

1 SUPERIOR COURT OF WASHINGTON
2 FOR DOUGLAS COUNTY

3 WAFLA, a Washington nonprofit) NO.
4 corporation,)
5 Petitioner,) PETITION FOR ORDER SETTING
6 vs.) ASIDE SECOND CIVIL
7 WASHINGTON STATE ATTORNEY) INVESTIGATIVE DEMAND FOR
8 GENERAL'S OFFICE, a Washington state) INTERROGATORIES AND
9 agency,) PRODUCTION OF DOCUMENTS
10 Respondent.)

11 Petitioner, wafla, a Washington nonprofit corporation, on behalf of itself and its
12 individual members so affected, through its attorneys of record, Jeffers, Danielson, Sonn &
13 Aylward, P.S., by Kristin M. Ferrera moves the Court for an Order setting aside Civil
14 Investigative Demand ("CID") issued by the Washington State Attorney General and served
15 on the Petitioner on September 20, 2016.

16 This motion is based on RCW 19.86.110(8), the Declaration of Richard Anderson,
with exhibits, filed contemporaneously herewith, and the records and files herein. Wafla
alleges as follows:

MOTION FOR ORDER SETTING ASIDE CID

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1 **A. Parties**

2 1. Wafla is a Washington Nonprofit Corporation doing business in Douglas
3 County that assists its members in addressing agricultural labor issues. Wafla has members
4 doing business in Douglas County and provides human resources assistance to these
5 members in Douglas County.

6 2. The State of Washington Attorney General's Office ("AG") is a Washington
7 state agency and has issued a second Civil Investigative Demand ("CID") to wafla.

8 **B. Controversy**

9 3. A controversy arose in 2015 over wafla's education of its members
10 concerning the Employment Security Department's Agricultural Wage and Practices
11 Survey.

12 4. At the insistence of labor and legal services organizations, the AG issued a
13 CID to wafla on or around September 16, 2016. Wafla received the CID September 20,
14 2016.

15 5. Although it initially attempted to comply with the broad terms of a CID the
16 AG issued earlier this year regarding the same subject matter, wafla has found compliance
17 with the AG's escalating and ever more intrusive demands for information to be
18 problematic, overly burdensome, and intrusive.

19 **C. Legal Issues**

20 6. Venue is appropriate in Douglas County. RCWA 19.86.110; 4.12.025.

21 7. The CID violates RCW 19.86.110 by failing to comply with its requirements

1 for specificity as to the subject matter of the investigation, among others.

2 8. The CID violates wafla's and its members' Fourth Amendment rights.

3 9. The CID violates Article 1, § 7 of the Washington State Constitution.

4 10. The CID violates wafla's and its members' First Amendment rights.

5 WHEREFORE, wafla prays as follows:

6 1. The Court set aside the September, 2016 CID.

7 2. The Court award wafla its costs, including reasonable attorney fees.

8 3. The Court grant such other relief as the Court deems equitable and proper.

9 DATED this 10 day of October, 2016.

10 JEFFERS, DANIELSON, SONN & AYLWARD, P.S.

11
12 By 

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1 SUPERIOR COURT OF WASHINGTON
2 FOR DOUGLAS COUNTY

3 WAFLA, a Washington nonprofit) NO.
4 corporation,)
5 Petitioner,) MEMORANDUM IN SUPPORT OF
6 vs.) MOTION FOR ORDER SETTING
7 WASHINGTON STATE ATTORNEY) ASIDE SECOND CIVIL
8 GENERAL'S OFFICE, a Washington state) INVESTIGATIVE DEMAND FOR
9 agency,) INTERROGATORIES AND
10 Respondent.) PRODUCTION OF DOCUMENTS

11 Petitioner, wafla (formerly known as the Washington Farm Labor Association), a
12 Washington nonprofit corporation, on behalf of itself and its individual members so
13 affected, through its attorneys of record, Jeffers, Danielson, Sonn & Aylward, P.S., by
14 Kristin M. Ferrera respectfully submits this Memorandum in support of its Petition to Set
15 Aside the Civil Investigative Demand ("CID") issued by the Washington State Attorney
16 General's Office ("AG") and served on Petitioner on September 20, 2016. For the reasons
stated below, Petitioner has good cause to request the Court set aside the CID. The Court
should grant Petitioner's request and set aside the September 2016 CID.

MEMORANDUM IN SUPPORT OF MOTION
FOR ORDER SETTING ASIDE SECOND CID

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1 **I. INTRODUCTION**

2 Wafla is a 501(c)(6) nonprofit association.¹ Its members consist primarily of
3 agricultural employers. Since 2007, wafla has provided members with human resources
4 assistance, counseling, products, services, and guidance. Among wafla’s most important
5 services is the federal H-2A guest worker program. Through this program, wafla brings a
6 stable, well regulated, and legal workforce to its members.

7 In past years, the Washington State Employment Security Department (“ESD”)
8 conducted biennial surveys examining wages paid to H-2A workers. ESD now conducts
9 these surveys on an annual basis. The United States Department of Labor (“USDOL”) uses
10 survey data to make binding wage determinations for H-2A workers. These voluntary
11 surveys are completed by H-2A employers, many of whom are wafla members.

12 In preparation for the 2015 ESD survey, wafla prepared and provided survey
13 guidance to its members. In response, the AG initiated an open-ended investigation into
14 wafla’s conduct. The AG issued its first CID to wafla in January, 2016. See Declaration of
15 Richard Anderson (“Anderson Decl.”), Ex. H. Although the CID was broadly worded,
16 burdensome, and groundless, wafla produced thousands of pages of responsive documents.
17 Now, the AG has issued a second, similarly broad, burdensome, and groundless CID. Wafla
18 respectfully requests that the Court set aside the second CID which has violated both
19 RCW 19.86.110 and constitutional standards, and end the AG’s fishing expedition.

20 //

21 _____
¹ Unless otherwise noted, the facts in this memorandum are supported by the Declaration of R. Anderson.

1 **II. BACKGROUND**

2 Recent changes to the agricultural labor force in Washington and the 2015
3 Washington Supreme Court decision that drastically changed the way employers
4 compensate seasonal agricultural workers are important in understanding the AG's
5 investigation of wafla. The legal landscape for Washington agricultural employers is and has
6 been changing at a rapid pace. Wafla, through its board of directors and employees, helps its
7 members, many of whom are small employers of limited resources, achieve compliance
8 with complex regulations and government conduct. It is this complex regulatory government
9 conduct that has led to the present dispute.

10 **A. The H-2A guest worker program in Washington.**

11 Washington has long employed a substantial number of seasonal agricultural
12 workers. Like many western states, over the past decade, Washington employers have
13 grappled with a significant shortage in agricultural employees. Wafla was created in 2007 to
14 propose solutions to the State's growing labor shortage.

15 Since 2011, wafla has helped bolster the Washington agricultural workforce through
16 the federal H-2A guest worker program. The H-2A program benefits agricultural employers
17 by guaranteeing a legal and stable workforce. The program also benefits agricultural
18 employees. Guest workers receive higher wages (\$12.69 guaranteed hourly wage in 2016,
19 free housing and free transportation), better working conditions, and more access to
20 assistance than their peers who work outside of the H-2A program. Perhaps most
21 importantly, the program provides H-2A employees with the dignity of legal presence.

1 As the H-2A program is relatively new in Washington, wafla supports its members
2 by providing advice regarding government actions and regulations that directly affect their
3 interests.

4 **B. The ESD wage survey.**

5 One type of government action and regulation that wafla provided member advice
6 on includes the ESD wage survey. Relevant to this dispute, ESD propounded its biennial
7 survey to wafla members in both 2013 and 2015. The two surveys analyzed H-2A worker
8 compensation using vastly different methods.

9 *1. The 2013 Survey.*

10 In 2013, the ESD survey focused solely on piece rates for tree fruit agricultural
11 employers.¹ The 2013 survey did not collect data regarding hourly rates. Anderson Decl.,
12 Ex. A. It did not give employers the option to report hourly wages for tree fruit harvests. *Id.*
13 Nonetheless, the survey obtained a wide variety of data distinguishing not only by product,
14 but also by picking style.² The 2013 survey returned unexpected results. For example,
15 although “color picking” requires more skill and time, ESD’s analysis indicated that piece
16 rates for color picking were actually *lower* than those paid for strip picking. Anderson
17

18 ¹ When an employee receives “piece rate compensation” they are paid per unit of product. For example, an
19 employee may receive a certain sum of money for every bin of apples picked each day. Piece rate
20 compensation is generally paired with an “hourly wage guarantee” wherein the employer guarantees a
21 certain sum of money for each hour worked regardless of the amount of fruit picked. Each employee can
increase her daily pay by picking at least a certain number of units of fruit. In contrast, when an employee
receives solely hourly compensation, they are paid a set amount of money for each hour worked, regardless
of the amount of fruit picked.

² For example, the ESD collected data regarding “strip picking” as compared to “color picking.” “Strip
picking” requires employees to pick all of the fruit in a determined area. “Color picking” requires
employees pick only the fruit that appears ripe, which requires both additional skill and man hours.

1 Decl., Ex. B.

2 2. Demetrio changes the industry's approach to agricultural wage compensation.

3 In July 2015, the Washington Supreme Court decided *Demetrio v. Sakuma Brothers*
4 *Farms, Inc.*, 183 Wash. 2d 649 (2015). In *Demetrio*, the Court informed agricultural
5 employers—who had nearly universally believed that piece rate pay included rest breaks
6 and other non-productive time—that they must pay employees for rest breaks at their
7 “regular rate of pay.” *Id.* at 662. The compensation scheme required by the Court in
8 *Demetrio*, as well as the administrative burden it represents, is not required when
9 agricultural employees are paid by the hour. Further, after the *Demetrio* decision, employers
10 can no longer pay in “pure” piece rate wages, and must instead provide additional pay for
11 rest breaks.

12 3. The 2015 Survey.

13 In preparation for the 2015 Survey, ESD decided to revamp its survey and survey
14 process. ESD welcomed input from stakeholders such as wafla and legal services agencies.
15 After *Demetrio*, and in light of the incongruous results provided by the 2013 survey, wafla
16 strongly recommended that ESD examine *both* piece rate and hourly wages in the 2015
17 survey. In response, ESD stated that it would not ask directly about hourly wages, but would
18 permit farmers to report hourly wages.

19 From what I understand, you are concerned that respondents
20 are not able to report hourly wages but only piece rates. In the
21 versions of the survey being piloted, we include “hour” in the
list of potential units of pay, and include an example that lists
an hourly rate.

1 Anderson Decl., Ex. C. Additionally, the USDOL's general survey instructions stated:
2 "piece rates with earnings guarantees represent a different method of payment from piece
3 rates without an earnings guarantee, and should be listed separately." DOL ETA Form 232,
4 Anderson Decl., Ex. D. Wafla's suggested changes to the 2015 survey addressed this exact
5 issue but ESD did not include such an inquiry in the survey.

6 **C. Wafla's guidance regarding the 2015 Survey.**

7 In preparation for the 2015 survey, wafla prepared a seminar and letters for
8 presentation to its members wafla was concerned with the inadequacies of the survey
9 questions regarding hourly wage guarantees and expressed this frustration in its guidance.
10 Wafla provided ESD with the content of its intended guidance at least 11 days before the
11 survey was slated to be released. Despite more than one invitation to attend wafla functions
12 to discuss the survey, the ESD declined to participate. Anderson Decl. at ¶ 41. ESD never
13 contacted wafla or expressed objections to its intended guidance.

14 In its letters and seminars, wafla discussed the fact that the survey allowed
15 employers to report *either* hourly or piece rate wage information. Wafla was aware that the
16 majority of its members compensated employees using piece rates coupled with a
17 guaranteed hourly rate. Wafla also assumed some employers would switch to hourly pay in
18 light of the *Demetrio* decision. Given the recent legal decision, the practices of its members,
19 communications with ESD, the USDOL's general survey instructions, and the fact that 2013
20 piece rate data failed to accurately reflect market factors, wafla advised members who used
21 a guaranteed hourly wage compensation scheme to report hourly instead of piece rate wage

1 information. Although wafla expressed frustration that the 2015 survey was not adequately
2 designed to accurately depict total compensation, wafla stressed to its members in every
3 communication that every employer must answer the survey questions honestly. Anderson
4 Decl. at ¶ 48.

5 **D. Subsequent Investigation**

6 In late 2015, despite being well informed of wafla's guidance and consistently
7 declining invitations to participate in the organization's survey-related functions, ESD began
8 investigating wafla's 2015 survey guidance. Ultimately, ESD concluded that wafla impacted
9 the preliminary prevailing wage estimates for some apple varieties. Anderson Decl., Ex. F
10 and G. ESD stated that wafla "publically provided guidance to growers regarding their
11 responses to the survey, and that this guidance directed respondents to provide information
12 that differed from previous years' survey results." Anderson Decl., Ex. G.

13 What ESD did not report is that the 2013 survey *only allowed apple growers to*
14 *report piece rates.* Although the 2013 survey was structured to be unable to collect
15 information regarding hourly wage rates, and even though the 2015 survey was
16 administered after the groundbreaking *Demetrio* decision, ESD reported that any grower
17 that "changed" its reported method of compensation—i.e. any grower who reported hourly
18 wages in 2015—did so because she was following wafla's advice. Anderson Decl., Ex. F.
19 Interestingly, ESD's investigation also determined that those employers who were allegedly
20 influenced by wafla's guidance reported equal or higher wages than those growers who
21 wafla did not allegedly influence. Anderson Decl., ¶ 59, Ex. G at 3 and 6.

1 Despite the dubious nature of ESD's conclusions, the AG initiated an investigation
2 into wafla by issuing its first CID. The first CID was broad in scope but sparse in its
3 description of the legal basis for its issuance. Nonetheless, wafla produced thousands of
4 pages of responsive documents. In return, the AG issued multiple individual CIDs to wafla
5 members. Anderson Decl. at ¶ 62. Now, the AG has issued a second open ended CID
6 ("Second CID") seeking further information from wafla. Anderson Decl. at ¶ 62, Ex. L.

7 The Second CID, which is the subject of this Motion, is broad in scope and would
8 require wafla to produce all communications between all officers and directors of wafla
9 regarding any discussion of wages and piece rates:

10 For each WAFLA officer and director please produce the
11 following Documents:

- 12 a. All documents in your possession, custody, or control
13 (including agendas, meeting minutes, emails, or notes)
14 discussing, reflecting, or relating to any meetings, whether
15 in person or by an electronic or telephonic means, at which
16 any of the following subject matters were discussed:
17 i. Agricultural Peak Employment Wage and Practices
18 Survey
19 ii. Survey Guidance
20 iii. Piece Rate
21 iv. Hourly Wage
v. Hourly Wage Guarantee

(Anderson Decl., Ex. L.)

18 The result of answering the Second CID would be that a large percentage of all
19 wafla communications between wafla's Executive Director, Dan Fazio, and the Chief
20 Operating Officer, Rick Anderson, would be produced, including many communications
21 mentioning the piece rate rest break litigation (*Demetrio*) and related issues and any

1 discussion that happened to mention of the word “hourly wage.” For an agricultural labor
2 assistance organization, this yields thousands of pages of information. The result far
3 exceeds the scope of the subject matter of the inquiry and is extremely burdensome on
4 wafla. For all these reasons and those stated below, wafla requests the Court set aside the
5 Second CID.

6 III. ARGUMENT

7 RCW 19.86.110 sets forth the scope of the AG’s authority to issue CIDs. It also
8 provides the individual subject to an improper CID with a remedy for challenging the
9 demand:

10 At any time before the return date specified in the demand,
11 or within twenty days after the demand has been served,
12 whichever period is shorter, a petition to extend the return
13 date for, or to modify or set aside a demand issued pursuant
to subsection (1) of this section, stating good cause, may be
filed in the superior court for Thurston county, or in such
other county where the parties reside.

14 RCW 19.86.110(8).

15 “Good cause” exists to set aside the second CID: The CID fails to satisfy the
16 requirements set forth in RCW 19.86.110; the CID violates the Fourth and First
17 Amendments of the United States Constitution; and the CID violates Article 1, § 7 of the
18 Washington Constitution.

19 **1. The CID is Defective on its Face and therefore Unenforceable.**

20 RCW 19.86.110 places explicit requirements on the AG as to the form of its CID:

21 (2) Each such demand shall:

1 (a) State the statute and section or sections thereof, the
2 alleged violation of which is under investigation, and the
general subject matter of the investigation;

3 RCWA § 19.86.11(2)(a)-(d). Failure to fully comply with the statutory requirements for
4 CID renders a purported CID ineffective and unenforceable:

5 [T]he statutory requirements must be met. Nowhere in [the
6 AG's] letter is a statutory citation to the CPA or a
description of the general subject matter of the
7 investigation.

8 *Ameriquist Mortgage Co. v. Office of Attorney Gen. of Washington*, 177 Wn.2d 467, 496,
9 300 P.3d 799, 813 (2013) (holding that an informal request for information could not be a
10 CID within the statute because it failed to provide statutory citations and a general
description of the investigation).

11 Here, the CID at issue fails to “state the statute and section or sections thereof”
12 or “the general subject matter of the investigation.” RCW 19.86.110(2)(a). Instead, the
13 CID references the entire Washington Consumer Protection Act and the Entire Sherman
14 Act, then further fails to include any description, “general” or otherwise, of the “subject
15 matter of the investigation.” Anderson Decl., Ex. L at 1:16-19. Wafra is only left to guess
16 based on the generally worded CID and vague assertions from the AG as to what the AG
17 is investigating. Accordingly, the CID is defective as a matter of law and unenforceable.

18 **2. The CID is unreasonable and therefore violates the Fourth Amendment.**

19 An unreasonable administrative subpoena violates the Fourth Amendment. *See*
20 *Steele v. State ex. rel. Gorton*, 85 Wn.2d 585, 593–94, 537 P.2d 782 (1985). To determine
21 the reasonableness of an administrative subpoena within the Fourth Amendment, the

1 Washington Supreme Court applies the test set forth by the United States Supreme Court
2 in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209, 66 S. Ct. 494, 90 L.
3 Ed. 614 (1946), and *United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S. Ct. 357,
4 94 L. Ed. 401 (1950):

5 (1) the inquiry must be within the authority of the agency,

6 (2) the demand must not be too indefinite, and

7 (3) the information sought must be reasonably relevant.

8 *Steele*, 85 Wn.2d at 594. The CID in this case fails the third prong.

9 The Second CID is unreasonable because wafla's conduct cannot, as a matter of
10 law, implicate any of the acts cited in the CID and thus, cannot be "reasonably relevant"
11 to a legitimate investigation. Here, the CID issued to Petitioner suggests that the AG is
12 investigating wafla for possible violations of Washington's Consumer Protection Act and
13 the Sherman Act. Anderson Decl., Ex. L at 1:16-19. However, as the AG is well aware
14 through the documents provided by wafla in response to the first CID, wafla's conduct as
15 a matter of law cannot implicate either the Washington CPA or the Sherman Act. There
16 can be no legitimate claims against wafla under either statute cited in the AG's Second
17 CID. Because the CID cannot be relevant to any legitimate investigation, it is
18 unreasonable and violates the Fourth Amendment.

19 1. The Sherman Act cannot apply to wafla's guidance.

20 The Sherman Act, 15 U.S.C. § 1, *et seq.*, applies to restraints of trade or
21 commerce "among the several States":

1 Every contract, combination in the form of trust or
2 otherwise, or conspiracy, in restraint of trade or commerce
3 among the several States, or with foreign nations, is
4 declared to be illegal.

5 15 U.S.C. § 1. Accordingly, the Sherman Act, by its
6 express terms, only applies to “interstate” commerce:
7 [When] the claim is asserted under the Sherman Act, 15
8 U.S.C.A. §§ 1-7 ..., the wrongs complained of must
9 involve interstate commerce, either in ‘effect’ or ‘purpose’,
10 for obviously, the acts can have no greater potency than the
11 commerce clause itself.

12 *Mead's Fine Bread Co. v. Moore*, 208 F.2d 777, 779 (10th Cir. 1953), *rev'd sub nom on*
13 *other grounds, Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 75 S. Ct. 148, 99 L. Ed.
14 145 (1954).

15 Thus, intrastate, or “local conduct” is exempt from Sherman Act liability:

16 Local conduct which is separable and unrelated to interstate
17 commerce is necessarily insulated from the operation of the
18 anti-trust laws, and so, ... it is important to keep in mind
19 the obvious distinction to be drawn between a course of
20 conduct wholly within a state and conduct which is an
21 inseparable element of a larger program dependent for its
success upon activity which affects commerce between the
states. It is the effect upon the interstate commerce or its
regulation, regardless of the particular form which the
competition may take, which is the test of federal power.

Mead's Fine Bread Co., 208 F.2d at 779 (internal quotation omitted).

In this case, wafla provided a webinar and letters to its Washington State
membership regarding an issue solely of Washington law. Such action constitutes
“conduct wholly within” Washington and thus is “necessarily insulated from the
operation of” the Sherman Act. *Id.*

1 2. Washington's Consumer Protection Act cannot apply to wafla's guidance.

2 When the Attorney General brings a CPA enforcement action on behalf of the
3 State, "it must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or
4 commerce, and (3) public interest impact." *State v. Kaiser*, 161 Wn. App. 705, 719, 254
5 P.3d 850 (2011). Unlike in a private cause of action under the CPA, "the State is not
6 required to prove causation or injury, nor must it prove intent to deceive or actual
7 deception." *Id.*

8 Despite this lesser burden, the AG cannot, as a matter of law, establish a CPA
9 claim against wafla because wafla's guidance did not occur "in trade or commerce." The
10 CPA expressly defines "trade" and "commerce" as "the sale of assets or services, and any
11 commerce directly or indirectly affecting the people of the state of Washington."
12 RCW 19.86.010(2). The provision of information to consumers without charge does not
13 constitute "trade" or "commerce" as contemplated by the CPA. *See, e.g., Browne v. Avvo*
14 *Inc.*, 525 F.Supp.2d 1249, 1254 (W.D. Wash. 2007) (applying Washington law)
15 (corporation that provided information about attorneys to consumers free of charge did
16 not engage in trade or commerce so as to violate the CPA); *Fidelity Mortgage Crop. V.*
17 *Seattle Times Co.*, 131 Wn. App. 462, 128 P.3d 621 (2005) (newspaper publication or
18 mortgage rates from various lenders was not, in the absence of payment from the lenders,
19 trade or commerce).

20 Here, wafla accepted no "payment" from anyone in exchange for access to its
21 guidance. Wafla's membership dues were the same regardless of whether their members

1 attended the webinar. Wafla incurred no pecuniary gain from the guidance and thus did
2 not engage in “trade” or “commerce” so as to incur potential liability under the CPA.

3 As a matter of law, wafla’s conduct could not have violated the statutes generally
4 referenced in the second CID. Thus, the requests set forth in the Second CID cannot, as a
5 matter of law, be reasonably relevant to any legitimate investigation. The CID fails the
6 third prong of the *Steele* test and is unreasonable in violation of the Fourth Amendment.

7 **3. The CID Violates Article 1, § 7 of the Washington Constitution**

8 Further, the CID offends Article 1, § 7 of the State constitution. Article 1, § 7 is
9 even more protective of privacy interests of Washington citizens than is the Fourth
10 Amendment. *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). Section 7
11 provides that “no person shall be disturbed in his private affairs, or his home invaded,
12 *without authority of law.*” (emphasis added). An executive agency violates Article 1, § 7
13 when it (1) demands access to protected affairs (2) without “authority of law.” The CID
14 demands access to protected information without authority of law and should be set aside.

15 **1. The information sought by the CID is protected by Article 1, § 7.**

16 Because the Washington Constitution protects citizens from government intrusion
17 into their private affairs, a constitutional search occurs whenever the government disturbs
18 “those privacy interests which citizens of this state have held, and should be entitled to
19 hold, safe from governmental trespass absent a warrant.” *State v. Myrick*, 102 Wn.2d
20 506, 511, 688 P.2d 151 (1984). Among the privacy interests protected under Article 1, §
21 7 are text messages, *Hinton, supra*; bank records, *State v. Miles*, 160 Wn.2d 236, 156

1 P.3d 864 (2007); motel guest registry entries, *State v. Jordan*, 160 Wn.2d 121, 156 P.3d
2 893 (2007); garbage, which could expose business records, bills, correspondence, tax
3 records, and other protected information, *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112
4 (1990); *Miles*, 160 Wn.2d at 245 (discussing *Boland*); and telephone records, *State v.*
5 *Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). The records requested here, including the
6 communications, associations, and business records of wafla, its board members, and its
7 officers, are protected by the Washington Constitution. The requested information
8 implicates a wealth of detail about the association's, officers', and board members'
9 private affairs and is protected by Article 1, § 7.

10 2. The CID was not issued under "authority of law."

11 Further, the AG failed to issue the CID under "authority of law" as required by
12 Article 1, § 7. Generally, a "subpoena must be issued by a neutral magistrate to satisfy
13 the authority of law requirement." *Miles*, 160 Wash.2d at 247. A CID is issued solely by
14 the AG, an executive branch agency without involvement by an impartial magistrate.
15 The only authority for the CID is provided by RCW 19.86.110. A statute cannot, alone,
16 provide the lawful authority to an executive agency to unilaterally invade protected
17 affairs. *Miles*, 160 Wash.2d at 248. Because the CID was not issued under "authority of
18 law" it violates Article 1, § 7 and should be set aside.

19 In *Miles*, the Department of Financial Institutions ("DFI") issued an
20 administrative subpoena to obtain the bank records of a party under investigation for
21 securities violations. *Id.* at 240.. No neutral magistrate addressed the propriety of the

1 subpoena. However, the Securities Act of Washington granted the DFI explicit statutory
2 authority to issue the administrative subpoena. Nonetheless, the Washington Supreme
3 Court invalidated the subpoena. The Court concluded that mere statutory authorization to
4 an executive branch official to issue a subpoena did not constitute “authority of law”
5 under Article I, § 7. *Id.* at 248–49. “[A] statute cannot authorize the state to invade a
6 person’s otherwise private affairs.” *Id.* at 249.

7 Here, the AG issued the CID without authority of law. The AG relies solely upon
8 statutory authority to unilaterally issue its investigatory demand. The CID was not
9 reviewed or authorized by a neutral magistrate. A subpoena issued by an executive
10 branch official without consideration by a neutral magistrate unconstitutionally lacks the
11 protections that a warrant offers. *Id.*; *See also, State v. Meza*, 191 Wn. App. 849, 364
12 P.3d 1081 (2015) (ex parte order to credit union to freeze defendant’s assets and hold his
13 account violated Article 1, § 7). When a subpoena provides the “authority of law” for
14 examination of a citizen’s protected affairs, “such subpoena must be justified by some
15 reason besides the statutory authority granting the power to issue the subpoena.” *State v.*
16 *Reeder*, 184 Wash.2d 805, 817, 365 P.3d 1243, 1250 (2015) (citing *Miles*, 160 Wash.2d
17 at 248). The CID was issued solely pursuant to statutory authority and lacks the “authority
18 of law” required by Article 1, § 7.

19 The AG’s second CID to wafla extended to the private affairs of wafla, its
20 members, and its Board and was not issued under “authority of law.” The CID violates
21 Article I, § 7 and should be set aside.

1 **3. Wafla’s dissemination of information regarding the survey was**
2 **constitutionally protected free speech.**

3 Finally, by pursuing this politically motivated fishing expedition, the AG seeks to
4 impact wafla communications with its members, board members, and officers in
5 retaliation for wafla’s publically expressed dissatisfaction with the 2015 ESD survey.
6 Such action violates the First Amendment.

7 “[A]s a corporation,” wafla “is entitled to the same free speech protections as any
8 individual.” *Port of Longview v. Int’l Raw Materials, Ltd.*, 96 Wn. App. 431, 442, 979
9 P.2d 917 (1999) (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct.
10 1407 (1978)). Such protections are conferred to wafla based upon “universal agreement”
11 that corporations, like individuals, play a “role in affording the public access to
12 discussion, debate, and the dissemination of information and ideas,” and that the First
13 Amendment protects “the free discussion of governmental affairs.” *Bellotti*, 435 U.S. at
14 778-89, 783.

15 Wafla’s conducting of the webinar and its dissemination of accompanying
16 informational documents are protected against adverse State action by the First
17 Amendment via the Fourteenth Amendment. Wafla merely provided information and
18 opinion to its membership regarding the survey, including suggestions regarding how to
19 answer the survey based on that information and opinion. It admits that it told employers
20 to report the hourly wage they guarantee to workers, which, as it turns out, is required by
21

1 DOL,¹ but expressly stated that its membership must answer the survey truthfully and
2 report whatever its members' rates of pay actually were.

3 State governments are "constitutionally disqualified from dictating the subjects
4 about which [corporations] may speak and the speakers who may address a public
5 issue....Such power in government to channel the expression of views is unacceptable
6 under the First Amendment." *Bellotti*, 435 U.S. at 784-85.

7 The AG's investigation, culminating in this Second CID, constitutes an attempt to
8 "channel" wafla's speech and thereby suppress wafla's right to "the free discussion of
9 governmental affairs." Such offense is even more egregious where, as here, the CID is
10 facially defective, as noted *supra*, and the AG's investigation is not "reasonably relevant"
11 to the AG's unsupported and unsupportable claims for violations of the CPA and the
12 Sherman Act. *Steele*, 85 Wn.2d at 594.

13 IV. CONCLUSION

14 For the reasons set forth above, wafla respectfully requests the Court set aside the
15 Second CID issued by the AG to wafla.

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¹ See DOL Form 232 Instructions.

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DATED this 10th day of October, 2016.

JEFFERS, DANIELSON, SONN & AYLWARD, P.S.

By



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SUPERIOR COURT OF WASHINGTON
FOR DOUGLAS COUNTY

WAFLA, a Washington nonprofit corporation,) NO.
)
Petitioner,) DECLARATION OF RICHARD
) ANDERSON IN SUPPORT OF
vs.) PETITION FOR ORDER SETTING
) ASIDE SECOND CIVIL
) INVESTIGATIVE DEMAND
WASHINGTON STATE ATTORNEY GENERAL'S OFFICE, a Washington state agency,)
)
Respondent.)

Richard ("Rick") Anderson, pursuant to RCW 9A.72.085, declares:

1. This declaration is based upon my personal knowledge, and I am competent to testify to the matters asserted herein.
2. I have been the Chief Operating Officer for wafla (previously known as the Washington Farm Labor Association) since June 8, 2015.
3. Prior to my work with wafla, I was an executive for a large agricultural employer for over 19 years.
4. Wafla is a 501(c)(6) nonprofit association.

1 5. Wafla's members consist primarily of agricultural employers.

2 6. Wafla conducts business in Douglas County. This business includes providing
3 H-2A application assistance for members who reside in Douglas County.

4 7. Since 2007, wafla has provided members with human resource assistance,
5 counseling, products, services, and guidance.

6 8. Among wafla's most important services is the federal H-2A guest worker
7 program. Through this program, wafla brings a stable, well regulated, and legal workforce to
8 its members.

9 9. Washington has long employed a substantial number of seasonal agricultural
10 workers.

11 10. Like many western states, over the past decade, Washington employers have
12 grappled with a significant shortage in agricultural employees.

13 11. Wafla was created in 2007 to propose solutions to the state's growing labor
14 shortage.

15 12. Since 2011, wafla has helped bolster the Washington agricultural workforce
16 through the federal H-2A guest worker program ("H-2A program").

17 13. The H-2A program benefits agricultural employers by guaranteeing a legal and
18 stable workforce.

19 14. The program also benefits agricultural employees. Both domestic and guest
20 workers employed under the H-2A program receive higher wages (minimum hourly rate of
21 \$12.69 per hour, which is the Adverse Effect Wage Rate set by DOL, free transportation,
22

1 and free housing), better working conditions, and more access to assistance than their peers
2 who work outside of the H-2A program. Perhaps most importantly, the program provides H-
3 2A employees with legal presence and guaranteed wages above both the state and federal
4 minimum wages.

5 15. As the H-2A program is relatively new to Washington employers who are
6 experiencing a labor shortage, wafla supports its members by providing advice regarding
7 government actions and regulations that directly affect their interests.

8 16. Such government actions and regulations include the Washington State
9 Employment Security Department (“ESD”) clearance orders certifying a labor shortage and
10 an Agricultural Wage and Practices Survey.

11 17. The ESD historically conducted biennial surveys examining wages paid to H-2A
12 workers. ESD is now conducting the survey annually.

13 18. The United States Department of Labor (“USDOL”) uses ESD’s survey data to
14 make binding wage determinations for H-2A workers.

15 19. These voluntary surveys are completed by H-2A employers, many of whom are
16 wafla members.

17 20. The ESD propounded its biennial survey to wafla members in both 2013 and
18 2015.

19 21. The 2013 and 2015 surveys analyzed H-2A worker compensation using vastly
20 different methods.

21 22. In 2013, the ESD survey focused solely on piece rates for tree fruit agricultural
22

1 employers.

2 23. When an employee receives “piece rate compensation,” they are paid per unit
3 of product. For example, an employee may receive a certain sum of money for every bin
4 of apples picked each day.

5 24. Piece rate compensation is generally paired with an “hourly wage guarantee”
6 wherein the employer guarantees a certain sum of money for each hour worked
7 regardless of the amount of fruit picked. Each employee can increase their daily pay by
8 picking at least a certain number of units of fruit. In contrast, when an employee receives
9 solely hourly compensation, they are paid a set amount of money for each hour worked,
10 regardless of the amount of fruit picked.

11 25. The 2013 Survey did not collect data regarding hourly rates. Attached to this
12 Declaration as Exhibit A is a true and correct copy of relevant pages of the 2013 Survey.

13 26. The 2013 Survey also did not give employers the *option* to report hourly wages
14 for tree fruit harvests. Nonetheless, the survey obtained a wide variety of data distinguishing
15 not only by product, but also by picking style.

16 27. For example, the ESD collected data regarding “strip picking” as compared to
17 “color picking.” “Strip picking” requires employees to pick all of the fruit in a determined
18 area. “Color picking” requires employees pick only the fruit that appears ripe, which
19 requires both additional skill and man hours.

20 28. The 2013 survey returned unexpected results. For example, although “color
21 picking” requires more skill and time, ESD’s analysis indicated that piece rates for color

1 picking were actually *lower* than those paid for strip picking. Attached to this Declaration
2 as **Exhibit B** is a true and correct copy of the results of the 2013 Survey.

3 29. In July 2015, the Washington Supreme Court decided *Demetrio v. Sakuma*
4 *Brothers Farms, Inc.*, 183 Wash. 2d 649 (2015).

5 30. In *Demetrio*, the Court informed agricultural employers that they must pay
6 employees for rest breaks at their “regular rate of pay.” *Id.* at 662.

7 31. Previously, in wafla’s experience, most agricultural employers believed that
8 piece rate pay included rest breaks and other non-productive time and this was wafla’s
9 understanding as well.

10 32. The compensation scheme required by the Court in *Demetrio*, as well as the
11 administrative burden it represents, is not required when agricultural employees are paid by
12 the hour.

13 33. After the *Demetrio* decision, employers can no longer pay in “pure” piece rate
14 wages, and must instead pay additional amounts for mandatory rest breaks at the highest rate
15 of pay earned by the worker (the higher of the piece rate or hourly guarantee).

16 34. In preparation for the 2015 survey, ESD decided to change its survey and survey
17 process.

18 35. ESD welcomed input from stakeholders such as wafla and legal services
19 agencies.

20 36. After *Demetrio*, and in light of the incongruous results provided by the 2013
21 survey, wafla strongly recommended that ESD examine *both* piece rate and hourly wages in
22

1 the 2015 survey.

2 37. In response, ESD stated that it would not ask directly about hourly wages, but
3 would permit farmers to report hourly wages.

4 From what I understand, you are concerned that respondents
5 are not able to report hourly wages but only piece rates. In the
6 versions of the survey being piloted, we include "hour" in the
list of potential units of pay, and include an example that lists
an hourly rate.

7 Attached to this Declaration as Exhibit C is a true and correct copy of portions of emails
8 between Cynthia Forland and Dan Fazio from May of 2015.

9 38. Additionally, the USDOL's general survey instructions stated: "piece rates with
10 earnings guarantees represent a different method of payment from piece rates without an
11 earnings guarantee, and should be listed separately." Attached to this Declaration as Exhibit
12 D is a true and correct copy of DOL ETA Form 232.

13 39. In preparation for the 2015 survey, wafla prepared a seminar and letters for
14 presentation to its members.

15 40. Wafla provided ESD with the content of its intended guidance at least 11 days
16 before the survey was slated to be released.

17 41. Despite more than one invitation to attend wafla functions to discuss the survey,
18 the ESD declined to participate.

19 42. ESD never contacted wafla or expressed objections to its intended guidance.

20 43. In its letters and seminars, wafla discussed the fact that the survey allowed
21 employers to report *either* hourly or piece rate wage information.

22 DECLARATION OF RICK ANDERSON

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1 44. Wafla was aware that its members that compensated employees using piece rates
2 coupled that piece rate with a guaranteed minimum hourly rate.

3 45. Wafla has been advising employers for over a year to switch to hourly rates of
4 compensation as opposed to piece rate pay because of the *Demetrio* case and because of
5 other practical and regulatory factors that are making piece rate pay increasingly more
6 difficult for employers to administer.

7 46. Wafla also assumed some employers would switch to hourly pay in light of the
8 *Demetrio* decision.

9 47. Given the recent legal decision, the practices of its members, communications
10 with ESD, the USDOL's general survey instructions, and the fact that 2013 piece rate data
11 failed to accurately reflect market factors, wafla advised members who used an hourly wage
12 compensation scheme to report hourly wage information.

13 48. Although wafla expressed frustration that the 2015 Survey was not adequately
14 designed to accurately depict total compensation, wafla stressed to its members in every
15 communication that every employer must answer the survey questions honestly.

16 49. In late 2015, despite being well informed of wafla's guidance and consistently
17 declining invitations to participate in the organization's survey-related functions, ESD began
18 investigating wafla's 2015 survey guidance.

19 50. ESD appears to have initiated its investigation because of demands from labor
20 unions to investigate wafla's guidance. Attached to this Declaration as **Exhibit E** is a
21 true and correct copy of an email chain that includes a December 21, 2015 email from
22

1 Cassie Bordelon (ESD) to Ben Orona (DOL) explaining what transpired during the fall of
2 2015:

3 We wanted to let you know that we have had the
4 Washington State Labor Council (WSLC), AFL-CIO reach
5 out to us concerned about the potential influence of the WA
6 Farm Labor Association (WAFLA) on our 2015 prevailing
7 wage and practices survey results. In short, WAFLA
8 produced a webinar for agricultural employers which
9 advised them to willfully answer our prevailing wage and
10 practices survey inaccurately and according to their
11 guidance.

12 (Highlighted in document for emphasis.)

13 51. The statement that wafla "*advised [employers] to willfully answer our*
14 *prevailing wage and practices survey inaccurately*" is false. Ms. Forland, as manager of
15 the ESD Survey unit, admitted this mistake in a December 31, 2015 email to Ben Orona
16 at DOL (see Exhibit E):

17 I would like to follow up on Cassie's email below, and
18 clarify the highlighted statement. WAFLA has publicly
19 provided guidance to growers regarding their responses to
20 the survey, and that guidance directed respondents to
21 provide information that differed from previous years'
22 survey results. **However, we cannot say that they were
advising growers to "willfully" answer "inaccurately." I
apologize for the mischaracterization.** And we look
forward to further conversations with you as we continue
our analysis of the results of the 2015 survey.

52. Wafla obtained the above emails pursuant to a public records request
propounded on DOL.

53. On December 23, 2015, ESD released a briefing paper stating that wafla's
guidance appeared "to impact the preliminary prevailing wage rate estimates for Fuji,

DECLARATION OF RICK ANDERSON

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1554568

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1 Golden Delicious and Granny Smith apple varieties.” Attached to this Declaration as
2 Exhibit F is a true and correct copy of ESD’s December 2015 Report.

3 54. What ESD did not report is that the 2013 survey *only allowed apple growers to*
4 *report piece rates.*

5 55. Although the 2013 survey was structured to be unable to collect information
6 regarding hourly wage rates, and even though the 2015 survey was administered after the
7 groundbreaking *Demetrio* decision, ESD reported that any grower that “changed” its
8 reported method of compensation—i.e. any grower who reported hourly wages in 2015—
9 did so because it was following wafla’s advice.

10 56. ESD released an update to its December 23, 2015 briefing paper on March 3,
11 2016. Attached to this Declaration as Exhibit G is a true and correct copy of this report.

12 57. In the March briefing paper, ESD again stated that wafla, “publicly provided
13 guidance to growers regarding their responses to the survey, and that this guidance
14 directed respondents to provide information that differed from previous years’ survey
15 results.” Ultimately, ESD’s March 2016 Briefing Paper concluded that, “Upon further
16 analysis, ESD’s final estimates for orchard crop responses indicate that 9.0 to 12.9
17 percent of apple growers, 2.5 to 4.9 percent of pear growers, and 1.4 to 3.2 percent of
18 cherry growers were influenced by WAFLA guidance.”

19 58. The March 2016 Briefing Paper provides a comparison of survey results that
20 include what ESD determined as influenced by wafla’s guidance versus those that were
21 not influenced. Essentially, ESD concludes that an employer who provided an hourly

1 rate of pay as the method of paying their employees must have been doing so because
2 they were following wafla's advice rather than honestly reporting their actual practice of
3 paying an hourly rate.

4 59. Interestingly, ESD's investigation also determined that those employers who
5 were allegedly influenced by wafla's guidance reported equal or higher wages than those
6 growers who wafla did not allegedly influence.¹ See Exhibit G at pp. 3 and 6.

7 60. Despite the dubious nature of ESD's conclusions, the Washington State Attorney
8 General ("AG") initiated an investigation into wafla by issuing its first Civil Investigative
9 Demand ("CID") in January of 2016 (the "First CID"). Attached to this Declaration as
10 **Exhibit H** is a true and correct copy of the First CID.

11 61. Although wafla was concerned that the first CID was overly broad and lacked
12 necessary information in its description of the legal basis for its issuance, wafla produced
13 thousands pages of responsive documents.

14 62. In return, the AG issued multiple individual CIDs to wafla members. Attached to
15 this Declaration as **Exhibit I** is a true and correct copy of one of the CIDs sent to our
16 members, with the member's name redacted, for privacy considerations.

17 63. ESD finally excluded the results which it alleged wafla impacted from the wage
18 reporting information it provided to the DOL. In a June 20, 2016 email (attached to this
19 Declaration as **Exhibit J**), Ms. Forland informed certain stakeholders:

20 _____
21 ¹ Compare the wafla influenced "unfiltered" result of \$12.42 per hour (\$99.36 for an 8-hour day) with the
22 \$18 per bin filtered result. It would require a worker to harvest 6 bins of apples (exactly double the 3 bin
minimum acceptable standard as determined by ESD) for a piece rate to result in a higher wage for the
worker.

1 The initial submission of prevailing wage rate estimates
2 included two [Department of Labor] ETA 232 forms for all
3 other apple harvest. One of the ETA 232s was referred to as
4 "unfiltered" because it included all survey responses. The
5 second ETA 232 form was referred to as "filtered" because
6 it did not include responses from employers who were
7 flagged as being influenced by WAFLA guidance. However, during the review period with OFCL we were
8 instructed to submit only one ETA 232 form.

...ESD chose to submit the "filtered" version ETA 232
form for all other apple harvesting. ...

64. ESD has addressed wafla's concerns about the minimum hourly wage guarantee
in the 2016 Agricultural Wage and Practices Survey and has now included some language
that wafla suggested to address the concerns with the 2015 Survey. Those 2016 changes by
ESD were in response to the rationale that wafla advised its members in 2015 regarding
reporting hourly wages. See attached Exhibit K for an explanation of the 2016 Survey
provided by ESD to wafla members.

65. Now, the AG has issued a second open ended CID seeking further information
from wafla (the "Second CID"). Attached to this Declaration as Exhibit L is a true and
correct copy of the Second CID served on wafla's attorney on September 20, 2016.

66. I declare under penalty of perjury under the laws of the State of Washington
that the foregoing is true and correct.


RICHARD ANDERSON

Date: October 10, 2016
Place of Signing: Burlington, WA 98233