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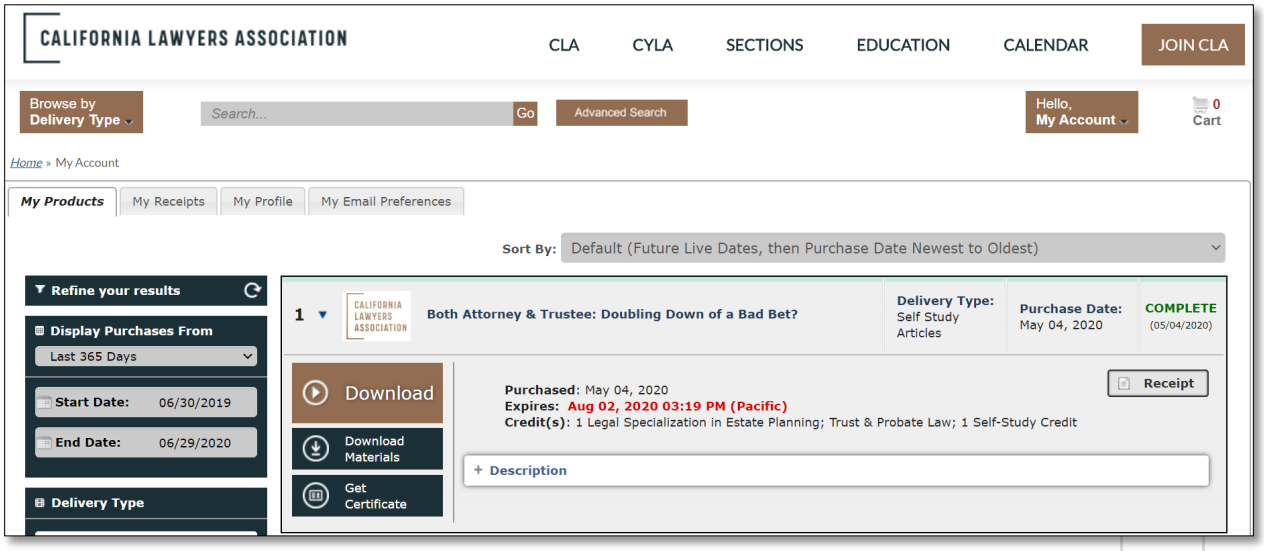

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An Official Publication of
CALIFORNIA LAWYERS ASSOCIATION

PUBLIC LAW JOURNAL

Vol. 43, No. 2
Spring 2020

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Gone Fishing? Preventing Accusations of Investigative Subpoena Overreach

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If you are a public attorney, at some point in your career you will likely be accused of government overreach—where a private party insists that your public entity client has exceeded legal bounds. The phrase "fishing expedition," used to insinuate that a government investigation lacks a legitimate or stated objective, is sometimes asserted when a public entity issues an investigative subpoena for the production of records or witness testimony. Public attorneys working for the state, a city, or a county can prevent accusations of investigative overreach, and readily disprove these

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accusations, by crafting subpoenas to fit within legal limits.

A body of case law has developed around investigative subpoenas, originating with the United States Supreme Court, and evolving in California courts. While the government's investigative subpoena authority is broad—decisions analogize this authority to that of a grand jury—there are limits.

Most cases discussing accusations of overreach address challenges to the state's subpoena authority, with a smaller number of cases addressing subpoenas issued by local governments. However, in large part, the same basic principles should apply to all investigative subpoenas issued by a public entity, whether it be a state department, a city council, county board of supervisors, or other authorized local entity body or officer.

This article surveys California and some federal case law involving common accusations of government overreach in their various forms: the public entity lacks jurisdiction to investigate; the investigation violates the Fourth Amendment's prohibition on unreasonable searches and seizures; the investigation compels self-incrimination in violation of the Fifth Amendment; and the investigation violates privacy rights.

I. STATUTORY BASIS FOR INVESTIGATIVE SUBPOENA AUTHORITY

Distinct from subpoenas issued in cases pending before criminal, civil, and administrative courts, the investigative subpoena is authorized under the Government Code.[1] All California department heads are authorized to issue subpoenas.[2] Specifically, Government Code section 11180 provides that state department heads may make investigations concerning "[a]ll matters relating to the business activities and subjects under the jurisdiction of the department," and "[s]uch other matters as may be

1. Investigative subpoenas are also referred to as "administrative subpoenas." However, this article uses the term investigative subpoena to distinguish them from subpoenas issued by parties in quasi-judicial proceedings before, for example, the Office of Administrative Hearings under the Administrative Procedure Act (Gov. Code, § 11500 et seq.). Also, while a demand requiring production of documents is commonly referred to as a "subpoena duces tecum," in contrast to a "subpoena" which only commands witness testimony, this article uses the general term subpoena to refer to both.
2. Gov. Code, §§ 11180, 11181. In addition to the statutory authority provided under the Government Code, some state departments are also authorized by other statutory provisions to issue subpoenas and conduct investigations (see, e.g., Corp. Code, § 25531 (authorizing the Commissioner of Business Oversight to issue subpoenas); Gov. Code, § 83118 (authorizing the Fair Political Practices Commission to issue subpoenas).)

provided by law."[3] In furtherance of an investigation, Government Code section 11181 permits a department head to issue subpoenas "for the attendance of witnesses and the production of papers, books, accounts, documents and testimony."[4]

Different sections of the Government Code authorize cities[5] and counties[6] to issue investigative subpoenas. Government Code section 37104 states that the legislative body of a city may issue subpoenas "requiring attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding pending before it." Likewise, Government Code section 25170 provides that, following a determination by a county board of supervisors, the chairperson of the board may issue a subpoena "to examine any person as a witness upon any subject or matter within the jurisdiction of the board" and the subpoena may require the production of "all books, papers, and documents . . . relating to the affairs or interests of the county."

Although state and local governments find their subpoena authority in different parts of the Government Code, courts have applied state subpoena jurisprudence to address questions raised in challenges to local government subpoena authority.[7] Therefore, the same basic legal principles that apply to investigative subpoenas issued by the state likely apply to subpoenas issued by a city and county.

A public entity cannot compel compliance with its own subpoenas; instead, the public entity must seek relief from the superior court.[8] The subpoena enforcement processes under the Government Code for the state, a city, and a county have key differences.[9] It is during these proceedings before the superior court that a subpoenaed party's accusations of government overreach or other objections are heard and decided by the court.[10] Superior court orders enforcing compliance with investigative subpoenas are appealable.[11]

II. CASE LAW LAYING THE FOUNDATION FOR INVESTIGATIVE SUBPOENA AUTHORITY

Two often cited United States Supreme Court cases addressing investigative subpoenas are *Oklahoma Press Publishing Co. v. Walling*[12] and *United States v. Morton Salt Co.*[13] In *Oklahoma Press Publishing Co.*, the high court addressed the question of whether a newspaper publisher must comply with subpoenas issued by the U.S. Department of Labor to investigate potential violations of the federal Fair Labor Standards Act when the publisher maintained that the act was not applicable to it and that the question of coverage of the act to the publisher must be adjudicated before the subpoenas may be enforced.[14] The Supreme Court upheld district court orders enforcing compliance with department's subpoenas and found that a public entity's investigative function in searching out violations "is essentially the same as the grand jury's," where an investigation could be undertaken to inquire not only into the existence of violations of the law but also into

3. In *Franchise Tax Board v. Barnhart* (1980) 105 Cal.App.3d 274, the appellate court relied on the language "such other matters as may be provided by law" in section 11180 to conclude that the Franchise Tax Board is authorized to issue subpoenas to investigate a registered lobbyist's compliance with the Political Reform Act, although the act does not specifically authorize the board to issue subpoenas, because the act empowers the board to "audit and conduct field investigations" of lobbyists. "In other words, although the Political Reform Act does not itself confer subpoena power on the board, it adds to the matters which are under the jurisdiction of the board and it increases the board's investigative arena." (*Id.* at p. 279.)
4. Under the Government Code, a department head's investigative power is not limited to subpoenas for records and witness testimony, a department head may also issue "interrogatories." (Gov. Code, § 11181, subd. (f).)
5. Gov. Code, §§ 37104, 37105.
6. Gov. Code, §§ 25170, 25171 [board of supervisors], Gov. Code, § 31110.2 [county civil service commissions], § 27498 [county coroners], § 27721 [count hearing officers], and § 31535 [county retirement boards].
7. *See Connecticut Indemnity Co. v. Superior Court (City of Lodi)* 23 Cal.4th 807, 813–817 (hereafter *Connecticut Indem. Co.*) [where the California Supreme Court relied, in part, on case law discussing state subpoena authority under Government Code section 11180 et seq. in deciding that under Government Code section 37104 the city could issue an investigative subpoena for information that may later be used by the city in litigation]; *City of Vacaville v. Pitamber* (2004) 124 Cal.App.4th 739, 748–749 [the appellate court relied on case law analyzing state subpoena authority to uphold a city's subpoena authority under Government Code section 37104 et seq.]; and *City of Santa Cruz v. Patel* (2007) 155 Cal.App.4th 234 [in deciding that a subpoena issued by a city under Government Code section 37104 et seq. did not violate the Fourth Amendment, the appellate court cited cases on state subpoena authority].
8. *Dibb v. County of San Diego* (1994) 8 Cal.4th 1200, 1218. There is no due process deprivation where statutes provide "ample provisions for notice and hearing . . . before one's papers may be exposed by the 'investigative' subpoena." (*People ex rel. Lynch v. West Coast Shows, Inc.* (1970) 10 Cal.App.3d 462, 471 (hereafter *West Coast Shows, Inc.*) [subpoena issued by the California Attorney General].)
9. Gov. Code, §§ 11186–11188; §§ 25173–25175; §§ 37106–37109. Both *City of Vacaville v. Pitamber*, *supra*, 124 Cal.App.4th at pp. 741–743 and *City of Santa Cruz v. Patel*, *supra*, 155 Cal.App.4th 234 at pp. 239–241, discuss the subpoena enforcement procedures used by cities and *West Coast Shows, Inc.*, *supra*, 10 Cal.App.3d at p. 470, discusses the procedures for state departments.
10. *West Coast Shows, Inc.*, *supra*, 10 Cal.App.3d at p. 470.
11. *People v. U.S. Financial Management, Inc.* (2009) 169 Cal.App.4th 1502, 1509–1511; *City of Santa Cruz v. Patel*, *supra*, 155 Cal.App.4th at pp. 240–243.
12. (1946) 327 U.S. 186.
13. (1950) 338 U.S. 632. A third important United States Supreme Court case, *Endicott Johnson Corp. v. Perkins*, (1943) 317 U.S. 501, was described by the Ninth Circuit Court of Appeal, sitting en banc, as a decision where the Supreme Court "began to lay the foundation of the law governing agency investigations." (*Equal Employment Opportunity Com. v. Children's Hosp. Medical Center of Northern California* (9th Cir. 1983) 719 F.2d 1426, 1429 (en banc).) In *Endicott Johnson Corp.*, the Supreme Court concluded that an investigative subpoena issued by the Secretary of Labor should be enforced despite questions about whether federal law covered the conduct being investigated and that the question of coverage should be resolved at a later time. (*Endicott Johnson Corp. v. Perkins*, *supra*, 317 U.S. at pp. 508–509.)
14. *Oklahoma Press Publishing Co. v. Walling*, *supra*, 327 U.S. at p. 189 (hereafter *Oklahoma Press Publishing Co.*).

questions of coverage of the law over the subpoenaed party.[15]

The Supreme Court further elaborated on the breadth of a public entity's investigative function in *Morton Salt Co.* There, Morton Salt challenged the Federal Trade Commission's authority to require production of reports showing the company's continued compliance with a court decree.[16] Among other contentions, Morton Salt asserted that because the commission had made no charge of violation of either the decree or statute that the commission was invading the jurisdiction of the courts by requiring production of a new report showing compliance with the decree after the issuing court already determined compliance with the decree.[17] The Supreme Court rejected Morton Salt's arguments and explained that public entities have the power of inquiry which is not derived from the judicial function.[18] A public entity's power of inquiry "is more analogous to the Grand Jury," which does not depend on a case or controversy for power to get evidence.[19] Instead, a public entity "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."[20]

In *Brovelli v. Superior Court (Mosk)*,[21] the California Supreme Court adopted the reasoning of *Oklahoma Press Publishing Co.* and *Morton Salt Co.* At issue in *Brovelli* was a challenge to the California Attorney General's subpoena issued to investigate whether the concrete block industry was violating state antitrust or unfair competitions laws.[22] Before disposing of the case based on a service issue,[23] the California Supreme Court cited *Oklahoma Press Publishing Co.* and quoted from *Morton Salt Co.*[24]

The California Supreme Court, in *Younger v. Jensen*,*25* clarifies that this power of inquiry extends beyond the purposes recognized in *Morton Salt Co.* and *Oklahoma Press Publishing Co.* In *Younger*, a subpoenaed party argued that the California Attorney General's investigation was preempted by federal regulation of interstate distribution of natural gas. In the case, the California Supreme Court upheld enforcement of the subpoena and commented that the Attorney General's investigation could lawfully be concerned not only with violations of the law but also with other purposes such as enforcement policy formulation "in cooperation with federal authorities and with recommendations for remedial administrative rulings and legislation."[26]

Despite the broad pronouncements of investigative subpoena authority, there are limits to the investigative function which may lead to accusations of government overreach.

III. DOES THE PUBLIC ENTITY LACK JURISDICTION TO INVESTIGATE?

Some accusations of government overreach are based on the subpoenaed party's claim that the public entity lacks jurisdiction to investigate. The Ninth Circuit Court of Appeal noted the term "jurisdiction" is imprecisely used by both courts and litigants.[27]

Where a so-called jurisdictional challenge is made, the general rule is in favor of enforcing compliance with a subpoena.[28] This is because a subpoenaed party cannot avoid compliance with a subpoena by raising fact-bound challenges related to "coverage or compliance with the law," such as the subpoenaed party having a valid defense to a potential lawsuit by the public entity.[29]

A narrow exception to the general rule in favor of subpoena enforcement exists when the defense is jurisdictional in nature—i.e., when the public entity lacks jurisdiction over the subject of the investigation.[30] However, even where this jurisdictional exception applies, the role of a reviewing court is strictly limited.[31] As long as there is some "plausible" grounds for

15. *Id.* at p. 215–217.
16. *United States v. Morton Salt Co.*, *supra*, 338 U.S. at pp. 634–638 (hereafter *Morton Salt Co.*).
17. *Ibid.*
18. *Id.* at pp. 642–643.
19. *Ibid.* California courts have also held the investigative power of a public entity does not depend on a pending proceeding. *See Brovelli v. Superior Court (Mosk)* (1961) 56 Cal.2d 524, 528–529 [where the California Supreme Court noted that a formal administrative hearing need not be pending before an investigative subpoena could be issued and enforced]; and *City of Vacaville v. Pitamber*, *supra*, 124 Cal.App.4th at pp. 747–748 [where the appellate court upheld the city's issuance of a subpoena to obtain records in furtherance of a tax audit].
20. *Morton Salt Co.*, *supra*, 338 U.S. at pp. 642–643.
21. (1961) 56 Cal.2d 524.
22. *Brovelli v. Superior Court (Mosk)*, *supra*, 56 Cal.2d at pp. 526–527.
23. For a discussion of proper service for investigative subpoenas, see *Brovelli v. Superior Court (Mosk)*, *supra*, 56 Cal.2d at p. 531 and *Fielder v. Berkeley Properties Co.* (1972) 23 Cal.App.3d 30, 43–44.
24. *Brovelli v. Superior Court (Mosk)*, *supra*, 56 Cal.2d at p. 529.
25. (1980) 26 Cal.3d. 397, 402.
26. *Younger v. Jensen*, *supra*, 26 Cal.3d. at p. 406. This point is criticized in a dissenting opinion at p. 419.
27. *Equal Employment Opportunity Com. v. Karuk Tribe Housing Auth.* (9th Cir. 2001) 260 F.3d 1071, 1077 (hereafter *Karuk Tribe Housing Auth.*). Examples of cases cited in this article which used the term "jurisdiction" in relation to accusations of government overreach include *Franchise Tax Bd. v. Barnhart*, *supra*, 105 Cal.App.3d at p. 279 (where the appellate court characterized a subpoenaed party's argument that the board lacked statutory authority to issue an investigative subpoena as jurisdictional) and *Younger v. Jensen*, *supra*, 26 Cal.3d at pp. 404–405 (where the California Supreme Court used the term jurisdiction to discuss the contention that the California Attorney General was preempted by federal law).
28. *Karuk Tribe Housing Auth.*, *supra*, 260 F.3d 1071, 1076. The general rule favoring enforcement of public entity subpoenas was followed by a California appellate court in *Public Employment Relations Bd. v. Superior Court (Dept. of Personnel Admin. of the State of Cal.)* (1993) 13 Cal.App.4th 1816, 1825 [addressing enforcement of administrative subpoenas issued in quasi-judicial proceedings before the Public Employment Relations Board].
29. *Id.* at p. 1076–1077; *Consumer Financial Protection Bur. v. Future Income Payments, LLC* (C.D.Cal. 2017) 252 F.Supp.3d 961, 966.
30. *Karuk Tribe Housing Auth.*, *supra*, 260 F.3d at pp. 1076–1077; *Consumer Financial Protection Bur. v. Future Income Payments, LLC*, *supra*, 252 F.Supp.3d at p. 966.
31. *Karuk Tribe Housing Auth.*, *supra*, 260 F.3d at p. 1077.

jurisdiction, or in other words, unless jurisdiction is "plainly lacking," the court should enforce compliance with the subpoena.[32] The "plainly lacking" standard is necessarily a low bar to avoid tasking courts and parties with resolving complex fact-based hypotheticals before a public entity even decides whether to take legal action against a subpoenaed party.[33]

In *Equal Employment Opportunity Commission v. Children's Hospital Center of Northern California*,[34] the Ninth Circuit Court of Appeals addressed the issue of whether a subpoenaed party may avoid compliance with an investigative subpoena when the party claims it has a defense—in that case, res judicata—to a potential subsequent lawsuit by a public entity. There, the hospital objected to producing subpoenaed information based on a claim that the Equal Employment Opportunity Commission lacked "jurisdiction" to investigate.[35]

In that case, the hospital previously entered into a court-approved consent decree resolving discrimination claims made by employees. The commission was not a party to the decree. After the decree was entered, three employees of the hospital filed discrimination charges with the commission. The commission subpoenaed the hospital to investigate the charges and the hospital claimed the commission lacked jurisdiction because the charging employees were limited to the grievance remedy provided by the decree.

The Ninth Circuit ordered the hospital to comply with the subpoena, reasoning that if, after conducting its investigation, the commission brings legal action or issues a right-to-sue letter to the charging employees which they pursue, then the question of the preclusive effect of the decree can be asserted and decided.[36] In other words, the public entity's power to investigate is not abrogated because the subpoenaed party may have a valid defense to a subsequent suit based on the subpoenaed evidence.[37]

32. *Ibid.*
33. *Consumer Financial Protection Bur. v. Future Income Payments, LLC* (C.D.Cal. 2017) 252 F.Supp.3d 961, 966.
34. *Equal Employment Opportunity Com. v. Children's Hospital Center of Northern California*, *supra*, 719 F.2d 1426 (hereafter *Children's Hospital*).
35. *Ibid.*
36. *Children's Hospital*, *supra*, 719 F.2d at p. 1428. The Ninth Circuit went on to say that the scope of the judicial inquiry in a subpoena enforcement proceeding is quite narrow. The critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence sought in the subpoena is relevant and material to the investigations. (*Ibid.*) These questions are discussed below.
37. *Id.* at p. 1429.

Instead, questions about coverage of the statute in question and possible defenses available to a potential suit should not be addressed by the court at the subpoena enforcement stage; those questions should be left for judicial review after the public entity takes legal action.[38]

On the other hand, some jurisdictional challenges are ripe for resolution at the subpoena enforcement stage, as the Ninth Circuit explains in *Karuk Tribe Housing Authority*.[39] There, a tribal housing authority refused to comply with an investigative subpoena issued by the Equal Opportunity Employment Commission to investigate potential violations of the federal Age Discrimination in Employment Act, arguing that the act does not apply to Native American Tribes and that the tribe enjoys sovereign immunity from the commission's investigation.[40]

In *Karuk Tribe Housing Authority*, the Ninth Circuit distinguished "coverage" challenges from "jurisdiction" challenges, because the two different types of challenges lead to different results.[41] Factual challenges based on a lack of statutory coverage are not permitted, while challenges based on jurisdiction may in certain circumstances result in a refusal to enforce the subpoena.[42] "There is a difference, particularly in the case of an Indian tribe, between the determination whether an agency has regulatory jurisdiction to enforce a subpoena in the first instance, and the very different question whether a subpoena recipient has a defense to liability."[43]

The Ninth Circuit found that the tribe's sovereign immunity challenge falls into the narrow category of jurisdictional challenges that are ripe for determination at the subpoena enforcement stage and utilized three factors in its analysis: (1) there is clear evidence that exhaustion of administrative remedies will result in irreparable injury; (2) the agency's jurisdiction is plainly lacking; and (3) the agency's special expertise will be of no help on the question of its jurisdiction.[44] The Ninth Circuit determined that the tribe would suffer irreparable injury–in the nature of intrusion into its sovereignty–if the subpoena were enforced, and that the commission has no special expertise in interpretation of statutes with respect to Native American Tribes.[45] The Ninth Circuit also noted that the facts of the case before it were unlike those in *Children's Hospital*, where the subpoenaed party was "clearly subject to the federal laws that authorized the administrative investigations."[46]

IV. IS THE INVESTIGATIVE SUBPOENA AN UNREASONABLE SEARCH AND SEIZURE?

The Fourth Amendment of the U.S. Constitution prohibits unreasonable searches and seizures.[47] Courts have distilled Fourth Amendment principles that apply to investigative subpoenas.

In *Oklahoma Press Publishing Co.*, the Supreme Court, after questioning whether the Fourth Amendment applied at all to the subpoenas at bar which sought production of corporate records, articulated a test that applied Fourth Amendment requirements, only by analogy, to investigative subpoenas.[48] For a subpoena to satisfy the Fourth Amendment, the investigation must have a lawfully authorized purpose.[49] In addition, the requirement of "probable cause, supported by oath or affirmation," applicable to a search warrant, is satisfied as long as the subpoenaed documents are relevant to the inquiry.[50] Beyond this, the requirement of reasonableness, including particularity in "describing the place to be searched, and the persons or things to be seized," also applicable to a warrant, comes down to the specification of the documents to be produced, and those documents must be adequate, but not excessive, for purposes of the relevant inquiry.[51] In a later case, the Supreme Court emphasized that, while the subpoena may be issued and served by the government, the subpoenaed party must have the opportunity for judicial

38. *Ibid.*, citing *Endicott Johnson Corp. v. Perkins*, *supra*, 317 U.S. at p. 509 and *Oklahoma Press Publishing Co.*, *supra*, 327 U.S. at p. 214. In addition to a res judicata defense, the Ninth Circuit also noted it is premature for a subpoenaed party to raise other possible defenses–such as the statute of limitations, even assuming timeliness of a complaint is jurisdictional–at the subpoena enforcement stage. (*Children's Hospital*, *supra*, 719 F.2d at pp. 1429–1430.)
39. *Karuk Tribe Housing Auth.*, *supra*, 260 F.3d 1071.
40. *Id.* at p. 1073.
41. *Karuk Tribe Housing Auth.*, *supra*, 260 F.3d 1071, 1077.
42. *Ibid.*
43. *Ibid.*
44. *Karuk Tribe Housing Auth.*, *supra*, 260 F.3d 1071, 1077. This three-factor test was also applied in *Public Employment Relations Bd.*, *supra*, 13 Cal. App.4th at p. 1830, to analyze when a superior court should intervene and decide a question of "administrative jurisdiction" without requiring a party challenging jurisdiction to exhaust administrative remedies.
45. *Ibid.*
46. *Ibid.*
47. The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be search, and the person or things to be seized."
48. *Oklahoma Press Publishing Co.*, *supra*, 327 U.S. at pp. 208–209; *City of Santa Cruz v. Patel*, *supra*, 155 Cal.App.4th at p. 250. In *Oklahoma Press Publishing Co.*, the United States Supreme Court noted that "no question of actual search and seizure" is raised where the agency has not sought "to enter [the subpoenaed party's] premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections." (*Ibid.* at p. 195.)
49. *Oklahoma Press Publishing*, *supra*, 327 U.S. at p. 209.
50. *Ibid.*
51. *Ibid.*

review before suffering any penalties for refusing to comply.[52]

In *Morton Salt Co.*, this Fourth Amendment test was restated more succinctly to require that: (1) the inquiry is within the authority of the government; (2) the demand is not too indefinite; and (3) the information sought is reasonably relevant.[53] The substance of the protection is in the requirement that the disclosure of information sought shall not be unreasonable.[54]

With regard to investigative subpoenas issued by a city, the California Supreme Court applied a slightly different standard in *Connecticut Indemnity Co.*[55] There, the California Supreme Court specified that a subpoena issued by a city is proper if: (1) it is authorized by ordinance or similar enactment; (2) it serves a valid legislative purpose; and (3) the witnesses or materials subpoenaed are pertinent to the subject matter of the investigation.[56] At least one court reasoned that the standard announced in *Connecticut Indemnity Co.* applied "the same principles" articulated in the Fourth Amendment test outlined in *Oklahoma Press Publishing Co.*[57]

The first factor of the *Oklahoma Press Publishing Co's* Fourth Amendment test—whether the public entity is authorized to investigate—is met where a statute provides the public entity authority to regulate.[58] The second factor that the demand is not too indefinite comes down to whether the documents sought are identified with sufficient particularity to allow a response.[59] And as to the third factor, the relevance standard is construed broadly.[60] As stated in *Brovelli*, the information sought need only be "reasonably relevant."[61] A public entity is not required to meet the same standards as a party seeking discovery in pending litigation.[62]

If the subpoena meets the three-factor Fourth Amendment test, it may be irrelevant for Fourth Amendments purposes whether the subpoenaed

52. *See v. City of Seattle (1967)* 387 U.S. 541, 544–545 [in dictum]; *City of Santa Cruz*, *supra*, 155 Cal. App.4th at pp. 250–251; *West Coast Shows, Inc.*, *supra*, 10 Cal.App.3d at p. 470 ["If a person affected by the Government Code process shall believe the [Fourth Amendment test is] not met, without contempt or other penalty he need not respond. Thereupon the investigating agency is obliged, on an order to show cause, to arrange a superior court hearing at which conformity of the subpoena duces tecum to constitutional and legal standards may be judicially tested."]
53. *Morton Salt Co.*, *supra*, 338 U.S. at p. 652; and *Brovelli v. Superior Court (Mosk)*, *supra*, 56 Cal.2d at p. 529, adopting the three-part Fourth Amendment test.
54. *Morton Salt Co.*, *supra*, 338 U.S. at pp. 652–653, quoting *Oklahoma Press Publishing*, *supra*, 327 U.S. at p. 208.
55. *Connecticut Indem. Co.*, *supra*, 23 Cal.4th 807 [where a city council was investigating toxic contamination of the water supply for the purpose of obtaining information regarding insurance coverage and responsibility for the contamination].
56. *Connecticut Indem. Co.*, *supra*, 23 Cal.4th at p. 813; *City of Vacaville v. Pitamber*, *supra*, 124 Cal.App.4th at p. 748.
57. *City of Santa Cruz v. Patel* (2008) 155 Cal.App.4th 234, 251.
58. See *State Water Resources Control Bd. v. Baldwin & Sons, Inc.* (2020) 45 Cal.App.5th 40, 56 [Government Code sections 11180 and 11181 by extension provide the State Water Resource Control Board with authority to issue a subpoena to investigate stormwater discharge violations when the board is mandated by statute to regulate stormwater]; *Franchise Tax Bd. v. Barnhart*, *supra*, 105 Cal.App.3d at p. 279 [although the Political Reform Act does not expressly authorize the Franchise Tax Board to issue subpoenas, authority still exists because the act empowers the board to "audit and conduct field investigations" and the Government Code provides subpoena authority to investigate "other matters as may be provided by law"].
59. *State Water Resources Control Bd. v. Baldwin & Sons, Inc.*, *supra*, 45 Cal.App.5th at p. 57.
60. *Ibid.*; *Oklahoma Press Publishing v. Walling*, *supra*, 327 U.S. at p. 209 ["[T]his cannot be reduced to formula, for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purpose and scope of the inquiry"].
61. *Brovelli v. Superior Court*, *supra*, 56 Cal.2d at p. 529; see also *Endicott Johnson Corp. v. Perkins* (1943) 317 U.S. 501, 509 [relevancy is established when the information sought is not "plainly incompetent or irrelevant to any lawful purpose"].
62. *State Water Resources Control Bd. v. Baldwin & Sons, Inc.* (2020) 45 Cal.App.5th 40, 57. And because investigative subpoenas do not relate to judicial proceedings, but to statutorily-permitted investigations, subpoenas issued under Government Code sections 11180 and 11181 need not comply with the requirements of Code of Civil Procedure section 1985, referring to subpoenas issued in civil litigation. (*Fielder v. Berkeley Properties Co.*, *supra*, 23 Cal.App.3d at p. 38.)

party is an individual rather than a corporation or a large business.[63]

Subpoenaed parties have challenged subpoenas on the ground that the public entity failed to support the subpoena with an affidavit showing "probable cause" or "good cause." However, as regulatory schemes have become increasingly important, reliance on "probable cause" as a means of restraining public entity subpoenas has all but disappeared.[64] An affidavit *accompanying the subpoena when served*, showing good cause for the relevancy and materiality of the matters sought, is not required.[65] However, submitting a good cause affidavit to the court *in support of a petition* at the subpoena enforcement stage will assist a court with analyzing whether the matters sought are reasonably relevant to the investigation.[66]

V. DOES THE INVESTIGATIVE SUBPOENA VIOLATE THIRD-PARTY PRIVACY RIGHTS?

The California Constitution guarantees the right to privacy.[67] To determine whether an investigative subpoena invades the privacy rights of third-parties effected by disclosure, courts have looked at the nature of the information sought.[68]

In *Division of Medical Quality, Board of Medical Quality v. Gheraradini*,[69] when the Board of Medical Quality issued an investigative subpoena for production of complete medical records for five patients, the hospital refused to comply citing, in part, the patients' right to privacy under the California Constitution.[70] There was no evidence that the patients consented to disclosure.[71] The appellate court reversed the superior court's order enforcing compliance with the subpoena citing the intimate nature of medical records when compared to other areas already judicially recognized as being protected.[72] The appellate court reasoned that federal constitutional growth as well as the addition of a right to privacy added by amendment to the California Constitution in 1974 may have circumscribed the broad investigative subpoena authority of public entities.[73] While the constitutional amendment does not prohibit all incursions into individual privacy, any such invasion must be justified by a compelling interest and any statute authorizing invasion of such is subject to strict scrutiny.[74]

Where the information subpoenaed is less intimate in nature, courts have permitted disclosure of third-party information over privacy objections by the subpoenaed party. In *Tom v. Schoolhouse Coins, Inc.*,[75] a state department head investigating possible

63. *Craib v. Bulmash* (1989) 49 Cal.3d 475, 485 [citing cases where the three-factor Fourth Amendment test was applied to subpoenas directed to individuals]. Although it may be irrelevant if the subpoenaed party is an individual or corporation for purposes of a Fourth Amendment objection, whether this distinction exists for a Fifth Amendment challenge is discussed under the section titled "Does the investigative subpoena compel self-incrimination?"
64. *Id.* at 481 [where the Supreme Court held that although the public entity's investigative subpoena was issued without "probable cause," a requirement for warrants, compliance with the subpoena should still be enforced]; *City of Santa Cruz v. Patel*, *supra*, 155 Cal.App.4th at p. 250 [the court rejected the subpoenaed party's argument that the investigative subpoenas issued by a city council were invalid under the Fourth Amendment because they were issued without probable cause].
65. See *Fielder v. Berkeley Properties Co.*, *supra*, 23 Cal. App.3d at pp. 40–41, citing *People v. West Coast Shows, Inc.*, *supra*, 10 Cal.App.3d at p. 470. But see *Division of Medical Quality, Bd. of Medical Quality v. Gheraradini* (1979) 93 Cal.App.3d 669, 680–681 [where the court criticized the declaration in support of a subpoena for medical records because it "set forth no facts, no showing of relevance or materiality of the medical records" and posited that a public entity may now be require to show reasonable cause].
66. See *Barnes v. Molino* (1980) 103 Cal.App.3d 46, 54–55; *Fielder v. Berkeley Properties Co.*, *supra*, 23 Cal.App.3d at p. 41.
67. Article 1, section 1 of the California Constitution provides that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursing and obtaining safety, happiness, and privacy."
68. *Division of Medical Quality, Bd. of Medical Quality v. Gheraradini*, *supra*, 93 Cal.App.3d at p. 678 (hereafter *Board of Medical Quality*); *Tom v. Schoolhouse Coins, Inc.* (1987) 191 Cal.App.3d 827, 830.
69. *Board of Medical Quality*, *supra*, 93 Cal.App.3d 669.
70. *Id. at pp.* 673–674.
71. *Id. at p.* 673.
72. *Id. at p.* 678 [citing cases.]
73. *Id. at p.* 679. But see *Barnes v. Molino*, *supra*, 103 Cal. App.3d at p. 52.
74. *Board of Medical Quality*, *supra*, 93 Cal.App.3d at p. 679.
75. (1987) 191 Cal.App.3d 827.

violations of securities laws issued a subpoena calling for production of investor names, addresses, and telephone numbers.[76] When the subpoenaed party only produced a partial investor list, containing the requested information for investors consenting to disclosure, the department head petitioned for and obtained an order from the superior court enforcing compliance with the subpoena.[77] The appellate court upheld the order compelling production of investor contact information—whether or not investors consented to disclosure—finding that the department head has a "sufficiently compelling interest in identifying and rectifying violations" of the law to "justify the de minimus intrusion" caused by disclosure.[78] The appellate court reasoned that a consumer engaged in transactions in a regulated industry has no reasonable expectation that her identity will be withheld from a public entity responsible for enforcing the law.[79] Also, the appellate court noted that where a subpoena is issued by a state department, existing provisions of the law provide protections for privacy concerns.[80]

If a subpoenaed party objects to a subpoena based on the privacy rights of a third-party corporation, no privacy right may exist for the corporation's information under the California Constitution.[81] This does not mean that a corporate entity has no valid concern about public disclosure of its affairs; however, those concerns may already be protected by existing law.[82] To provide additional privacy protections, some courts have issued protective orders related to investigative subpoenas.[83]

VI. DOES THE INVESTIGATIVE SUBPOENA COMPEL SELF-INCRIMINATION?

Under the Fifth Amendment to the U.S. Constitution, no person can be compelled in a criminal case to be a witness against himself or herself.[84] Where the records of a corporation are sought by an investigative subpoena, neither the corporation nor a person having custody of its records can refuse to produce the corporate records on the basis of the privilege against self-incrimination.[85]

When a subpoena is issued to an individual, under certain circumstances, courts have compelled production of documents despite the individual's Fifth Amendment rights. In *Craib v. Bulmash*,[86] the California Supreme Court considered a challenge to a subpoena by Bulmash, an individual, who as appointed trustee for his sister employed attendants for her care.[87] Bulmash objected to a subpoena issued by a labor commissioner requesting production of time and wage records for all persons employed by the trust.[88]

Bulmash argued that all the prerequisites for asserting the privilege against self-incrimination were met: he is an individual who has been statutorily compelled to make incriminating statements by producing the wage and hour records which could be used as a basis for imposing civil or criminal penalties.[89] The California Supreme Court concluded that the privilege did not apply to him because the wage and hour records fit under the "required records doctrine."[90] The doctrine applies where records are required by law to be kept in order that there may be suitable information about transactions which are the appropriate subject of governmental regulation and the enforcement of restrictions validly established.[91]

The stage at which courts will determine a Fifth Amendment challenge to a subpoena depends on whether the subpoena calls for production of documents *or* the attendance of a witness to give testimony. This is because whether a subpoenaed party has a valid privilege to assert can only be determined—in the context of a witness's refusal to answer questions—after specific questions have been put to the witness.[92]

76. *Tom v. Schoolhouse Coins, Inc.*, *supra*, 191 Cal.App.3d at p. 829.
77. *Ibid.*
78. *Id.* at p. 830.
79. *Ibid.* ["It is common knowledge that securities transactions are heavily regulated by both the state and federal governments"], not followed as dicta in *Pacific-Union Club v. Superior Court* (1991) 232 Cal.App.3d 60, 77, fn. 6.
80. *Schoolhouse Coins, Inc.*, *supra*, 191 Cal.App.3d at p. 830. Government Code section 11183 makes it a misdemeanor for a public officer to divulge information pertaining to the "confidential or private transactions, property or business of any person" acquired pursuant to an investigative subpoena issued under Government Code sections 11180 and 11181. Additional protection is afforded by the provisions of the Information Practices Act of 1977 (Civ. Code, § 1798 et seq.) which bars disclosure of "personal information" regarding "financial matters" gathered by a state department, without "prior written voluntary consent of the individual to whom the record pertains." (Civ. Code, §§ 1798.3, 1798.24, and 1798.53.) Disclosure of information obtained from an investigative subpoena is permitted in certain circumstances. (Gov. Code, § 11181, subd. (g); Civ. Code, § 1798.24, subds. (o) and (p).)
81. *Connecticut Indem. Co. v. Superior Court (City of Lodi)*, *supra*, 23 Cal.4th at p. 818, quoting *Robert v. Gulf Oil Corp.* (1983) 147 Cal.App.3d 770, 791-793 for the proposition that corporate entities have no privacy rights under the California Constitution.
82. See fn. 80.
83. *See, e.g., State Water Resources Control Bd. v. Baldwin & Sons, Inc. supra*, 45 Cal.App.5th 40.
84. U.S. Const., 5th Amend.
85. *Brovelli v. Superior Court (Mosk)*, *supra*, 56 Cal.2d at p. 529. In *Brovelli*, the California Supreme Court noted that an investigative subpoena may be directed to a corporation without naming any particular officer, and the command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. (*Id.* at p. 528, fn. 1.)
86. (1989) 49 Cal.3d 475.
87. *Id.* at p. 479.
88. *Ibid.*
89. *Craib v. Bulmash*, *supra*, 49 Cal.3d 475, 486.
90. *Id.* at p. 489.
91. *Id.* at p. 487, quoting *Shapiro v. United States* (1948) 335 U.S. 1, 33.
92. See *Barnes v. Molino*, *supra*, 103 Cal.App.3d at p. 56, citing *Fielder v. Berkeley Properties Co.*, *supra*, 23 Cal. App.3d at pp. 39–40.

VII. IS COMPLIANCE WITH THE INVESTIGATIVE SUBPOENA UNDULY BURDENSOME?

The accusation that compliance with an investigative subpoena is unduly burdensome is related to the Fourth Amendment analysis. If a public entity shows a reviewing court that the three-factor Fourth Amendment test is met, "the subpoena should be enforced unless the party being investigated proves the inquiry is unreasonable because it is overboard or unduly burdensome."[93]

In *Morton Salt Co.*, the Supreme Court commented that before a court will hold that a subpoena is overly broad or burdensome, the court may expect the subpoenaed party to make reasonable efforts to work with the public entity to limit the subpoena's sweep.[94] A subpoenaed party should meet and confer with the public entity, at the very least, to make a record for the court of the party's grievances rather than ask the court to assume that compliance with the subpoena is burdensome.[95]

If a subpoenaed party fails to meet and confer with the public entity regarding the burden posed by compliance, the subpoenaed party may waive this objection.[96] To show that an investigative subpoena imposes an undue burden, a subpoenaed party cannot merely point to an agency's "extensive" requests or assert that compliance would be costly.[97] In order to prevail at the subpoena enforcement stage on an argument that compliance is unduly burdensome, the party opposing enforcement must supply evidence establishing that compliance threatens to unduly disrupt or seriously hinder normal operations of a business.[98]

Courts have tied the reasonableness of the temporal scope for which information is demanded to the applicable statute of limitations which creates liability. For example, in *Consumer Financial Protection Bureau v. Future Income Payments, LLC*,[99] the bureau sought information for 2011 until the date of production and the responding party argued the relevant time period for production should be two years shorter, from 2013 until production, because of the applicable statute of limitations.[100] The district court found that—assuming liability was not available before 2013—the bureau may properly demand production of information dating back to 2011 because it was "reasonably relevant to conduct occurring within the statute of limitations period."[101]

Regarding the expense and inconvenience associated with producing subpoenaed documents, courts have held that a subpoenaed party is like a defendant to a lawsuit and must bear some burden of making an appropriate defense.[102] "[N]o way has been discovered of relieving a defendant from the necessity of a trial to establish the facts."[103] And because a public entity undergoes investigations with judicial supervision, subpoenaed parties have a judicial system at their disposal to thwart unwarranted investigations.[104]

93. *Children's Hospital*, *supra*, 719 F.2d at p. 1428.
94. *Morton Salt Co.*, *supra*, 338 U.S. 632, 653.
95. See *Id.* at pp. 653–654.
96. *Consumer Financial Protection Bur. v. Future Income Payments, LLC*, *supra*, 252 F.Supp.3d at p. 970.
97. *Ibid.*
98. *Ibid.*
99. *Consumer Financial Protection Bur. v. Future Income Payments, LLC*, *supra*, 252 F.Supp.3d 961.
100. *Id.* at pp. 969.
101. *Ibid.*
102. *Oklahoma Press Publishing*, *supra*, 327 U.S. at pp. 212–218, fns. 50 and 58.
103. *Id.* at p. 212, fn. 50, quoting *Myers v. Bethlehem Shipbuilding Corp.* (1938) 303 U.S. 41, 50.
104. *Oklahoma Press Publishing*, *supra*, 327 U.S. at p. 217.

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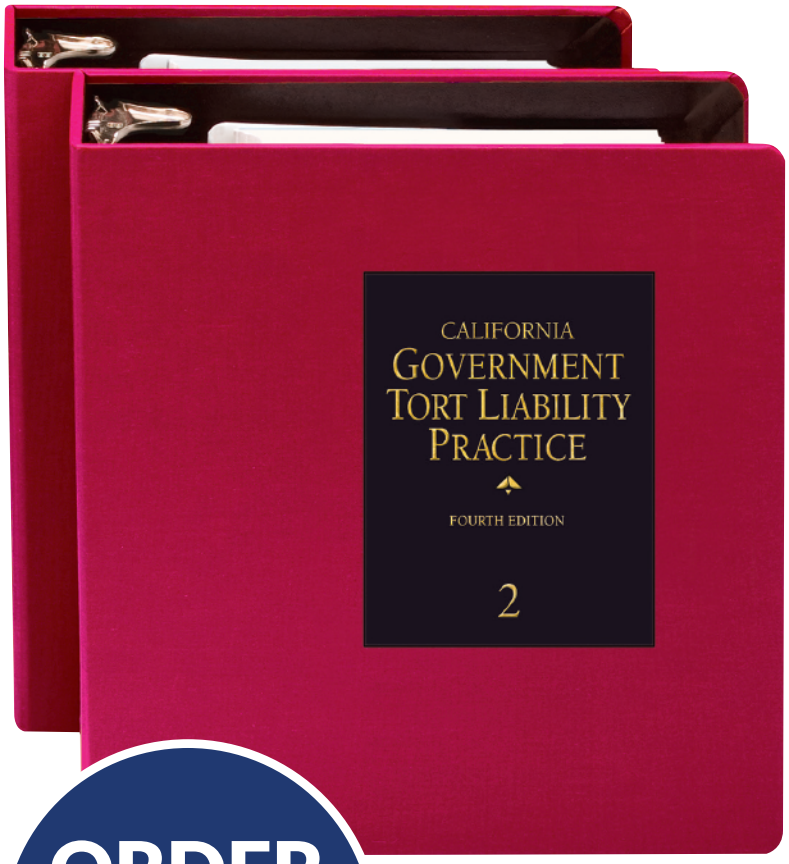

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