asserting
6 that Respondent failed to respond and failed to produce the requested documents. *Id.* at 2.
7 Petitioner claims that Respondent has “an absolute duty to respond to requests made to his
8 agency pursuant to the Sunshine Act and . . . an absolute duty to respond to Petitioner’s
9 Request.” *Id.* Petitioner therefore seeks (1) a writ of mandate ordering Respondent to disclose
10 the document, and (2) sanctions, including, *inter alia*, that Respondent be fined one thousand
11 dollars (\$1,000).

12 The Court held its first hearing in this matter on July 24, 2020. At the hearing,
13 Respondent asserted that his office had indeed e-mailed all requested documents to Petitioner on
14 July 8, 2020, thereby fully complying with the request. Min. Entry (Jul. 24, 2020). Respondent
15 offered to produce a computer screenshot proving that his office sent the e-mail on July 8, 2020.
16 *Id.* Respondent subsequently filed the Declaration of Margaret N. Duenas re Transmission of
17 Documents (Jul. 31, 2020). Per her Declaration, Ms. Duenas asserted that on July 8, 2020, she
18 e-mailed sixty-three pages of documents to the e-mail account from which Petitioner sent his
19 initial Sunshine Act request. *Id.* at 2.

20 Respondent additionally filed a document entitled Declaration of Service (Jul. 31, 2020).
21 The Declaration of Service avers that an employee of the Office of the Attorney General
22 attempted to e-mail a copy of the Declaration of Margaret N. Duenas to Petitioner but was not
23 successful. *Id.* The employee allegedly received a “bounce back” error message indicating that
24 the e-mail could not be delivered. *Id.* According to the alleged error message, a copy of which
25 was appended to the Declaration of Service, it appears that Petitioner’s “mail folder [was] over
26 the allowed quota (size)” and could not receive new messages. *Id.*

27 The Court held another hearing on August 3, 2020. At this hearing, Petitioner
28 acknowledged that the Office of the Attorney General had personally served him with some

1 documents. Min. Entry (Aug. 3, 2020). However, Petitioner asserted that the documents served
2 upon him did not comply with the scope of his request. *Id.* In response, Respondent argued that
3 the Sunshine Act does not require Respondent to personally serve the requested documents on
4 Petitioner, but simply to make the requested documents available for his inspection. *Id.*
5 Petitioner admitted that he had not traveled to the Port Authority to inspect the documents, but
6 he nevertheless renewed his request for the Court to impose sanctions on Respondent. At the
7 conclusion of the hearing, the Court took the issue of sanctions under advisement.

8 DISCUSSION

9 The Sunshine Act is the local analogue to the federal Freedom of Information Act
10 (FOIA). *See Macris v. Guam Mem'l Hosp. Auth.*, 2008 Guam 6 ¶ 33 (“[T]he Sunshine Act and
11 FOIA are alike in language, purpose, and subject matter . . .”). The Sunshine Act creates a
12 right for “any person” to inspect and take a copy of public documents. 5 GCA § 10103(a). If an
13 officer of a government agency fails to comply with a Sunshine Act request, a Verified Petition
14 for Writ of Mandamus in the Superior Court is an appropriate remedy. *Id.* § 10111(b).

15 Upon the filing of a Verified Petition, the Superior Court shall order the officer to either
16 promptly disclose the requested documents or to show cause why the officer need not do so. *Id.*
17 § 10111(c). If the officer neither discloses the requested documents nor fails to show good
18 cause for the failure to disclose, the Court may impose sanctions, including a one thousand
19 dollar (\$1,000) personal fine. *Id.* § 10112(a). Pursuant to Section 10112(a), such a fine is
20 appropriate only where the Court finds “that the public official’s decision to refuse disclosure is
21 not justified under this Chapter.” *Id.* Hence, the Court’s inquiry centers on the question of
22 whether Respondent made a “decision to refuse disclosure.”

23 The Court must first determine the date on which Respondent was required to disclose.
24 When an agency of Guam receives a request pursuant to the Sunshine Act, it must comply with
25 the request within four (4) working days from receipt of request. 5 GCA § 10103(d). The
26 term “working days” is not defined within the Sunshine Act and has not been clarified by the
27 Guam Supreme Court. The Court therefore looks to interpretations of FOIA for guidance. For
28 a FOIA request, legal holidays and weekend days do not constitute “working days” within the

1 meaning of the statute. *See, e.g., Judicial Watch, Inc. v. U.S. Dept. of Energy*, 191 F.Supp.2d
2 138, 139 (D.D.C. Mar. 5, 2002). Here, the Court takes judicial notice of the fact that July 4th and
3 5th fell on a weekend, and that July 3rd was a GovGuam holiday for the observation of
4 Independence Day. The Court thus calculates that four (4) working days after July 1, 2020,
5 would be July 8, 2020—precisely the date on which Respondent claims he e-mailed the
6 requested documents to Petitioner. If Respondent did indeed fully comply by July 8, 2020, his
7 disclosure would therefore be timely pursuant to Section 10103(d).

8 Based on the arguments advanced by the parties, in order to determine whether or not
9 Respondent actually complied by that deadline, the Court must make two related
10 determinations: one factual and one legal. The factual question presented is whether a
11 preponderance of evidence shows that the documents were not made available by July 8, 2020.
12 The related legal question presented is whether Respondent’s compliance necessarily required e-
13 mailing the requested documents to Petitioner. The Court addresses each in turn.

14 With respect to the evidentiary question, Petitioner bears the burden of showing that it is
15 more likely than not that Respondent failed to make the documents available. Petitioner’s
16 evidence is his sworn allegation that he did not receive the documents on or before July 8, 2020.
17 Respondent’s counter-evidence is his own sworn allegation that he e-mailed the documents on
18 July 8, 2020, as well as the sworn Declaration of Margaret N. Duenas (Jul. 31, 2020) which
19 appears to corroborate Respondent’s claim. There is no evidence in the record, and no other
20 reason to believe, that any of Petitioner, Respondent, and Ms. Duenas have spoken untruthfully.
21 Indeed, it appears plausible that the collective allegations can coexist. Viewing all allegations in
22 light of the Declaration of Service (Jul. 31, 2020), suggesting that Petitioner’s e-mail account
23 may be full or otherwise faulty, the Court recognizes a possibility that the culprit for Petitioner’s
24 lack of receipt may be technology rather than human willfulness. The Court therefore concludes
25 that there is not a preponderance of evidence in favor of a finding that Respondent decided not
26 to make the requested documents available to Petitioner.

27 The related legal question is whether the text of the Sunshine Act imposes a specific
28 legal duty for Respondent to e-mail the documents to Petitioner. When examining questions of

1 statutory interpretation, “the plain language of a statute must be the starting point.” *Amerault v.*
2 *Intelcom Support Servs., Inc.*, 2004 Guam 23 ¶ 14. The Court begins its analysis with 5 GCA §
3 10104, which provides that an agency “shall provide the [requested] record in any form or
4 format requested by the person if the record is readily reproducible by the agency in that form or
5 format.” The meaning of this statute is clear: if the requesting person requests that documents
6 be delivered in a particular form or format, and if the documents are “readily reproducible” in
7 that format, then the agency must deliver the requested documents in that format. Presumably,
8 an agency would have to comply with a specific demand for the documents to be delivered by e-
9 mail. Here, however, Petitioner’s request does not make such a specific demand; his request
10 merely states “Pursuant to the Sunshine Reform Act, Please provide the following”
11 Verified Petition (Jul. 1, 2020) Exh. A. Nothing in the request letter, or the e-mail carrying the
12 request letter, specifies that the documents had to be delivered by e-mail or in any other form.
13 Accordingly, the Court holds that Section 10104 is inapplicable to the instant Verified Petition.

14 With the specific right created by 5 GCA § 10104 inapplicable, the Court turns to the
15 general right created by 5 GCA § 10103. The Court notes that Section 10103, which provides
16 the general structure for Sunshine Act requests, is entitled “Right of *Inspection* of Public
17 Documents.” 5 GCA § 10103 (emphasis added). The body of the statute provides that every
18 person “has *the right to inspect and take a copy* of any public document on Guam.” *Id.* §
19 10103(a) (emphasis added). It further provides that “public records are *open to inspection at all*
20 *times during the office hours* of the agency.” *Id.* § 10103(b) (emphasis added). The meaning of
21 this statute is clear: members of the public have a right to travel to an agency, to view
22 documents there, and to make their own copies of the documents. Nothing in this statute—nor
23 anywhere else in the Act, excepting the inapplicable Section 10104—requires an agency to
24 deliver documents to a requesting person. Instead, the plain meaning of the above-cited
25 portions of Section 10103 is that a requesting person has the right to travel to an agency, to
26 request to see documents, and to make his or her own copies of those documents. That is the
27 full extent of the relevant right created by Section 10103.

1 Here, Petitioner has admitted on the record that he did not travel to the Port Authority
2 offices, did not request to view documents there, and did not pay to make copies of the
3 documents he seeks. These decisions appear to have been made of Petitioner's own volition;
4 nothing in the record suggests that Respondent inhibited or prevented Petitioner from doing any
5 of these things. Because Petitioner never traveled to the Port Authority offices, the record
6 contains no evidence as to whether the requested documents were available for Petitioner to
7 view and/or copy there on July 8, 2020. With no evidence to weigh, the Court by definition
8 cannot determine what a preponderance of the evidence would show.

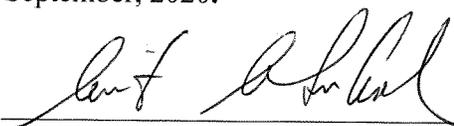
9 As the Court has explained, the evidence does not preponderate in favor of the
10 proposition that Respondent did not send the documents by e-mail on July 8, 2020. Likewise,
11 the evidence does not preponderate in favor of the proposition that Respondent did not make the
12 documents available for Petitioner's viewing at the Port Authority office on July 8, 2020.
13 Therefore, upon consideration of the whole record, the Court cannot find that Respondent
14 "decided to refuse disclosure" to Petitioner. Accordingly, it would not be appropriate to impose
15 a one thousand dollar (\$1,000) fine, or any other sanction, on Respondent at this time.

16 To be clear, the Court's decision today is not intended to relieve Respondent of his
17 statutory duties under the Sunshine Act. The Court's decision not to impose sanctions does not
18 mean that Respondent no longer needs to make the requested documents available to Petitioner.
19 The Court encourages the parties to communicate with one another in order to resolve
20 outstanding disputes, if any still remain, as to Petitioner's Sunshine Act requests.

21 **CONCLUSION**

22 For the foregoing reasons, Petitioner's request to impose sanctions on Respondent is
23 **DENIED.** The Court orders no sanctions on Respondent at this time.

24
25 **SO ORDERED** this 10 day of September, 2020.

26
27 
28 _____
The Honorable Anita A. Sukola
Judge, Superior Court of Guam