

FOR OFFICIAL PUBLICATION

**SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

ST. CROIX AVIS,	)	CASE NO. SX-15-CV-300
	)	
Petitioner,	)	ACTION FOR MANDAMUS
	)	
v.	)	
	)	
WEST INDIAN COMPANY, LTD a/k/a	)	
WICO,	)	
	)	
Respondent.	)	
	)	

Cite as: 2019 VI Super 81

Appearances:

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For Respondent

MEMORANDUM OPINION

MOLLOY, Judge.

¶1 **BEFORE THE COURT** is a motion filed by West Indian Company, Limited (“WICO”), to dismiss for failure to state a claim for relief, and a motion filed by the St. Croix Avis (“the Avis” or “Petitioner”), for leave to amend the petition.¹ Also before the Court is the Avis’ motion for sanctions and WICO’s motion to strike the Avis’ motion for sanctions. For the reasons stated below, WICO’s

¹ Because the Avis referred to itself both as plaintiff and petitioner, and because the Court concludes below that the operative pleading is a petition, to avoid confusion, the Court refers to the Avis as “Petitioner” throughout this Opinion.

motion to dismiss will be construed as a motion to deny the petition and will, itself, be denied. The Avis' motion to amend, construed as a motion to amend and to supplement, will be granted. Finally, the motion for sanctions and to strike the motion for sanctions will both be denied.

I. BACKGROUND

¶2 Where the Governor of the Virgin Islands of the United States must reside during his time in office is a question that has shadowed several governors in recent years. *Cf. Olive v. de Jongh*, 57 V.I. 24 (Super. Ct. 2012); *People v. de Jongh*, 64 V.I. 53 (Super. Ct. 2016); *see also* Act No. 7834, 2015 V.I. Sess. L. 268, 268 (Jan. 26, 2016) (“An Act providing for temporary housing for the Governor of the Virgin Islands and for other purposes.”). According to the law, the Governor of the Virgin Islands must “maintain his official residence in the Government House on Saint Thomas during his incumbency,” and “[w]hile in Saint Croix the Governor may reside in Government House on Saint Croix.” 48 U.S.C. § 1591. “[H]istorically,” “the third floor of Government House has . . . been used as the official residence of the Governor of the United States Virgin Islands.” Act No. 7834, 2015 V.I. Sess. L. at 269. But “in 1995, the 5th elected Governor of the Virgin Islands, Governor Roy L. Schneider, converted the third floor of Government House into additional office space for the Office of the Governor and for the most part the third floor has been used as office space since that period in time.” *Id.* The 6th elected Governor of the Virgin Islands, Governor Charles W. Turnbull, took up residence in a building acquired by the Government of the Virgin Islands “as part of the transaction that purchased the West Indian Company Limited from Denmark and placed this property under the ownership of the West Indian Company.” *Id.* That building, situated on Denmark Hill on St. Thomas, is in Estate Catherineberg and, colloquially, known as Catherineberg. *See id.* (“[T]he West Indian Company-owned Catherineberg property contains structures that were used as the

residence of the former Directors of the West Indian Company prior to the acquisition of the property by the Government of the Virgin Islands in 1993.”).

¶3 Annually “since the acquisition,” WICO leased Catherineberg “to the Government of the Virgin Islands for a nominal fee of \$1.00 per year . . . for the purpose of housing the Governor of the Virgin Islands.” *Id.* But that changed when “the 7th elected Governor, John P. Dejongh [sic], resided at his personal residence during . . . his tenure . . . leaving Catherineberg unoccupied.” *Id.* “[A]s a result of this lack of use,” Catherineberg became “uninhabitable and unusable.” *Id.*

¶4 While concerns over where the Governor should reside subsided somewhat during Governor de Jongh’s tenure, *but cf. Olive*, 57 V.I. at 24, the issue resurfaced in 2015 when Governor Kenneth E. Mapp was elected as the 8th Governor of the Virgin Islands. Governor Mapp maintained his primary residence on St. Croix and “had to reside in a rented property or hotel rooms,” *id.*, while on St. Thomas because Government House had been converted into office space and Catherineberg was now uninhabitable. This case originated from requests for records pertaining to Villa Fratelli, one of the rental properties Governor Mapp stayed at while on St. Thomas.

¶5 The Avis, a St. Croix-based newspaper, submitted a request to WICO under the Virgin Islands Public Records Act, *see generally* 3 V.I.C. § 881, *et seq.*, to obtain documents pertaining to WICO’s decision to lease Villa Fratelli for Governor Mapp’s use. Specifically, the Avis requested:

1. The lease agreement between Governor Kenneth E. Mapp and[/]or the Virgin Islands Government for the villa rental at Estate Nazareth and the owner Mr. Jimenez Ashby or his designee;
2. Any WICO Board meetings minutes discussing the said lease, the roll call on the villa lease vote and any cancelled checks for related rental payments; [and]
3. Any documents and expenses related to that lease and occupancy.

(Pet. ¶ 4(a)-(c).) WICO declined the Avis’ request. So, the Avis, on July 31, 2015, filed a petition for mandamus and injunctive relief in the Superior Court of the Virgin Islands.

¶6 The Court set a deadline for WICO to file a response to the Avis' petition, ordered the Avis to file a brief in support of its petition, and set this matter for oral argument. WICO responded by filing a motion to dismiss for failure to state a claim, challenging the Avis' right to seek mandamus relief, *inter alia*, because "WICO is not a Governmental Agency as defined in the Public Records Act." (Resp. Mem. in Supp. of Mot. to Dismiss 3, filed Sept. 8, 2015 (hereinafter "Dismiss Mot.") (citing 3 V.I.C. § 883(b)(3)).) The Avis opposed, countering that "[a]ll WICO records belong to the Territory." (Pet'r's Opp'n to Mot. to Dismiss 5, filed Sept. 23, 2015 (hereinafter "Dismiss Opp'n").)

¶7 Notwithstanding that it had moved to dismiss the petition, WICO went ahead and filed a response as well as copies of the documents the Avis sought. Specifically, WICO provided copies of (1) the unexecuted lease for the rental of Villa Fratelli; (2) the guest folio representing the negotiated rental of \$12,500 per month all inclusive; (3) two resolutions passed by WICO's board concerning the rental; (3) a copy of the payment WICO made to the Villa owner; (4) a copy of the rebate from the owner representing the difference between the sum paid by WICO and the final sum agreed upon between the parties; and (6) transcripts of board meetings held on April 14, 2015 and June 9, 2015 when the rental was discussed and voted upon. A privilege log accompanied WICO's response because the transcripts were significantly redacted.

¶8 At the conclusion of the hearing, the Court directed the parties to address the scope of the attorney-client privilege exception to the public records act. *See* 3 V.I.C. § 881(g)(4). Counsel for WICO attended the two board meetings for which the Avis requested transcripts. During oral argument, a question arose whether the attorney-client privilege applies to the public records act. The Court also ordered WICO to submit unredacted copies of the board meeting transcripts under seal for an *in camera* review.

¶9 WICO was given until October 13, 2015 and October 16, 2015, respectively, to submit the sealed transcripts and file its supplemental brief. The Avis was given until October 26, 2015 to file a response to WICO's brief. At that point, the record was to be closed. (*See* Hr'g Tr. 90:1-4 ("THE COURT: Okay. So, to the extent that we need sequential briefing I will give you ten days and then [opposing counsel] ten days and then we close the record after that.")) Nine days after the hearing, WICO filed an amended response and privilege log asserting new grounds not raised at the hearing. The Avis objected on October 27, 2015 and moved for sanctions, which WICO opposed by filing a motion on November 10, 2015 to strike the motion for sanctions. The Avis opposed WICO's motion to strike and, on November 3, 2015, moved for leave to file an amended petition, which WICO opposed on November 16, 2015.

¶10 The Court took under advisement the merits and the several motions the parties had filed. Subsequently, the United States Court of Appeals for the Third Circuit held in *Sprauve v. the West Indian Company, Limited*, 63 V.I. 1032, 1045 (3d Cir. 2015), that WICO is a public agency and "subject to the constraints of the Constitution." Additionally, the Supreme Court of the Virgin Islands further held in *Virgin Islands Taxi Association v. the West Indian Company, Limited*, 66 V.I. 473, 485-86 (2017), that WICO is a public agency for purposes of the Virgin Islands' taxpayer lawsuit statute. Finally, Virgin Islanders elected the 9th elected Governor of the Virgin Islands, Governor Albert Bryan, Jr. As a result of these intervening changes, the Court set this matter for a status conference.

¶11 During the status conference, counsel for WICO informed the Court and the Avis that WICO's board decided to make WICO's records available to the public. WICO had no objection, therefore, to providing the Avis with unredacted copies of the April 14, 2015 and June 9, 2015 transcripts. Counsel for WICO asserted that the board's decision mooted (once the transcripts were provided)

the Avis' mandamus petition. Counsel for the Avis agreed, but as a caveat pointed to the Avis' motion to amend, which was still pending. After further argument from the parties, the Court took this matter under advisement. Nothing further has occurred to date except the Court denied a request WICO submitted for leave to file a post-hearing brief.

II. DISCUSSION

A. Motion to Dismiss

¶12 Before turning to the merits of WICO's motion to dismiss, the Court must first address WICO's contention that this proceeding has become moot. WICO has advanced several reasons why this matter is moot, both at the recent status conference and in various papers filed in this proceeding. First, WICO asserts that this matter is moot because WICO voluntarily provided all the documents the Avis initially requested before seeking mandamus relief. Only the transcripts were redacted and the redactions, according to WICO, were done to avoid waiving attorney-client privilege. But more importantly, this proceeding is moot, WICO asserts, because WICO's board agreed to make its records open to the public. And counsel for WICO represented in court that WICO would not have an objection to the Court unsealing the transcripts and ordering WICO to provide the Avis with unredacted copies. But none of this renders the entire proceeding moot.

¶13 Under Virgin Islands law, mootness occurs "when the court's decision . . . will be hypothetical or academic or without any practical significance." *Der Weer v. Hess Oil V.I. Corp.*, 60 V.I. 91, 99 (Super. Ct. 2014) (quotation marks and citation omitted). Mootness does not concern "whether a Virgin Islands court has authority to preside over a case that does not present an actual controversy." *Id.* at 98 n.6. The reason why is because mootness—in the case-or-controversy sense—is "a non-jurisdictional claims processing rule that is subject to waiver in Virgin Islands

courts.” *Id.* (quotation marks and citation omitted). But when used in the sense of something being hypothetical or academic, the question becomes “whether a change in the circumstances that prevailed at the beginning of litigation has forestalled the prospect for meaningful relief.” *V.I. Taxi Ass’n v. V.I. Port Auth.*, 67 V.I. 643, 663 (2017) (quotation marks and citation omitted). In other words, when “a decision will have no practical impact in the case however the court [rules],” *Der Weer*, 60 V.I. at 99, then the case may be moot.

¶14 In this instance, WICO is correct in part. A portion of this matter did become moot once WICO provided the Avis with some of the documents it requested. By providing the Avis with a copy of the lease agreement for Villa Fratelli, WICO mooted the Avis’ petition in part. WICO also mooted the Avis’ petition in part by providing the Avis with the documents and expense receipts relating to the lease. Had WICO further provided the Avis with unredacted copies of the board meeting transcripts, either through counsel in court or in advance of the status conference, then WICO would have mooted the Avis’ petition in its entirety because everything the Avis had requested would have been provided.

¶15 But WICO has not provided copies of the transcripts, so far as the record shows, because WICO has not filed notice that it provided copies to the Avis. Instead, WICO awaits an order of the court, directing it to provide unredacted copies of the transcripts to the Avis. Before this Court can issue that order, the Court must be assured that the order is lawful. *Cf. Fontaine v. People*, 56 V.I. 571, 590 n.12 (2012) (“[I]t is not only the right but the duty of the trial judge to refuse to intentionally commit error, even harmless error.” (quotation marks and citation omitted)). Courts do not order litigants to act or refrain from acting for the sake of convenience. Rather, courts order litigants to do or not do something because the law compels that result. So, the Court cannot just

order WICO to provide the transcripts to the Avis to moot this case. Mootness is a claims processing doctrine akin to an affirmative defense that must be asserted by a party. *Cf. Paese v. Hartford Life & Accident Ins. Co.*, 449 F.3d 435, 443 (2d Cir. 2006) (analogizing claim-processing rules to affirmative defenses “subject to equitable considerations such as waiver, estoppel or futility.”); *see also Malloy v. Reyes*, 61 V.I. 163, 175 n.9 (2014) (“It is unquestionably error for the Superior Court to raise an affirmative defense *sua sponte* on behalf of a defending party where that party has waived the issue by failing to raise it or support it with evidence.” (citation omitted)).

¶16 Here, WICO asserted mootness multiple times through this proceeding, both in its motion papers as well as in open court. And WICO did moot the Avis’ petition in part – not by supporting it with evidence. Mootness is akin to, not identical to, an affirmative defense, so it is not proven. Instead, mootness results from changes that occur during litigation, “a change in the circumstances that prevailed at the beginning of litigation.” *V.I. Taxi Ass’n*, 67 V.I. at 663 (quotation marks and citation omitted). Rather, by voluntarily providing the Avis with some of the relief it requested, WICO partly changed the circumstances that prevailed at the time when the Avis filed its petition. Except for the unredacted board meeting transcripts, the Avis now has all the records it requested. Furthermore, the concerns that had arisen, which prompted the Court to order WICO to file the transcripts under seal and the parties to brief the applicability of the attorney-client privilege to the Virgin Islands Public Records Act, would have also been eliminated if WICO had voluntarily provided the transcripts to the Avis. But that circumstance has not yet changed. And it will not change until the Court orders WICO to provide the transcripts. Consequently, the Court concludes that WICO’s motion is moot only as to the documents WICO already provided. It is not moot as to the transcripts. Moreover, the entire proceeding is not moot insofar as the underlying legal

question—whether WICO is a public agency subject to the Virgin Islands Public Records Act—remains unsettled and impacts on the Avis’ motion to amend and supplement. Granting leave would be futile if the Court were to conclude that WICO is not a public agency for purpose of the Virgin Islands Public Records Act.

¶17 Turning to the merits, the Court first notes that neither party addressed the legal standard that governs a motion to dismiss a *petition* for failure to state a claim for relief.² The standard governing motions to dismiss a *complaint* for failure to state a claim for relief is well-known. “The Virgin Islands is a notice pleading jurisdiction which . . . determines the sufficiency of a plaintiff’s complaint upon whether it ‘adequately alleges facts that put an accused party on notice of claims brought against it.’” *Toutouyoute v. St. Croix Trading Co., Inc.*, 69 V.I. 234, 236 (Super. Ct. 2018) (quoting *Mills-Williams v. Mapp*, 67 V.I. 574, 584, 585 (2017)); *see also id.* at 237 (“A complaint . . . must set forth ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’” (quoting V.I. R. Civ. P. 8(a)(2)). But “[a] complaint is not the same as a petition.” *Cruzan Tires v. Gov’t of the V.I.*, 68 V.I. 241, 249 (Super. Ct. 2018) (citations omitted).

² WICO’s motion was filed before March 31, 2017, the effective date of the Virgin Islands Rules of Civil Procedure, and was brought, therefore, under Federal Rule of Civil Procedure 12(b)(6), which applied to the Superior Court of the Virgin Islands through former Superior Court Rule 7. At that time, the legal standard was different. *Cf. Toutouyoute v. St. Croix Trading Co., Inc.*, 69 V.I. 234, 236-37 (Super. Ct. 2018); *see also Mills-Williams v. Mapp*, 67 V.I. 574, 584-86 (2017). Virgin Islands Rule of Civil Procedure 1-1 provides that the Virgin Islands rules “govern . . . proceedings in any action pending on the effective date of the rules or [their] amendment.” V.I. R. Civ. P. 1-1(c)(2). Several “Superior Court judges have concluded that courts should apply the procedure in effect at the time a motion was filed.” *Newton v. Hess Oil V.I. Corp.*, 68 V.I. 467, 474 n.2 (Super. Ct. 2018) (quotation marks and citations omitted). This Court agrees, insofar as applying current rules to motions filed under prior rules could be unfair. *See, e.g., Litwin Corp. v. Univ. Oil Products Co.*, 69 V.I. 363, 368 n.2 (Super. Ct. 2018); *see also In re: Kelvin Manbodh Asbestos Litig. Series*, 69 V.I. 394, 416 n.12 (Super. Ct. 2018) (applying current rules) (“[T]he focus here is not on past action, i.e., whether a motion is properly before the court, which necessarily entails determining whether the rules in effect at the time the motion was filed were complied with. Rather, the focus here is on future action, i.e., whether . . . [two cases] should be consolidated going forward. In that instance, this Court believes the Virgin Islands rule of procedure should be applied.”). Applying the legal standard in effect when WICO filed its motion would serve no purpose.

¶18 “Some civil actions are commenced by petition and not by complaint.” *Id.* at 250 (citations omitted). But here the Avis initially filed an action. (*See* Action 1, filed July 31, 2015 (“COMES NOW . . . [the] Avis, by and through undersigned counsel, and brings this Action for Mandamus and Injunction against West Indian Company Ltd.” (bold font omitted))). But an “action” is not a pleading. *Cf.* V.I. R. Civ. P. 7(a)(1)-(10). And all civil actions are “commenced by filing a complaint with the clerk of court.” V.I. R. Civ. P. 3. The Court could overlook the title since “[p]leadings must be construed so as to do justice.” V.I. R. Civ. P. 8(e); *accord Moorhead v. Mapp*, 62 V.I. 595, 601 n.6 (2015) (“it is the substance, and not the [title], of a document that controls the legal standard that the Court should apply.” (citations omitted)). For example, in *Moorhead*, the Supreme Court of the Virgin Islands concluded that the Superior Court should have overlooked the title of the document that initiated the lawsuit when determining what claims were pending. *See id.* But *Moorhead* was proceeding *pro se*, *see id.*, and the Avis is not.

¶19 Whether mandamus is commenced by complaint or by petition is an unsettled question of procedure. Nonetheless, courts have overlooked the error, if any, in mandamus having been commenced by complaint instead of by petition. *Cf. Bryan v. V.I. Water & Power Auth.*, 22 V.I. 48, 55 n.2 (Terr. Ct. 1986) (declining to consider “whether it is appropriate to consider a petition for a writ of mandamus as being a ‘civil action’” for jurisdictional purposes); *see also Donastorg v. Gov’t of the V.I.*, 45 V.I. 259, 262 n.1 (Terr. Ct. 2003) (“The plaintiff filed an *action* for a writ of mandamus, the proper vehicle however is to seek a *petition or application* for a writ of mandamus.”); *cf. Wilson v. Daily News of the V.I.*, 881 F.2d 82, 84 (3d Cir. 1989) (public records act case) (“In petitioning for an injunction in this case, the Government did not support its petition by filing an affidavit as required by the statute. Instead, the Government filed a verified complaint which failed to disclose the

confidential nature of the audit reports.”). Courts can also “reclassify the suit” but only if “nothing turns on whether [the] suit is described as a suit for mandamus or a suit to enforce a . . . right.” *Moorhead*, 62 V.I. at 601 n.6 (quotation marks and citation omitted). But this is, in fact, the question that is raised here, because the merits turns on what legal standard applies.

¶20 Typically, a petitioner must show a clear right to relief in the petition to move past the pleading phase. *Cf. Rivera-Moreno v. Gov’t of the V.I.*, 61 V.I. 279, 311 (2014) (“When presented with a petition for a writ of habeas corpus, a court must first determine whether the petition states a *prima facie* case for relief—that is, whether it states facts that, if true, entitle the petitioner to relief.” (quotation marks and citation omitted)); *accord Baumann v. Publ. Emples. Rel. Bd.*, 68 V.I. 304, 329 (Super. Ct. 2018) (citing cases holding that petitions for writs of prohibition, habeas corpus, and certiorari must show entitlement to relief in the initiating document). This threshold showing is required because petitions typically “proceed by permission and . . . must be granted.” *Cruzan Tires*, 68 V.I. at 250 (quotation marks and citation omitted); *accord Moorhead*, 62 V.I. at 598 n.4 (“Typically, when the initiating document in a case is styled as a petition—such as a petition for a writ of mandamus—and the court rules in favor of the respondent, it is appropriate . . . to state that the petition is denied.”). By contrast, a plaintiff only has to give “a short and plain statement of the claim showing that the pleader is entitled to relief.” V.I. R. Civ. P. 8(a)(2). Suits commenced by complaint do not have to make out a “*prima facie*” showing or a “clear entitlement” to the relief because courts do not grant complaints. *Cf. Cruzan Tires*, 68 V.I. at 250. Instead, the complaint is proven at trial.

¶21 Here, if the Avis is proceeding by complaint, then WICO’s pre-answer motion to dismiss is premature because courts must construe the allegations in a complaint in the light most favorable

to the plaintiff. The right to examine public records and to seek mandamus relief to enforce that right is authorized by law. *See* 3 V.I.C. § 881(b)(3). Thus, the Court cannot dismiss the Avis' complaint for failure to *state* a claim for relief. The claim the Avis has alleged is viable. But if the Avis is proceeding by petition, then WICO could challenge whether the Avis has shown that its "right to the writ is clear and undisputable." *In re: People of the V.I.*, 51 V.I. 374, 382 (2009) (*per curiam*). The petition would be denied, however, not dismissed. *Cf. Moorhead*, 62 V.I. at 598 n.4; *accord In re: Connor*, 61 V.I. 273, 276-77 (2014) (*per curiam*) (mandamus petition denied where relief sought—to have one judge appoint another judge as a senior judge—did not exist under Virgin Islands law). To resolve this impasse, the Court will construe the Avis' initiating document as a petition for two reasons.

¶22 First, after WICO filed its motion to dismiss, the Avis moved for leave to amend its initiating document and referred to that document as an amended *petition*. (*See* Pet'r's Mot. for Leave to File First Amend. Action for Mandamus and Inj. 1, filed Nov. 3, 2015 (hereinafter "Amend. Mot.") ("Plaintiff, St. Croix Avis, through undersigned counsel, files this Motion for Leave to file a First Amended Petition for Mandamus and Injunction." (emphasis added))).) Although courts do look beyond titles and labels to consider the substance of the documents filed in court, *see Moorhead*, 62 V.I. at 601 n.6, and notwithstanding that the party is represented by counsel, *cf. Anthony v. FirstBank V.I.*, 58 V.I. 224, 228 n.5 (2013); *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 611-12 (2012), courts also cannot second-guess the choices litigants make, particularly when represented by counsel. The initiating document the Avis initially filed said "action," not complaint or petition. The proposed amendment to that document says petition. The Court declines to construe the pleading as a complaint or reclassify this suit as a civil action.

¶23 Second, and more importantly, the Virgin Islands public record act directs that suits for injunctive relief must proceed by “petition supported by affidavit.” 5 V.I.C. § 881(h). Although section 881(h) only refers to injunctive relief and not to mandamus relief, which are similar but not the same,³ enforcing the same cause of action via different initiating documents, with the only difference being what relief is sought, e.g., mandamus by complaint and injunction by petition, would be confusing to laymen and lawyers alike. This Court holds that suits seeking mandamus or injunctive relief under the Virgin Islands Public Records Act should proceed by petition, absent a different procedure. *Cf.* V.I. R. Civ. P. 1-3(a); *see* 3 V.I.C. § 881(h) (public records act cases proceed “[i]n accordance with the rules of civil procedure”); *accord* 55 C.J.S. *Mandamus* § 350 (2009) (“An application for a writ of mandamus is typically initiated by petition rather than by motion.” (footnote omitted)).

¶24 “[T]he very purpose of a mandamus petition is to compel performance of a ministerial duty.” *Simon v. Warden of the Bureau of Corr.*, 69 V.I. 963, 968 (2018) (citations omitted). There may be a “[r]easonable delay [before] . . . permitting the examination of a record,” 3 V.I.C. § 881(h), perhaps to determine whether “access . . . is limited by . . . [the] express exemptions found in 3 V.I.C. § 881(g),” *Wilson*, 881 F.2d at 86, or while the government agency “seek[s] an injunction.” 3 V.I.C. § 881(h). But generally, providing access to public records is a ministerial duty and suits to compel or enjoin such access are summary proceedings that may proceed by petition.⁴ Since the *Avis* filed

³ Mandamus relief and injunctive relief are opposite sides of the same coin. *Cf. Dobrovolny v. Reinhardt*, 173 N.W.2d 837, 841 (Iowa 1970) (“Before a writ of mandamus can be granted performance must have been demanded. . . . Rights already lost and wrongs already committed are not subject to injunctive relief, especially when there is no showing the wrong will be repeated.” (citations and paragraph break omitted)).

⁴ Commencing a public records act suit by petition further ensures that the civil proceeding is not automatically saddled with all the discovery automatically accompanying civil actions commenced by complaint. *E.g.*, V.I. R. Civ. P. 13, 14, 26-37. This is not to say that discovery is unavailable in mandamus proceedings. *Cf. Conservation Law Found., Inc. v. Clark*,

a petition for mandamus relief, WICO could move to deny (not dismiss) the petition, not because the Avis failed to state a claim for relief, but because the Avis failed to carry its burden to show it is clearly entitled to the relief. (*Cf.* Dismiss Mot. 1 (“The granting of mandamus relief . . . would necessarily force WICO to disclose the very information requested, without affording WICO any opportunity to fully and fairly litigate its position on the merits, specifically . . . that it is not a ‘Governmental Agency.’”).) Admittedly, the Court is drawing a fine line because the legal standard for a motion to deny a petition for a writ of mandamus is similar to a motion to dismiss a complaint for failure to state a claim for relief. But when a petition shows that a request was made to a governmental agency to examine a public record and access to examine or to copy the record was denied, then the petition makes out a clear claim to mandamus relief under the Virgin Islands Public Records Act.

¶25 Having construed WICO’s motion to dismiss as a motion to deny, the Court now turns to the merits. WICO offered two reasons in support of denying the petition. First, WICO points out that mandamus relief “is ‘a drastic remedy that a court should grant only in extraordinary circumstances in response to an act amounting to a judicial usurpation of power.’” (Dismiss Mot. 2-3 (quoting

590 F. Supp. 1467, 1472-73 (D. Mass. 1984) (“Courts have indicated that independent fact finding under mandamus is appropriate in some circumstances, even where agency action is under review.” (citations omitted)); *see also A. O. Smith Corp. v. FTC*, 530 F.2d 515, 527 (3d Cir. 1976) (“[W]e agree with the district court that the availability of discovery in a summary enforcement proceeding is not foreclosed to either party. . . . [since] the compass of available discovery is circumscribed by the requirement that discovery be relevant to the subject matter involved in the pending action, and not by the form of the action.” (quotation marks and citations omitted)). But mandamus proceedings are summary proceedings. *Cf. United States v. Associated Merch. Corp.*, 256 F. Supp. 318, 321 (S.D.N.Y. 1966) (“At common law, a mandamus proceeding was a summary proceeding. A writ of mandamus issued in a proceeding instituted by motion or by a petition and order to show cause, not after a plenary trial.”). Discovery may be necessary in some instances but not in all. *Accord Graham v. Baker*, 447 N.W.2d 397, 402 (Iowa 1989) (“An action for mandamus is a summary and extraordinary proceeding. A summary proceeding is one in which the established course of legal proceedings may be disregarded. Chapter 661 recognizes this principle. Section 661.10 requires that ‘as nearly as may be,’ proceedings in an action for mandamus shall be the same as those in an ordinary action. The words ‘as nearly as may be’ indicate a clear understanding of the differences between mandamus and other actions. Mandamus is an action to compel one who, by law, owes a duty to perform that obligation. Mandamus proceedings can be used only to compel the performance of a ministerial act which must be performed on a given state of facts.” (citation omitted)).

Birdman v. Office of the Gov., 56 V.I. 973, 983 (3d Cir. 2012)). “For a Writ of Mandamus to issue, there must clear right in the plaintiff for the relief sought,” WICO contends. *Id.* at 4 (citing *Richardson v. V.I. Hous. Auth.*, 18 V.I. 351, 356 (D.V.I. 1981)). The Avis does not meet this standard, WICO argues, because the “Avis was . . . able to obtain the documents requested from other sources including the Government of the Virgin Islands.” *Id.* at 5. Consequently, the Avis cannot show that it has “no other adequate remedy available.” *Id.* at 3 (quoting *Richardson*, 18 V.I. at 356). Consequently, mandamus relief is not available here, WICO asserts.

¶26 Second, and more importantly, WICO argues that the Avis’ petition fails because WICO is not a government agency under the public records act. Section 883 of title 3 of the Virgin Islands Code defines governmental agencies as “the Legislature, any governmental entity, board, bureau, commission, department, agency, division, authority, office, or agent, or semi-private governmental entity receiving governmental funds for its operation in whole or in part, or any entity having bonding authority under the United States Virgin Islands Government in whole or in part.” 3 V.I.C. § 883(b)(3). “WICO does *not* receive any governmental funds for its operation in whole or in part,” WICO asserts, “and there is no specific provision in WICO’s enabling statute conferring bonding authority.” (Dismiss Mot. 3.) WICO concedes that the United States Court of Appeals for the Third Circuit did conclude in *Sprauve* that WICO “is part of the government *for purposes of the constitutional claims and section 1983 claims.*” (Dismiss Mot. 5 (quoting *Sprauve*, 63 V.I. at 1047).) But that holding does not extend to the public records act, WICO contends. So, since the Avis can obtain the documents it requested from other entities, and because WICO is not a government agency, the petition should be denied, WICO concludes.

¶27 The Avis disagrees. Mandamus relief is appropriate, the Avis counters, because it is “the statutorily prescribed enforcement mechanism[.]” (Dismiss Opp’n 2 (citing 3 V.I.C. § 881(e)).) “[O]nce this Court makes the initial determination that the records sought are subject to public inspection . . . a mandamus . . . must be issued as a matter of law,” the Avis contends. *Id.* Moreover, WICO “is a public corporation,” the Avis counters, because it is “an instrumentality of the government and a wholly owned subsidiary of the Virgin Islands Public Finance Authority.” *Id.* at 1 (citing Act No. 5826, 1993 V.I. Sess. L. 10 (Mar. 31, 1993)). “Act 5826 specifically states that WICO ‘shall be deemed to be a public entity operating on behalf of the Government.’” *Id.* (quoting Act No. 5826, § 8(b), 1993 V.I. Sess. L. at 13.) “There is no other reading,” the Avis asserts, “that can support an argument . . . that WICO is not a government entity for purposes of” the public records act. *Id.*

¶28 Having considered the parties’ arguments, the Court concludes that WICO’s motion must be denied. WICO is correct in that, ordinarily “to obtain a writ of mandamus, a petitioner must establish that it has no other adequate means to attain the desired relief and that its right to the writ is clear and undisputable.” *In re: People of the V.I.*, 51 V.I. 374, 382 (2009) (*per curiam*); accord 5 V.I.C. § 1361(a) (“In an appropriate action, or upon an appropriate motion in an action . . . the [superior] court may issue a mandatory order to any . . . corporation . . . to compel the performance of an act which the law specially enjoins as a duty The order shall not be issued in any case where there is a plain, speedy, and adequate remedy in the ordinary course of the law.”). But here, the Avis is seeking mandamus relief under the Virgin Islands Public Records Act and the public records act “may be enforced by mandamus or injunction *whether or not any other remedy is also available.*” 3 V.I.C. § 881(e) (emphasis added). Thus, WICO’s first argument must be rejected. Whether the Avis has any other adequate means to obtain the documents it seeks is irrelevant and to import the “no

other adequate means” requirement into section 881 would eviscerate the statute and effectively rewrite it. *Cf. People v. Noel*, 68 V.I. 196, 210 (Super. Ct. 2017) (“Courts are not authorized to rewrite, revise, modify, or amend statutory language in the guise of interpreting it.” (quotation marks, brackets, and citation omitted)). The Avis asserted a valid cause of action and it does not have to show that it has no other adequate means to attain the records it requested.⁵

¶29 WICO’s second argument is more complicated because it raises a threshold issue, whether WICO is a public agency subject to the public records act. To determine whether the Avis is entitled to mandamus relief, the Court looks to the statute. “It is well-settled that the interpretation of a statute begins with its plain meaning.” *Thomas v. People*, 69 V.I. 913, 923 (2018) (citation omitted). Courts “begin and end [their] inquiry with the text, giving each word its ordinary, contemporary, common meaning.” *Id.* (quotation marks and citations omitted). Indeed, “[w]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.” *Heyliger v. People*, 66 V.I. 340, 351 (2017) (quotation marks, brackets, and citations omitted).

¶30 The Virgin Islands Public Records Act defines “public records” as “all records and documents of or belonging to this Territory or any branch of government in such Territory or any department,

⁵ WICO’s first argument also raises another issue relevant to the petition-versus-complaint consideration in that WICO is presenting facts in support of its motion that are not found in the petition, i.e., that the Avis already obtained several of the documents it requested. (*See* Dismiss Mot. 4-5 (“Clearly, Plaintiff had such avenue of relief as: the unsigned lease was previously published in its newspaper’s Sun-Mon June 21-22, 2015 edition, complete details of the expenses and checks, as well as the roll call of the vote of the WICO Board were provided to the Legislature in a public meeting in testimony and by Exhibits. All documents were provided to the Legislature. Plaintiff St. Croix Avis was therefore able to obtain the documents requested from other sources including the Government of the Virgin Islands. Consequently, the St. Croix Avis has other remedies available to them to obtain the information requested.”).) If the Court could deny the Avis’ petition based on WICO’s outside-the-pleadings argument, it would render standardless dispositive motions filed in section 881 suits because allegations in a petition could be overcome by arguments of counsel in motion papers. *Contra Moorhead*, 62 V.I. at 599 (citing *Henry v. Dennery*, 55 V.I. 986, 994 (2011)). The Avis’ petition does not allege that it obtained documents from other sources but nonetheless wants to obtain certified copies from WICO. *Cf.* 3 V.I.C. § 882. Instead, the Avis claims that it “made a request” and that “WICO has not responded to the request and has not provided the documents nor allowed the documents to be reviewed and copied.” (Pet. ¶¶ 4,5.) This is a clear statement showing its entitlement to relief, assuming that WICO is a public agency. *See infra*.

board, council, or committee of any branch of government.” 3 V.I.C. § 881(a). Thus, WICO’s records and documents are public records, but only if the records and documents belong to the Territory or if WICO is part of a branch of the Virgin Islands Government. There is no dispute that WICO is a “public corporation and governmental instrumentality of the Government of the Virgin Islands of the United States” and a “public entity operating on behalf of the Government, rather than a private corporation.” Act No. 5826, § 8(b), 1993 V.I. Sess. L. at 13. Yet, WICO still argues that it is not public, but private.

¶31 “WICO was founded in 1912, prior to the United States’ acquisition of the Virgin Islands from Denmark in 1917. WICO began as a coal bunkering business and later grew to serve as the ‘Port Agent’ for the cruise lines that visit the port of Charlotte Amalie in St. Thomas.” *Sprauve*, 63 V.I. at 1035 (citation omitted). “In 1993, the Government of the Virgin Islands purchased 100% of the shares of WICO through a Stock Purchase Agreement,” *id.*, “between Selendia Finance and Investment, B.V. and the Government of the Virgin Islands, under which the Government agreed to buy all of WICO’s issued and outstanding stock from Selendia.” *V.I. Taxi Ass’n*, 66 V.I. at 478-79 (citation omitted). The Legislature of the Virgin Islands approved the stock purchase agreement “in a special session in Act No. 5826.” *Sprauve*, 63 V.I. at 1035 (citation omitted).

Following this acquisition, the Government of the Virgin Islands transferred 100% of WICO’s shares to the Virgin Islands Public Finance Authority (“PFA”), a public corporation and governmental instrumentality created by the Government of the Virgin Islands. The PFA is run by a board of directors appointed by the Governor of the Virgin Islands, with the advice and consent of the Virgin Islands Legislature and WICO is run by its own board of directors, appointed by the PFA.

V.I. Taxi Ass’n, 66 V.I. at 478-79 (citations, quotation marks, brackets, and ellipsis omitted).

¶32 Act No. 5826 made it clear that WICO was to be a part of the Government of the Virgin Islands. To be sure, “[t]he Revised Organic Act—the Virgin Islands’ *de facto* constitution—accords

governance power over the territory among a legislative branch, an executive branch, and a judicial branch.” *In re: Joseph*, 65 V.I. 217, 224 (2016) (citation omitted). There is no fourth branch of government. So, WICO, is not a fourth branch of the Virgin Islands Government. But WICO is a part of the executive branch. *Cf. Fed. Mar. Comm’n v. S.C. Ports Auth.*, 535 U.S. 743, 773 (2002) (Stevens, J., dissenting) (“Constitutionally speaking, an ‘independent’ agency belongs neither to the Legislative Branch nor to the Judicial Branch of Government. Although Members of this Court have referred to agencies as a ‘fourth branch’ of Government, the agencies, even ‘independent’ agencies, are more appropriately considered to be part of the Executive Branch.” (citations omitted)).

¶33 As WICO concedes in its motion, the Third Circuit concluded that “WICO is an agency or instrumentality of the Virgin Islands and subject to the constraints of the Constitution,” *Sprauve*, 63 V.I. at 1045, though only “for purposes of . . . constitutional and section 1983 claims.” *Id.* at 1046.⁶ The Supreme Court of the Virgin Islands also held that “the Virgin Islands Code treats public corporations as public agencies.” *V.I. Taxi Ass’n*, 66 V.I. at 485. Because WICO has “the status and authority of a public corporation and governmental instrumentality,” Act No. 5826, § 8(b), 1993 V.I. Sess. L. at 13, WICO is clearly a part of the Government of the Virgin Islands. And, because there are only three branches of government, it necessarily follows—and this Court holds—that, for purposes of the Virgin Islands Public Records Act, WICO is a public agency within the executive branch of the Government of the Virgin Islands. WICO’s records are public records because “‘public records’

⁶ The Court cites to *Sprauve* only as it bears on the broader inquiry whether WICO is an agency or instrumentality of the Virgin Islands Government. But the Court does note that *Sprauve* appears to conflict with *Ngiraingas v. Sanchez*, 495 U.S. 182 (1990), in which the Supreme Court of the United States held that Congress did not intend to encompass Territories to liability under section 1983 unless seeking injunctive relief. *See id.* at 187 (“Our review of § 1983’s history uncovers no sign that Congress was thinking of Territories when it enacted the statute over a century ago in 1871. The historical background shows with stark clarity that Congress was concerned only with events ‘stateside.’”).

includes all records and documents of or belonging to . . . any department, board, council or committee of any branch of government.” 3 V.I.C. § 881(a).

¶34 Nonetheless, although WICO conceded during oral argument that section 8(b) of Act No. 5826 clearly demonstrates the Legislature’s intent that WICO is “a public entity operating on behalf of the Government, rather than a private corporation,” Act No. 5826, § 8(b), 1993 V.I. Sess. L. at 13, WICO nonetheless maintains that it should not be treated as public agency for purposes of the public records statute for two reasons. First, WICO argues that subsequent amendments to Act No. 5826 requiring WICO to make contributions to the general fund transformed WICO from a public entity back into a private entity. Second, WICO contends that the definition of a public agency under the public records act clearly excludes WICO. The Court addresses each argument below.

1. Later Amendments Did Not Change WICO’s Status

¶35 WICO is correct that, after the passage of Act No. 5826, the Legislature amended the Act several times, specifically pertaining to WICO’s contributions to the Treasury of the Government of the Virgin Islands.⁷ But the Court does not find that these amendments have any bearing here for several reasons. First, none of the amendments expressed any intent by the Legislature to change the status of WICO from a government entity to a purely private corporation. In fact, none of the amendments altered the language in section 8(b) of Act No. 5826, which designated WICO as a

⁷ After the Government purchased 100% of the shares of common stock of WICO in 1993, the Legislature passed five acts requiring WICO to contribute to the government’s treasury. First, on April 6, 1998, the legislature passed Act No. 6224, which amended Act No. 5826, § 8(b), by adding “[i]n lieu of taxes, [WICO] shall pay ten percent (10%) of its revenues to the Government of the Virgin Islands as contribution to the General Fund.” Act No. 6224, § 2. Then, on November 23, 1999, the Legislature passed Act No. 6333, amending Act No. 6224, § 2, by inserting “or \$500,000, whichever is greater.” Act No. 6224, § 26(a)(2). Next, on October 19, 2000, the Legislature passed Act No. 6361, which required WICO to pay \$1,000,000 to the General Fund for fiscal year ending September 30, 2001. Additionally, on July 14, 2003, the Legislature amended Act No. 6333, § 26(a)(2), by requiring WICO to pay \$1,000,000 to the General Fund. Finally, on December 22, 2007, the Legislature passed Act No. 6984, which amended Act No. 6585, and required, WICO to pay the greater of 10% of its annual net revenues, or \$700,000, to the General Fund.

governmental instrumentality operating on behalf of the Government. Amendments concerning WICO's contributions to the General Fund show nothing more than the Legislature's intent that WICO should contribute funds to the Territory from its revenue-generating operations. And WICO's argument is made even less persuasive by the fact that the Legislature listed WICO as a governmental instrumentality in legislation passed in 2009. *See* Act No. 7074, § 1, 2009 V.I. Sess. L. 64 (July 2, 2009), *codified at* 23 V.I.C. § 1007(a)(5)(C) (listing WICO as a semiautonomous agency of the government for emergency management and homeland security purposes). What's more, the Legislature routinely enacts legislation that requires contributions from governmental agencies to the Treasury of the Government of the Virgin Islands. *See e.g.*, 30 V.I.C. § 111(b) (requiring WAPA to pay 10% of its net revenues to the Government as a contribution to the General Fund); 32 V.I.C. § 246(a)(11) (requiring the Virgin Islands Lottery to contribute "not less than twenty percent (20%) of the net income of the lottery from all games authorized by this chapter to the General Fund of the Treasury of the Virgin Islands."). Legislation of this type is in no way an indication that the Legislature intends to transform these public agencies into a private corporation or remove their status as instrumentalities of the Government of the Virgin Islands.

¶36 But more to the point, the Legislature did amend Act No. 5826 in 2002, specifically to clarify that WICO is a public corporation. Prior to the 2002 amendment, Act 5826 provided that, "[i]n addition to the powers granted to the Company under this Act, the Company shall be empowered to undertake any lawful act or activity permitted under the Company Charter and permissible for a general business corporation under the general corporation laws of the Virgin Islands." Act No. 5826, § 4, 1993 V.I. Sess. L. at 12. However, in 2002, the Legislature passed legislation, overriding the Governor's veto, that replaced "general" with "public." *See generally* Act. No. 6530, § 1, 2002 V.I.

Sess. L. 357, 357 (June 21, 2002). As amended, section 4 of Act 5826 now provides that, “[i]n addition to the powers granted to the Company under this Act, the Company shall be empowered to undertake any lawful act or activity permitted under the Company Charter and permissible for a **public** business corporation under the **public** corporation laws of the Virgin Islands.” Act No. 5826, § 4, 1993 V.I. Sess. L. at 12, *amended by* Act No. 6530, § 1, 2002 V.I. Sess. L. at 357. The Legislature used very clear and unequivocal language to declare that WICO is an agent of the Government and has repeatedly reaffirmed that status. If the Legislature intended to change WICO’s status, it would have used similar language to that effect. It did not. Thus, WICO’s argument is rejected.

2. Governmental Agency as Defined Section 883(b)(3)

¶37 WICO argues that its records are not public because WICO does not fall within the statutory definition of a governmental agency. *See* 3 V.I.C. § 883(b)(3). Section 883 defines “[g]overnmental agenc[ies]” as

includ[ing] the Legislature, any governmental entity, board, bureau, commission, department, agency, division, authority, office, or agent, or semi-private governmental entity receiving governmental funds for its operation in whole or in part, or any entity having bonding authority under the United States Virgin Islands Government in whole or in part.

Id. “WICO does not receive any governmental funds for its operation in whole or in part,” WICO argues, “and there is no specific provision in WICO’s enabling statute conferring bonding authority under the United States Virgin Islands Government.” (Dismiss Mot. 3.) Thus, WICO argues that it cannot be considered a governmental agency as defined by section 883(b)(3). WICO is mistaken.

¶38 First, the Avis correctly points out in response that “the definitions of Section 883 do not apply to Section 881.” (Dismiss Opp’n 9.) Section 883(b) limits its defined terms to “this section,” 3 V.I.C. § 883(b), whereas section 881’s definition of public records covers “this chapter.” *Id.* § 881(a).

There could be inconsistencies in how the two statutes intersect, but any inconsistencies are not relevant here because section 883 concerns intra-government activities. The statute provides a process whereby government agencies provide copies of public records for the Territorial Librarian “to make governmental information available to governmental agencies and to the general public.” *Id.* § 883(a). WICO’s reliance on section 883 is misplaced. But more importantly, WICO would still qualify as a “governmental entity” outright, and not as a “semi-private governmental entity” as WICO would have the Court find. WICO is correct in that it does not receive governmental funds for its operation or having bonding authority under the Government. But the terms “governmental entity” appear twice within section 883 and WICO satisfies the first definition. Therefore, WICO’s argument is rejected.

¶39 Because WICO falls under the executive branch of the Government of the Virgin Islands, all records or documents belonging to WICO also falls within the definition of “public records” under the Virgin Islands Public Records Act. Thus, the inescapable conclusion is that all records and documents of or belonging to WICO, “a public entity operating on behalf of the Government,” Act No. 5826, § 8(b), are subject to disclosure under the Virgin Islands Public Records Act. Thus, WICO’s motion to dismiss must be denied and the Court will order WICO to provide unredacted copies of the April 14, 2015 and June 9, 2015 transcripts.

B. Motion to Amend / Supplement

¶40 After WICO’s motion to dismiss was fully briefed and argued, the Avis moved for leave to file an amended petition. No rule, precedent, or statute was cited in support. But the Avis did attach a copy of the “proposed amendments to the Petition and the nature of the changes.” (Amend. Mot. 1.) One proposed change was to allege that “WICO is a public corporation.” *Id.* at Ex. 2 (Proposed

Amend. Pet. ¶ 4). The other changes seek to supplement—not amend as the Avis suggests—its petition with additional claims for mandamus based on subsequent requests for records, which the Avis submitted to WICO after this suit had been filed and which WICO denied. Specifically, the Avis seeks supplemental mandamus relief because WICO refused to provide the following documents, which the Avis requested on October 9th and 13th, 2015, respectively:

information as to all Board Members and employees of WICO’s who were provided credit cards through WICO or that were paid whole or in part by WICO as well as the monthly credit card billings and statements from January 01, 2014, to the present[; and] the billing statements of Attorney [Adriane J.] Dudley from January 01, 2015 to present.

Id. at Ex. 2 (Proposed Amend. Pet. ¶¶ 6, 8).

¶41 WICO opposes the Avis’ motion largely because the Court, after hearing oral argument on WICO’s motion to dismiss, had stated from the bench that “the record . . . [was] closed.” (Resp’t’s Mem. in Supp. of Opp’n to Mot. for Leave to Amend the Mandamus Action 2, filed Nov. 16, 2015 (footnote omitted) (citing Hr’g Tr. 90:1-4 (Oct. 7, 2015).) WICO further opposes the Avis’ motion because the Avis failed to cite any authority in support and, finally, because amending the petition would be futile since WICO is not subject to the public records act.

¶42 While the Court agrees with WICO that the Avis’ failure to cite any authority in support of its motion is troubling, denying the motion on that basis alone would only invite another motion supported by authority. But more importantly, Superior Court Rule 8, which was in effect at the time when the Avis filed its motion, mandates granting leave when justice requires. *See Toussaint v. Stewart*, 67 V.I. 931, 944 (2017) (“While amendment pursuant to Superior Court Rule 8 is not amendment as a matter of right and granting leave to amend is reposed in the sound discretion of

the trial court, ‘when justice so requires’ is the mandate of the liberal rule of pleading amendments articulated in Superior Court Rule 8.” (citations omitted)). In fact,

Superior Court Rule 8 allows the court, as opposed to a party, to amend pleadings and contains no requirement that a motion be submitted as a prerequisite to seeking an amendment. Rule 8 categorically authorizes the trial court to amend any pleading for any omission or defect and specifically dictates that a party who is surprised by this amendment be given an appropriate amount of time to prepare and respond.

Id. at 945-46 (citing Super. Ct. R. 8). Nevertheless, even though

the standard for amendment of pleadings articulated in Rule 8 is extremely liberal and strongly favors the granting of leave to file an amended pleading, the trial court has discretion to deny leave to amend due to reasons such as undue delay, bad faith or dilatoriness, repeated failures to correct any deficiencies in the pleading, futility of amendment, undue prejudice to the moving party, etc.

Id. at 946 (citations omitted). But “[t]he passage of time alone is not undue delay.” *Id.* (citation omitted). Instead, “[d]elay . . . becomes undue when allowing the amendment places an unwarranted burden on the trial court.” *Id.* (citations omitted).

¶43 Here, the Court finds that the Avis’ failure to allege that “WICO is a public corporation” is a defect or omission that can be corrected through amendment pursuant to Superior Court Rule 8, which was in effect at the time the Avis filed its motion. Clearly, the Avis’ petition assumed that WICO is a public corporation because the Virgin Islands Public Records Act only applies to public entities. Omitting this allegation was a defect and allowing the amendment will cure the omission. It will not delay the suit or prejudice WICO. And it is not futile in light of the Court’s holding above that WICO is subject to the Virgin Islands Public Records Act. Therefore, the portion of the Avis’ motion that seeks leave to amend will be granted.

¶44 Whether the Avis should be allowed to supplement its petition with additional claims for mandamus relief made after this suit was initiated is more difficult. The Avis fails to realize that

“pleadings are supplemented to add claims or defenses that accrue after a case is commenced, not amended.” *Martinez v. Hess Oil V.I. Corp.*, 69 V.I. 519, 545 (Super. Ct. 2018) (citations omitted). At the time when the Avis filed its motion, supplementation of pleadings was governed by Federal Rule of Civil Procedure 15(d), which applied through Superior Court Rule 7. *See Brady v. Cintron*, 55 V.I. 802, 818 n.16 (2011); *see also* Fed. R. Civ. P. 15(d) (“On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.”). Supplementation of pleadings is generally allowed “because the goal . . . is to promote as complete an adjudication of the dispute between the parties as possible.” *Martinez*, 69 V.I. at 545 (quotation marks and citation omitted). But courts only allow the pleadings to be supplemented if it “will not unfairly prejudice other parties.” *Mathavious v. V.I. Port Auth.*, No. ST-09-CV-326, 2012 V.I. LEXIS 10, at *1-2 (Super. Ct. Mar. 21, 2012); *accord Micron Tech., Inc. v. Rambus Inc.*, 409 F. Supp. 2d 552, 558 (D. Del. 2006) (“The standard under Rule 15(d) is ‘essentially the same’ as that under 15(a) . . . leave to supplement should be granted unless it causes undue delay or undue prejudice.” (citing *Medeva Pharma Ltd. v. Am. Home Prods. Corp.*, 201 F.R.D. 103, 104 & n.3 (D. Del. 2001))). And whether to grant a motion to supplement is still left to “the sound discretion of the court.” *Medeva Pharma Ltd.*, 201 F.R.D. at 104.

¶45 The concern here is that granting the Avis leave to supplement will certainly delay this matter even further. WICO will have to be given leave to respond to the amended/supplemented petition. *Cf. James v. O’Reilly*, 2019 VI 14, ¶17 (“This Court has repeatedly and consistently held that the right to due process encompasses the right to be heard, which includes the right to present an objection within the full time permitted by law.” (citations omitted)). Presumably, based on the

arguments WICO has made to date, WICO will respond in opposition to the Avis' amended/supplemented petition, specifically the assertion that must provide credit card statements and the billing statements of its attorney, which will further delay this matter as another motion to deny the petition is addressed. Moreover, nothing precludes the Avis from filing a second petition based on WICO's refusal to provide the records the Avis requested on October 9th and 13th. The Avis could also resubmit its request to WICO once this proceeding has concluded (and any appeals are exhausted or the time to appeal has passed) and, if denied again, commence a new proceeding for mandamus relief. Neither WICO nor the Avis touched on these points. But the Avis did point out, in reply to WICO's opposition, that "[i]t makes no sense to require [Petitioner] to file a new open records Mandamus [proceeding] and to have to argue the same issue of private versus public in that [proceeding] when all such issues can be determined one time in this one [proceeding] without involving multiple judges and filings." (Pet'r's Resp. [sic] to Opp'n to Mot. for Leave to Amend Mandamus Action 2, filed Nov. 16, 2015.) And the Court agrees with the Avis in this instance.

¶46 Admittedly, the Avis did move for leave to supplement its petition after the parties had argued WICO's motion to dismiss, addressed the merits, and briefed a supplemental point of law. And the Court did state from the bench that the record would be closed once the supplemental briefing was filed. But WICO amended its response and the Avis then moved for leave to amend and to supplement. So, the record could not close with additional matters to be addressed. More importantly, however, the merits changed completely when WICO, through counsel, represented years later in open court that WICO's board had changed its position on the Virgin Islands Public Records Act. Although parties cannot stipulate to the law, *cf. In re: Pet. for the Expungement of Crim. Rec. of Callwood*, 66 V.I. 299, 303 (2017), WICO agreed to provide unredacted transcripts and the

Court independently determined that the transcripts would have to be provided because WICO is a public agency. So that portion of this proceeding is resolved. What remains to be addressed, once the petition is amended and supplemented, can be expedited.⁸ Accordingly, the Avis' motion, construed as a motion for leave to amend and to supplement will be granted.

C. Motion for Sanctions / Motion to Strike Motion for Sanctions

¶47 After WICO filed its amended response and revised privilege log, the Avis moved for sanctions, claiming WICO had "provid[ed] the court and the parties with a false privilege log and ma[de] false representations . . . as to the basis for the redactions in the original privilege log." (Pet'r's Obj to Rev'd Priv. Log & Mot. for Sanctions 1, filed Oct. 27, 2015.) The Avis asserts that, if the Court "had . . . not requested to see the [un]redacted documents *en camera*, the[] false statements representations would have gone undiscovered and the additional documents never produced." *Id.* (italics added). Consequently, the Avis

requests sanctions of attorney fees incurred, in reviewing the and un-redacted documents and filing this motion and having to go through with the Court the original privilege log of four (6) [sic] hours at \$400.00 on [sic] hour as well a \$2,500.00 assessed against Attorney Dudley personally for wasting the Courts [sic] time having to go through a false privilege log and listen to false testimony as to what was redacted.

Id. at 6-7.

¶48 WICO responded by filing a motion to strike the Avis' motion for sanctions because it was filed "in violation of" Superior Court Rules 7, 29, and 39, Federal Rules of Civil Procedure 11, 26, and 37, and the District Court of the Virgin Islands' Local Rules of Civil Procedure 11.1 and 37.1 (Resp't's

⁸ During the recent status conference, counsel for WICO represented that there are no credit card statements to produce because board members do not have company-issued credit cards. Although the Court and counsel considered whether granting the motion to supplement would be futile as to that portion, the Court concludes, upon further reflection, that the safer course is to grant the motion to supplement and allow WICO to respond accordingly. *Cf. Henry*, 55 V.I. at 994 (unsworn representations of counsel regarding facts in dispute are not evidence).

Mem. of L. in Supp. of Mot. to Strike Pet'r's Combined Obj. and Mot. for Sanctions 1, filed Nov. 10, 2015.) WICO contends that this "matter has been settled [sic], by virtue of WICO's decision to voluntarily provide the requested information." *Id.* "The only remaining issue," according to WICO, "is whether, even assuming that Section 881 does apply to WICO, certain pages redacted from the transcript of the executive session portion of WICO's board meetings are privileged." *Id.* at 1-2. WICO "provided a privilege log, and at a hearing on October 7, 2015, the parties discussed the basis for each and every redaction in detail. Agreements were reached regarding some issues, and the Court requested additional briefing on other issues." *Id.* at 2 (footnote omitted). WICO contends that it had further "agreed to provide an unredacted copy to the Court under seal *and* to provide a *revised privilege log* and additional pages to the Avis reflecting the agreements made at the October 7, 2015 hearing." *Id.* (emphasis added). But WICO is mistaken.

¶49 During oral argument, co-counsel for WICO, Xaviere Baxley-Hull, Esq. ("Attorney Baxley-Hull"), did offer to amend the privilege log. After discussing the April 14, 2015 board meeting transcript and the various reasons cited for redacting portions of the transcript, Attorney Baxley-Hull explained, when asked why one of the reasons WICO gave was "not relevant and not responsive," that the redacted portion concerned potential criminal litigation. When asked what subsection of title 3, section 881(g) governed, Attorney Baxley-Hull suggested subsection (g)(4), and then remarked, "as I stated before – and *if I can*, I will amend my Privilege Log." (Hr'g Tr. 40:16-17 (emphasis added).) From the Court's review of the transcript, this was the only reference by WICO's counsel to the possibility that WICO might amend or revise its privilege log. WICO did not request leave to amend its response. Instead, WICO amended its response without leave. But ultimately the Avis is mistaken in seeking sanctions because WICO could file an amended response.

¶50 If a response to a petition is akin to an answer to a complaint, then WICO could amend its response without permission “once as a matter of course within . . . 21 days after serving it.” Fed. R. Civ. P. 15(a) (2015 ed.); *accord* 55 C.J.S. *Mandamus* § 366 (2009) (“The return is a pleading which corresponds to the . . . answer in an action at law . . . [and] governed by the rules of pleading that apply to the . . . answer in an action at law.” (footnotes omitted)). WICO served its response and privilege log on October 5, 2015; twenty-one days later was October 26, 2015. WICO filed its amended response and privilege log on October 16, 2015, within the twenty-one day period to amend without leave. Although WICO is mistaken in suggesting the Court granted leave to amend—it did not, not explicitly or implicitly—the Avis is mistaken in objecting and moving for sanction because WICO’s amended response was timely filed.

¶51 However, if WICO’s response is more like an opposition than an answer, WICO would have had to seek leave first in that instance. Movants can withdraw and refile their motions. *See Albert v. Hess Oil V.I. Corp.*, 2019 VI Super 45, ¶ 11 (“[C]ourt approval is not required to withdraw a motion.” (citation omitted)). But generally, litigants cannot amend their motion papers without leave of court. *Cf. Brooks v. City of Sugar Creek*, 340 S.W.3d 201, 210 n.5 (Mo. Ct. App. 2011) (“Brooks cites no authority for the proposition that he was entitled to file such an amended response without leave of court, especially since this pleading was even tardier than his original response to the summary judgment motion.”); *accord DA v. Republic of the Phil.*, 307 F. Supp. 3d 171, 187 n.5 (S.D.N.Y. 2018) (acknowledging but refusing to consider untimely amended opposition filed without leave). Nonetheless, even if the Court were to disregard WICO’s amended response and privilege log, the result would be the same in this instance because WICO waived all the privileges it previously asserted when it agreed in open court to provide unredacted copies of the transcripts. Hence,

sanctioning WICO is unwarranted because the Court does not have to determine whether any of the privileges WICO asserted, whether in its initial response or its amended response, are valid exceptions under the Virgin Islands Public Records Act. *Cf. Lewis v. UFCW Local 2*, No. 06-4066-KGS, 2007 U.S. Dist. LEXIS 15353, *20 (D. Kan. Feb. 28, 2007), (“While the court agrees with defendant that the Federal Rules of Civil Procedure do not authorize filing an amended opposition without leave of court once a reply has already been filed, the court, out of an abundance of caution, has reviewed plaintiff’s additional responses and fails to find sufficient grounds contained in those responses to alter this court’s decision on defendant’s motion.”), *aff’d on other grounds*, 243 F. App’x 445 (10th Cir. 2007). Accordingly, the Avis’ motion for sanctions will be denied. Even if the amended response and revised privilege log was filed improperly, sanctioning counsel is unwarranted here.

¶52 For the same reasons, WICO’s motion to strike will also be denied. The authority to strike papers from is inherent in a court’s control over the record. *See Der Weer v. Hess Oil V.I. Corp.*, 64 V.I. 107, 126 (Super. Ct. 2016) (“[T]he authority to strike is actually inherent in the authority of a court to control its docket, including what papers and other items become part of the record.” (citations omitted)). Yet, even though courts have the authority to strike papers, “pleadings and other papers should only be stricken when they are in themselves improper and objectionable, or improperly placed on file.” *Xavier v. Treasure Bay V.I. Corp.*, 67 V.I. 251, 267 (Super. Ct. App. Div. 2017) (quotation marks, ellipsis, and citations omitted).

¶53 Here, the Avis, as a party, had permission to file a motion in this case. So, the Avis did not act improperly by filing the motion for sanction. Rather than respond in opposition, which is what WICO should have done since WICO disagreed that sanctions were warranted, WICO instead filed a motion to strike the Avis’ motion for sanctions. But that too was improper. Just as parties should not embed

motions within responses or replies, *see Der Weer*, 64 V.I. at 129, parties also should not respond to a motion with another motion. *See id.* at 127 ("It is sufficient for the party opposing the motion to register its objection . . . by way of . . . opposition to the motion." (citation omitted)). Striking the Avis' motion for sanctions is unwarranted here. Accordingly, WICO's motion will also be denied.

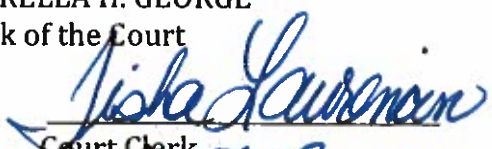
III. CONCLUSION

¶54 For the reasons stated above, the Court will deny WICO's motion to deny the Avis' petition, will grant the Avis' motion to amend and to supplement, and deny the Avis' motion for sanctions and WICO's motion to strike the Avis' motion for sanctions. An appropriate order follows.

DATED: June 7, 2019


ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

By: 

Court Clerk

Dated: 6.7.19