CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

In the Matter of:

Precedent DLSE
Decision No. DLSE-PD-002

Adat Shalom Board & Care, Inc. and Angelica Reingold's Appeal from Civil Citations Issued by Division of Labor Standards Enforcement, Department of Industrial Relations, State Of California

DECISION

Attached is a decision in the above-captioned Bureau of Field Enforcement ("BOFE") citation case issued by the Division of Labor Standards Enforcement, designated as DLSE Precedent Decision No. DLSE-PD-002 pursuant to California Government Code section 11425.60.

This decision applies to Tier 2 hearings held under the informal procedures of the Administrative Procedures Act for BOFE , Retaliation Complaint Investigation (RCI), Licensing and Registration (L&R), Judgement Enforcement Unit (JEU) and Public Works.

Adopted as Precent: October 1, 2024

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

Before the Labor Commissioner of the State of California

In the Matter of: Adat Shalom Board & Care, Inc. and Angelica Reingold's Appeal from Civil Citation Issued by: Division of Labor Standards Enforcement, Department of Industrial Relations, State of California	STATE CASE NO. 35-CM-259095-17 **ORDER RE: MOTION TO QUASH SUPBOENA, OR, IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER; REQUEST TO CONTINUE HEARING; AND RENEWED REQUEST FOR FORMAL APPEAL HEARING**

On January 29, 2018, Adat Shalom Board & Care, Inc. ("ASBC") and Angelica Reingold (collectively, "Appellants") appealed two citations issued against them by the Division of Labor Standards Enforcement's ("DLSE" or "Respondents") Bureau of Field Enforcement ("BOFE") for unpaid minimum wages, overtime wages, meal period premiums and penalties. Citation WA358588 assessed restitution and liquidated damages pursuant to Labor Code sections 1197.1, 510, 226.7 and 1194.2. Citation WA358589 assessed penalties for violation of Labor Code section 226(a). Both citations were issued on December 27, 2017. On July 12, 2018, an Order re. Form of Hearing, Discovery and Scheduling was issued, scheduling the hearing in the appeal of these citations (hereinafter, "Appeal Hearing") to commence on January 10, 2019.

On October 10, 2018, Appellants issued four Deposition Subpoenas for Production of Business Records (hereinafter, "subpoenas"). Respondent filed a Motion to Quash Subpoena, or in the Alternative, Motion for Protective Order (hereinafter, "Motion to Quash") on November 9, 2018. Appellants' Opposition to the Motion to Quash (hereinafter, "Opposition") was received on December 27, 2018, along with Appellants' Objections to the Declaration of Yanin Senachai, Appellants Renewed Request for a Formal Hearing, and Appellants' Request for a Continuance. On January 7, 2019, the parties participated in a telephonic hearing on the Motion to Quash (hereinafter, "Motion Hearing").

Respondents' Motion to Quash is granted in part, and the Motion for a Protective Order is granted in part, as described in the Order below. Appellants' Renewed Request for a Formal Hearing is denied; and Appellants' Request for a Continuation of the Current Appeal Hearing Commencement Date is granted, with modification.

I. Background

The moving and opposition papers filed in this matter indicate that the parties met and conferred prior to the issuance of the subpoenas. The parties first discussed the discovery requests propounded by Appellants, which were subsequently deemed impermissible by the July 12 Order. By August 7, 2018, the parties had confirmed that Respondent DLSE had already provided Appellants the full audit in support of the issued citations. The parties continued to correspond regarding additional information requested by the Appellants, but no agreement was reached. On October 10, 2018, the Appellants issued four subpoenas seeking:

1. Any and all records pertaining to the Action (referring to the underlying citations), including records pertaining to the calculation of the citation amounts, any and all statements (including witness statements and/or statements of persons contacted

concerning the Action), interview notes, investigative notes, analyses, and written and/or electronic communications (hereinafter, "Citation Records Subpoena").

2. Any and all records identifying persons contacted concerning the Action, including all persons interviewed, all persons to be called as witnesses at the Appeal hearing (including all current and/or former employees of Adat Shalom Board and Care, Inc.), and/or all contacted current and/or former employees of Adat Shalom Board and Care, Inc. (hereinafter, "Witness Records Subpoena").

3. Any and all records pertaining to BOFE's policies and practices for conducting investigations and issuing citations similar in nature to the Action, including standard operating procedures and training materials (hereinafter, "BOFE Policy Records Subpoena").

4. The personnel records of Annabelle Estaniel pertaining to the following: (1) job description(s); (2) performance and/or achievement; (3) employment related disclosures (including any disclosures related to hiring and/or promotions); (4) orientation; (5) training (including training concerning how to conduct an investigation, conduct witness interviews, perform citation related calculations, issue citations, and/or matters similar in nature to the Action; (6) discipline (including or [sic] written and/or oral counseling); (7) internal complaints (oral and/or written); and/or (8) external complaints (oral and/or written) (hereinafter, "Estaniel Personnel Records Subpoena").

The subpoenas demanded production of the requested records on November 9, 2018, and the DLSE filed its Motion to Quash on that date.

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II. Form of Subpoenas

As a preliminary matter, the subpoenas issued by Appellants are Deposition Subpoenas for the Production of Business Records, not subpoenas duces tecum. Deposition Subpoenas for the Production of Business Records are properly issued only to third-parties, and are not contemplated by Government Code section 11450.10, which specifically authorizes only witness subpoenas and subpoenas duces tecum. (*See* Code of Civ. Proc. Section 2020.020 et seq.; *cf.* Govt. Code section 11450.10(a).) Although both kinds of subpoena seek the production of documents, Respondent DLSE is a party to this action and the Deposition Subpoenas for the Production of Business Records are therefore technically invalid.

The difference between a Deposition Subpoena for the Production of Business Records and a subpoena duces tecum is not just a matter of form. A subpoena duces tecum must conform to the requirements set forth in Code of Civil Procedure section 1985, including the execution of:

> …an affidavit showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced; setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control.

(Code Civ. Proc. Section 1985(b).) A subpoena duces tecum served without an accompanying affidavit is unenforceable.

A deposition Subpoena for the Production of Business Records "shall designate the business records to be produced either by specifically describing each individual item or by reasonably particularizing each category of item." (Code. Civ. Proc. 2020.410(a)). This standard is arguably lower than that set forth for the affidavit that must accompany a subpoena duces tecum. However, the specificity sought by the latter was eventually obtained in this instance through the meet and confer process, Respondent DLSE's Motion to Quash, Appellants' Opposition, and the Motion Hearing. In particular, Appellants' Opposition elaborated at length on the materiality of the

documents sought pursuant to the subpoenas, and at the Motion Hearing, Respondent DLSE described the contents of the BOFE file in detail, providing a clear picture of the universe of potentially relevant documents.

Although the subpoenas are technically invalid and therefore unenforceable, Respondent DLSE has not objected to their incorrect form. Given the lack of objection and the additional information provided by the parties in the course of litigating the Motion to Quash, this Order resolves the dispute over the subpoenas without regard to form, so as not to further delay the citation appeal proceeding.

III. Subpoenas as Pre-Hearing Discovery

There is no disagreement that the citation appeal process must afford the Appellants due process. (*See* Government Code section 11425.10.) However, the parties have articulated very different views of what due process should look like in the context of this informal administrative adjudication. Respondent DLSE maintains that there is no due process right to pre-hearing discovery, while Appellants argue that they are entitled not only to the full range of discovery tools available to civil court litigants, but also the Constitutional protections afforded to criminal defendants. To reach a resolution, we must address the specific questions before us: Pursuant to Government Code section 11450.20 and the four subpoenas issued by Appellants, 1) *what* documents is Respondent required to produce; and 2) *when* is Respondent required to produce them?

A. The Applicable Standard

Government Code section 11415.10(a) provides that "[t]he governing procedure by which an agency conducts an adjudicative proceeding is determined by the statutes and regulations applicable to that proceeding." As explained in detail in the July 12 Order, the DLSE is a Tier 2 agency that is required by statute to hold an informal hearings to adjudicate an appeal of a citation issued by BOFE. The DLSE is subject to the due process requirements set forth in Government Code section

11425.10, most importantly to "give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence." (Government Code section 11425.10(a)(1).) Pursuant to Government Code section 11425.10(b), "[t]he governing procedure by which an agency conducts an adjudicative proceeding may include provisions *equivalent to, or more protective* of the rights of the person to which the agency action is directed, than the requirements of this section." (Emphasis added.) The DLSE exceeds the minimum requirements set forth in Government Code section 11425.10(a)(1) by routinely allowing for opening and closing statements; the introduction of physical and documentary evidence; witness testimony and cross-examination.

Regarding discovery, the specific tools -- such as exhibit and witness list exchange (*see* Government Code section 11507.6) -- provided in a formal administrative hearing are not required in a Tier 2 informal administrative hearing. However, parties may issue subpoenas duces tecum, or request that the presiding officer do so. Government Code section 11450.10(a) provides that "subpoenas and subpoenas duces tecum may be issued for attendance at a hearing and for production of documents *at any reasonable time and place* or at a hearing." (Emphasis added.) The presiding officer must issue a subpoena or subpoena duces tecum at the request of a party, or the attorney of record for a party may issue a subpoena. (Government Code section 11450.20(a).) Failure to comply with a subpoena may be punished as contempt. (Government Code section 11450.20.) A person served with a subpoena or subpoena duces tecum may object to its terms by a motion for a protective order, including a motion to quash. (Government Code 11450.30(a).) The presiding officer must resolve any objection to a subpoena, issuing an order on terms and conditions "appropriate to protect the parties or the witness from unreasonable or oppressive demands, including violations of the right to privacy." (Government Code section 11450.30(b).)

Central to a resolution of the Motion to Quash is a determination of the relevancy of the documents requested by the subpoenas. The parties appear to agree generally that evidence that may prove or disprove the allegations supporting the citations is relevant. (*See* Motion to Quash, at 4:26-27; and Appellants' Opposition, at 9:18-23, citing *People v. Nelson* (2008) 43 Cal.4th 1242, 1266 and Evidence Code section 210.) In the context of subpoenas issued in administrative appeals, the courts have clarified that the requesting party must make "a showing of more than a wish for the benefit of all the information in the adversary's files … in the absence of some additional showing of need and specificity, [the issuing parties] are not entitled to all of the reports and documents gathered by investigators." (*Everett v. Gordon* (1968) 266 Cal.App.2d 667, 672.[1]) Further, where evidence is obtained in confidence during the course of the investigation, the party objecting to the subpoena must demonstrate that the public interest in maintaining such information confidential outweighs the necessity for disclosure in the interest of justice. (Evid. Code sections 1040(b)(1) and 1041(a)(2).)

B. Scope of Subpoenas & Timing of Production

Respondent DLSE has raised objections to the subpoenas on numerous grounds, asserting: there is no pre-hearing right to discovery in informal administrative proceedings; the subpoenas are overly broad; they violate the right to privacy; the information sought is not relevant to proving the underlying violations that are the subject of the contested citations; and is protected by the attorney-client, attorney work-product and official information privileges. Appellants have clarified that: they are not seeking documents protected by the attorney-client or attorney work-product privileges; but that all other documents described by the subpoenas are relevant; that Appellants' due process rights outweigh the public interest in maintaining the confidentiality of information acquired by the DLSE

[1] *Everett*, *supra*, arose out of a discovery dispute in a formal administrative hearing, where heightened due process protections are afforded litigants. Respondent DLSE's argument that the relevance standard applied to a formal administrative hearing should be legally sufficient for an informal one is well taken.

in confidence; and that due process requires disclosure of the subpoenaed records prior to the hearing. To evaluate the parties' competing claims, we will address each subpoena in turn.

1. Estaniel Personnel Records Subpoena

Appellants have failed to establish the relevancy of Ms. Estaniel's personnel records. Ms. Estaniel's professional conduct is not at issue in this appeal and her personnel records are therefore irrelevant to its resolution. In addition, public employees have a reasonable expectation of privacy, guaranteed by the California Constitution, in their personnel files. (Cal. Const. Art. 1, Sec. 1; *Teamsters Local 856 v. Priceless*, LLC (2003) 112 Cal.App.4th 1500, 1515-16 (disagreed with on other grounds by *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319).[2])

Pursuant to Government Code section 11450.30(b)'s mandate to protect witnesses from unreasonable or oppressive demands, including violations of the right to privacy, Respondent DLSE's motion to quash as to the Estaniel Personnel Records Subpoena is granted.

2. BOFE Policy Records Subpoena

Similarly, Appellants have failed to demonstrate with any particularity their need for Respondent DLSE's internal documentation of BOFE's standard operating procedures and training materials. Appellants do not allege that BOFE deviated from its customary investigatory practices in this case, nor, if it did, how such deviation affects the evidence supporting the underlying citations. Appellants' assertion that a failure by BOFE to observe its own protocol could implicate due process is unaccompanied by specific facts or legal authority.

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[2] Although *Teamsters Local 856, supra*, arose in the context of a Public Records Act request, the court's reasoning is instructive here: "A 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. The express identification in the CPRA of personnel files as an exempt area of private information demonstrates a similar concern for confidentiality." (*Teamsters Local 856, supra*, at 1515–16 (internal citations omitted). We need not be bound by the PRA to refer to its articulation of an objective expectation of privacy.

By contrast, requiring Respondent DLSE to disclose BOFE's non-public operating procedures and training materials would reveal a critical component of its enforcement strategy, thereby undermining its ability to carry out its statutory duty to investigate labor law violations. (*See* Labor Code section 90.5.)

To the extent it is helpful for Appellants to know more about Respondent DLSE's workplace investigations, there is extensive information publically available online on the DLSE's website regarding BOFE's mission and protocols. In addition, Respondent DLSE has indicated that a BOFE representative will be testifying at the hearing, and the Appellants will have the opportunity to question the witness at that time regarding BOFE's standard protocol and whether it was followed in the investigation that led to the underlying citations (subject, of course, to objections raised by Respondent DLSE).

Pursuant to Government Code section 11450.30(b)'s mandate to protect the parties from unreasonable or oppressive demands, Respondent DLSE's motion to quash as to the BOFE Policy Records Subpoena is granted.

3. Witness Records Subpoena

Evidence Code section 1041 provides a public entity engaged in law enforcement the privilege to refuse to disclose the identity of a person who has furnished, in confidence, information regarding a violation of the law. The privilege may be asserted if disclosure of the identity of the informer is against the public interest because the necessity for preserving the confidentiality of his or her identity outweighs the necessity for disclosure in the interests of justice. (Evid. Code section 1041(a) and (b).)

There is no dispute that the witnesses with whom Respondent DLSE has communicated in the course of the investigation underlying the contested citations have furnished, in confidence, information regarding alleged violations of workplace law. The disagreement arises over whether

the public interest in maintaining the witnesses' identities confidential outweighs the Appellants' necessity for that information. Appellants argue specifically that disclosure of the witnesses' identities is necessary to afford Appellants due process.

Respondent DLSE maintains that because it has a duty to vigorously enforce minimum labor standards in the state of California, it is in the public interest to encourage workers to come forward to expose violations without fear of intimidation or retaliation. Respondent DLSE also offers evidence of threatened intimidation and retaliation, reported to private counsel retained by former employees of Appellants. (*See* Declaration of Yanin Senachai in Support of Plaintiff's Motion to Quash Subpoena.) Appellants challenge the admissibility of Respondent DLSE's evidence in this regard. (*See* Appellants Adat Shalom Board and Care, Inc. and Angelica Reingold's Objections to the Declaration of Yanin Senachai.) Although the reports of intimidation and threatened retaliation are troubling, they need not be considered in order to find that the public interest at stake in preserving the confidentiality of the witnesses' identities is strong.[3]

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[3] Appellants' position that a ruling on their objections to Ms. Senachai's declaration must be made before a decision is rendered on the Motion to Quash is incorrect, because the decision on the Motion to Quash does not rely on the evidence contained in the declaration. Nonetheless, it is worth noting that the formal rules of evidence, including the prohibition on hearsay, do not apply to informal administrative proceedings. In its comments to Evidence Code section 300, the Law Revision Commission clarifies that "the provisions of the code do not apply to administrative proceedings … unless some statute so provides or the agency concerned chooses to apply them." (Evid. Code 300, Law Revision Commission Comments, 1965 Addition.) There is no mention of the rules of evidence in the provisions of the Government Code governing informal hearings; however, Government Code section 11513(c) provides that a "[formal administrative] hearing need not be conducted according to the technical rules relating to evidence … Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." In the context of this informal administrative hearing, therefore, a hearsay objection would not prohibit admission of Ms. Senachai's declaration.

Courts have fleshed out the factors that are to be considered in weighing the public interest, clarifying that:

> … although … the preservation of the informer's usefulness and protection of the informer against … harm are additional purposes for secrecy, the primary justification for the privilege is the public interest in protecting the flow of information to law enforcement officials. Thus, the test for confidentiality … is not whether the particular informant demanded that his identity not be disclosed, or was in physical danger, but whether the investigation is of such a type that disclosure ... would cause the public interest to suffer… this public interest refers primarily to *the public interest in maintaining the flow of information to law enforcement officers*."

(*People v. Otte* (1989) 214 Cal. App. 3d 1522, 1532 (emphasis added) (internal quotations omitted) (citing *People v. Superior Court (Biggs)* (1971) 19 Cal.App.3d 522, 532; *People v. Hardeman* (1982) 137 Cal.App.3d 823, 827; *Jessup v. Superior Court, supra,* 151 Cal.App.2d at p. 108, 311 P.2d 177.)

Appellants contend that without knowing the witnesses' identities prior to the hearing, they will be denied due process because they will be unable to assess the witnesses' credibility. The sole case relied upon for this proposition is *Doe v. University of Southern California* (2018) 29 Cal.App.5th 1212), an appeal from the expulsion of a university student accused of sexual misconduct and rape. The decision to expel the accused student was made via a summary administrative review; there was no hearing. The adjudicator based her decision in part on the statements of witnesses she did not personally interview. The appeals court found that the accused student had been denied due process because the finder of fact did not have the opportunity to personally assess the credibility of critical witnesses, and that the accused student had the right to indirectly ask questions of the complainant (by submitting questions for the adjudicator to ask). (*Doe v. USC, supra*, at *13-17.)

The administrative disciplinary process described in *Doe v. USC, supra*, bears little resemblance to the DLSE's informal citation appeal hearing process, which requires a live hearing and affords the appellant the opportunity to cross-examine witnesses directly. The court in *Doe v.*

USC did not address Evidence Code section 1041 (as USC is a private institution), or make any ruling regarding the obligation of a government agency to disclose the identity of witnesses prior to an informal administrative hearing.

Appellants also argue that Respondent DLSE must disclose the names of the witnesses it intends to call at the hearing because due process requires that Respondent DLSE turn over exculpatory evidence. Although Appellants cite case law regarding the prosecution's duty to disclose exculpatory or impeachment evidence to the defendant in a criminal case, they provide no authority for the proposition that Respondent DLSE, a civil law enforcement agency, is under the same obligation. Simply asserting that Respondent DLSE is "California's 'prosecutorial arm' with regard to alleged wage and hour violations" (Opposition to Motion to Quash, 18:17-18) does not transform this informal administrative proceeding into a criminal trial. Tellingly, there is no mention of exculpatory evidence, or any obligation to disclose related thereto, in the Government Code provisions on formal or informal administrative proceedings, nor in the Code of Civil Procedure.

Respondent DLSE has clearly stated the need to protect the identities of its confidential informants in order to promote the public interest of encouraging workers to report unlawful working conditions. Appellants have failed to establish that the interests of justice -- due process, specifically -- require disclosure. Pursuant to the balancing test set forth in Evidence Code section 1041(a)(2) and Government Code section 11450.30(b)'s mandate to protect parties and witnesses from unreasonable or oppressive demands, Respondent DLSE's motion to quash as to the Witness Records Subpoena is granted.

4. Citation Records Subpoena

The primary points of contention regarding the Citation Records Subpoena, as mentioned above, are whether its scope exceeds the universe of relevant, non-privileged documents Respondent

DLSE should be ordered to produce, and, if so ordered, Respondent DLSE is required to produce such relevant, non-privileged documents prior to the hearing.

a. Scope of Subpoena

The Citation Records Subpoena is by far the broadest of the four in scope.[4] Appellants assert that the documents demanded therein are relevant to the underlying appeal, pursuant to the definition of relevance set forth in Evidence Code 210: "'Relevant evidence' means evidence … having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Respondent DLSE maintains that the correct standard is whether the requested records are relevant to proving or disproving the underlying violations – a definition strikingly similar to the one set forth by Appellants. However, Respondent DLSE also stated during the Motion Hearing that Appellants did not have a right to request any documents that were not going to be introduced into evidence at the appeal hearing, and further qualified the standard in their moving papers by adding that the requesting party must make "a showing of need and specificity of the information, something more than a wish for the benefit of all the information in the agency's file." (*Everette, supra*, at 672-73.)

Although the *Everett* decision does suggest that the requestor must tailor its document demands to the issues at hand, Respondent DLSE cites no legal authority for the proposition that a subpoena issued pursuant to Government Code section 11450.10(a) must be limited to evidence the responding party intends to introduce into evidence at hearing. Documents in the BOFE file that are not introduced into evidence by Respondent DLSE may be relevant under the definitions put forth by either party, insofar as those documents may tend to prove or disprove the underlying allegations, regardless of whether Respondent DLSE relies on them to defend the citations.

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[4] The Citation Records Subpoena, insofar as it demands witness statements and statements of persons contacted during the investigation, appears to be inclusive of the Witness Records Subpoena.

During the Motion Hearing, the parties discussed in greater detail what non-privileged documents make up the contents of the BOFE investigative file in this case, thereby refining the universe of relevant documents (and informing the specific contours of the Order, below). In addition, Respondent DLSE described the categories of documents it believes are protected from disclosure, and identified the applicable privileges.

Appellants raised no objections, either in their Opposition or at the Motion Hearing, to the privileges asserted by Respondent DLSE. However, Appellants rely on Code of Civil Procedure section 2031.240 to request that Respondent DLSE provide a privilege log specifying each individual document to which Respondent DLSE claims a privilege applies. As has been discussed at length here and in the July 12 Order, the discovery obligations in an informal administrative proceeding do not approach those imposed in a civil court proceeding; Code of Civil Procedure section 2031.240 is inapplicable to Government Code section 11450.10, et seq. Respondent DLSE's description of the categories of documents it believes to be privileged is sufficient to advise Appellants of the nature of the documents withheld.

i. Attorney-client privilege

Respondent DLSE asserts that the attorney-client privilege applies to the following Citation Records: e-mail communications between DLSE attorney Deborah Graves and Deputy Labor Commissioner Annabelle Estaniel; e-mail communications between Ms. Graves and other BOFE staff members; notes taken by Ms. Graves of her conversations with BOFE staff; Ms. Estaniel's notes of her conversations with Ms. Graves; Ms. Estaniel's notes of her conversations with other DLSE attorneys; and any notes taken by other BOFE staff recording their communications with Ms. Graves or other DLSE attorneys.

Preserving the confidentiality of communications between attorney and client is prioritized in our legal system because it encourages clients to make full disclosure to their attorneys, in order to

receive competent legal advice and representation. (See *City & County of San Francisco v. Sup.Ct.* (1951) 37 C2d 227, 235, 231 P2d 26, 30; *Costco Wholesale Corp. v. Sup.Ct. (Randall)* (2009) 47 C4th 725, 732, 101 CR3d 758, 763; *Mitchell v. Sup.Ct. (Shell Oil Co.)* (1984) 37 C3d 591, 599.) The privilege applies to all confidential communications between attorney and client as long as such communication does not fall within a statutory exception and is made in the course of the professional relationship between attorney and client. (Evid. Code 950, et seq.) The privilege may be raised in any proceeding, whether judicial, administrative or otherwise (*see S. Cal. Gas Co. v. Pub. Utilities Com. (1990)* 50 Cal. 3d 31, 38, 784 P.2d 1373, 1376 (quoting Evidence Code 910: "[T]he provisions of this division apply in all proceedings. The provisions of any statute making rules of evidence inapplicable in particular proceedings, ... do not make this division inapplicable to such proceedings.")), and is absolute – once it has been established that there was a confidential communication made within the scope of the attorney-client relationship, that communication may not be ordered disclosed regardless of necessity, or circumstances peculiar to the case. (*See Costco Wholesale Corp. v. Sup.Ct. (Randall)*, supra, 47 C4th at 732; *Chubb & Son v. Sup.Ct. (Lemmon)* (2014) 228 CA4th 1094, 1103; see also *Shannon v. Sup.Ct. (First Interstate Bank)* (1990) 217 CA3d 986, 995.)

The conversations between Ms. Graves and Ms. Estaniel and other BOFE staff, whether documented by email or in other notes, are confidential communications between an attorney (Ms. Graves) and her client (representatives of the DLSE), made in the course of their professional relationship. Similarly, communications of Ms. Estaniel and other BOFE staff with other DLSE attorneys also fall within the scope of the attorney-client privilege.

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ii. Attorney work-product doctrine

Respondent DLSE maintains that the attorney work-product doctrine protects the following documents from disclosure: Ms. Graves' notes of her conversations with Ms. Estaniel and other BOFE staff; and Ms. Graves' notes of her interviews with witnesses.

"A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." (Cal. Civ. Proc. Code section 2018.030 (a).) The work-product protection applies equally to writings prepared in anticipation of a lawsuit and those prepared in a non-litigation capacity. (*See State Comp. Ins. Fund v. Sup.Ct. (People)* (2001) 91 CA4th 1080, 1091; *Laguna Beach County Water Dist. v. Sup.Ct. (Woodhouse)* (2004) 124 CA4th 1453, 1461; *County of Los Angeles v. Sup.Ct. (Axelrad)* (2000) 82 CA4th 819, 833.)

Ms. Graves' notes of her conversations with Ms. Estaniel, other BOFE staff, and witnesses contain her impressions, conclusions, and/or opinions and are therefore protected from disclosure by the attorney work-product doctrine.

iii. Investigatory Depositions

Government Code section 11181(e) authorizes Respondent DLSE to conduct investigatory depositions. Government Code section 11183 prohibits and officer of the state from divulging any information or evidence acquired from the responses to an investigatory deposition conducted pursuant to Government Code section 11181(e). Violation of the prohibition is a misdemeanor and disqualifies the officer from state employment. (Government Code section 11183.)

Respondent DLSE is therefore prohibited from disclosing the transcript of any investigative deposition conducted by Respondent DLSE pursuant to Government Code section 11181(e). Appellants raised no objection to this conclusion in their Opposition or at the Motion Hearing.

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iv. Common Interest Agreement

Respondent DLSE and Asians Americans Advancing Justice ("AAAJ") - the non-profit legal organization representing some of Appellant's former employees - executed a Common Interest Agreement ("CIA"). Respondent DLSE asserts that e-mail communications between AAAJ and Ms. Graves and Ms. Estaniel that include information obtained by AAAJ in the course of the attorney-client relationship, and/or attorney work-product, are protected from disclosure by the CIA.

CIAs typically memorialize the relationship between two parties in the context of the common interest doctrine. "[T]he common interest doctrine is … appropriately characterized under California law as a nonwaiver doctrine, analyzed under standard waiver principles applicable to the attorney-client privilege and the work product doctrine." (*OXY Res. California LLC v. Superior Court* (2004) 115 Cal. App. 4th 874, 889.) The party seeking to invoke the common-interest doctrine must first establish that the information would otherwise be protected by a privilege. (*Id.*, at 890.) In this case, the e-mails from AAAJ to Ms. Graves and Ms. Estaniel contain information that was communicated from Appellants' former employees and clients of AAAJ, to AAAJ in the course of AAAJ's legal representation. The information contained in the emails would therefore otherwise be protected by the attorney-client privilege.

Evidence Code section 912 states: "A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege) … when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer … was consulted, is not a waiver of the privilege." The e-mails between AAAJ and Ms. Graves and Ms. Estaniel were presumably sent to facilitate the investigation of the alleged underpayment of AAAJ's clients. The disclosure of the information contained therein was arguably reasonably necessary to further the interest of AAAJ's clients.

Similarly, the work-product protection is not waived except by a disclosure "wholly inconsistent with the purpose of the privilege, which is to safeguard the attorney's work product," and to "a person who has no interest in maintaining the confidentiality." (*Oxy Res., supra*, at 891 (internal citations omitted).) Again, it is safe to assume that AAAJ communicated with Respondent DLSE to further the interests of its clients; and Respondent DLSE, by invoking the common interest doctrine, demonstrates its interest in maintaining the confidentiality of the e-mails it received from AAAJ.

The final consideration in evaluating whether a privilege was waived in the context of common interest communications is the reasonable expectation of confidentiality. "If a disclosing party does not have a reasonable expectation that a third party will preserve the confidentiality of the information, then any applicable privileges are waived." (*OXY Res., supra*, at 636.) Here, the CIA establishes both parties' reasonable expectation that the other would preserve the confidentiality of the e-mails.

For the foregoing reasons, the e-mails did not waive the attorney-client privilege between AAAJ and its clients, nor the AAAJ's work-product protection, and are protected from disclosure. Any other documentation of communications between AAAJ and Respondent DLSE that contains information that would otherwise be protected from disclosure by the attorney-client privilege and/or the attorney-work product doctrine is likewise protected from disclosure in this action.

b. Timing of Production

Respondent DLSE insists that "there is no basic constitutional right to pre-hearing discovery in administrative proceedings," and asserts that "[t]he scope of discovery in administrative hearings is governed by statute and the agency's discretion." (*Mohilef v. Janovici* (1996) Cal.App.4th 267, 302; *Cimarusti v. Superior Court* (2000) 79 Cal.App.4th 799, 808-09). Interestingly, Appellants also rely on *Mohilef, supra*, for the proposition that "discovery must be granted if in the particular

situation a refusal to do so would so prejudice a party as to deny him due process." (*Mohilef, supra*, at 302).[5] All three assertions are correct; however, *Mohilef* was decided prior to the enactment of Government Code section 11450(a) in 1997, which provides that a "subpoena duces tecum may be issued … for production of documents *at any reasonable time and place* ***or*** *at a hearing*." (Emphasis added.) We need not reach the question of whether due process separately requires the production of documents prior to an informal administrative process, because the governing statute authorizes such production pursuant to a subpoena duces tecum. [6]

In interpreting the statutory language, we must privilege its plain meaning, and "accord significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose." (*Turnacliff v. Westly* (9th Cir. 2008) 546 F.3d 1113, 1118 (interpreting a California statute).) "[A]ny reasonable time … or at a hearing" must be construed to mean that "any reasonable time" refers to some time *other* than "at a hearing," as any other interpretation would render the latter phrase superfluous. The only reasonable time for the production of documents other than at a hearing is

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[5] It should be noted that in *Mohilef, supra*, the Appeals Court found that the appellants were *not* denied due process when they were prohibited from subpoenaing witnesses in a public nuisance abatement proceeding.

[6] Although the plain language of Government Code section 11450.10 obviates the need for a detailed analysis of the cases cited by Appellants for the proposition that they are not only entitled to due process (which is undisputed), but also that due process in this case requires extensive pre-hearing discovery, a quick review of a sampling of those cases reveals that they are inapposite: In *People v. Ramirez* (1979) 25 Cal.3d 260, reviewing denial of admission of the appellant to a state-sponsored outpatient substance abuse treatment program, the court held that confrontation, cross-examination, and other formal hearing rights are not guaranteed to an administrative litigant by the Constitution; in *Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal. App.4th 1048, the court upheld an administrative proceeding that did not even require a hearing; and in *Doe v. Regents of the University of California* (2018) 28 Cal.App.5th 44, evaluating the due process afforded an expelled student who had been accused of sexual assault, the court considered a whole host of procedural irregularities related to the conduct of the hearing itself, including the complete failure ***at*** *the hearing* to provide the accused student with a copy of (or even allow the accused student to read) the responding officers' crime report. None of these cases address the question of whether a litigant in an informal administrative proceeding is entitled, as a matter of due process, to pre-hearing document production from the other party, and all of them approve procedures that are far less protective than the DLSE's citation appeal process.

before a hearing, because production after a hearing would be of no use. (*See In re Cty. of Orange* (1998) 31 F. Supp. 2d 768, 774 ("Interpretations that lead to absurd results or render words surplusage are to be avoided.").)

During the Motion Hearing, Respondent DLSE expressed confidence that should an order issue requiring production pursuant to the subpoenas, any necessary document review and redaction could be completed within a matter of days. It does not appear that Respondent DLSE anticipates limited document production will be an unreasonable or oppressive demand on the agency. Pursuant to Government Code section 11450.30(b), Respondent DLSE's Motion for a Protective Order is granted in part, pursuant to the specific directions mandated in the Order, below.

IV. Appellants' Renewed Request for Formal Appeal Hearing

Appellants filed a Renewed Request for Formal Appeal hearing concurrently with their Opposition to the Motion to Quash, in which they reiterate, in summary form, the arguments advanced in their initial request. As stated in the July 12 Order, although a formal hearing in this matter is not authorized by law, it is also not necessary to ensure that the parties' due process rights are protected. Appellants may refer to the July 12 Order for a detailed explanation of why. Appellants' Renewed Request for Formal Appeal Hearing is denied.

V. Appellants' Request to Continue the Current Appeal Hearing Date

Appellants also filed, concurrent with their Opposition and their Renewed Request for a Formal Appeal Hearing, a Request to Continue the Current Appeal Hearing Commencement Date for 90 days. Appellants made another, subsequent request for a 90-day continuance by e-mail on January 4, 2019, due to the death of Ms. Reingold's mother on January 3, 2019. On January 4, 2019, the parties were advised that the Appeal Hearing commencement date had been continued to January 16, 2018, to allow time for a hearing on and consideration of the Motion to Quash and Request for a

Continuance. During the Motion Hearing on January 7, 2019, the commencement date for the Appeal Hearing was further continued to February 6, 2109.

Appellants contend that if any production is ordered pursuant to the subpoenas, due process requires that they be afforded time to review the information contained therein. During the Motion Hearing, Appellants stated that they had not been in touch with Ms. Reingold since being informed of her mother's death the week before, but that they were assuming she would be unavailable to participate in preparation for the hearing for an indeterminate amount of time. Appellants could not articulate any specific reason why they believed Ms. Reingold would be unavailable for three months. Respondent DLSE objected to a 90-day continuance, stating that it should be able to provide any ordered production to Appellants within a matter of a few days; that Appellants would not need 90 days to review the production; and that the customary seven-day period of mourning plus 30 days should be sufficient to allow Ms. Reingold to return to hearing preparation.

Appellants' Request for a Continuance of the Appeal Hearing Commencement Date is granted, with modification. Pursuant to the Order, below, Respondent DLSE is ordered to produce the designated information and documents by February 6, 2019, and the Appeal Hearing commencement date is continued to March 4, 2019. This production and hearing schedule provides Appellants over three weeks to review the ordered production, and provides Ms. Reingold individually over eight weeks to return to assisting her counsel with hearing preparation.

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ORDER

As to the **Motion to Quash, or, in the Alternative, Motion for Protective Order**:

1. Estaniel Personnel Records Subpoena: Motion to quash is GRANTED.

2. BOFE Policy Records Subpoena: Motion to quash is GRANTED.

3. Witness Records Subpoena: Motion to quash is GRANTED.

4. BOFE Citation Records Subpoena: Motion for protective order GRANTED in part. Respondent DLSE shall comply with the subpoena as follows:

    a. Produce all BOFE Citation Records (except those protected from disclosure, enumerated in 4.d, below) including but not limited to:

        i. Correspondence between Deputy Labor Commissioner Annabel Estaniel and individuals associated with Appellants;

        ii. Correspondence between Ms. Estaniel and the Department of Social Services;

        iii. Information provided to Respondent DLSE by the Department of Social Services;

        iv. Notes of interviews of potential third-party witnesses (family members of residents), conducted by Ms. Estaniel;

        v. Notes of conversations between Ms. Estaniel and worker witnesses;

        vi. Case summary;

        vii. Investigative plan;

        viii. Documents obtained or produced during on-site inspections, including but not limited to: Notice to Discontinue; photos of workplace; photos of required postings; caregiver agreement;

    b. To the extent the documents described above (4.a.i-4.a.viii) identify witnesses who provided information in confidence, redact the following information, where applicable, before production:

i. Witness name;

ii. Witness phone number;

iii. Witness address;

iv. House where witness worked;

v. Time period of witness' employment.

c. Produce all BOFE Citation Records that were provided to Respondent DLSE by Appellants.

d. Do *not* produce the following privileged documents:

i. E-mail communications between DLSE Attorney Deborah Graves and Ms. Estaniel;

ii. E-mail communications between Ms. Graves and other BOFE staff members;

ii. Notes taken by Ms. Graves of her conversations with BOFE staff, including Ms. Estaniel;

iii. Ms. Estaniel's notes of her conversations with Ms. Graves;

iv. Ms. Estaniel's notes of her conversations with other DLSE attorneys;

v. Notes taken by other BOFE staff of their conversations with Ms. Graves or other DLSE attorneys;

v. Ms. Graves' notes of her interviews with witnesses;

vi. Investigative deposition transcript(s);

vii. E-mail communications between Asian Americans Advancing Justice and Ms. Graves and/or BOFE staff, that contain information otherwise protected by the attorney-client privilege and work-product doctrines.

viii. Notes by Ms. Graves, Ms. Estaniel or other BOFE staff documenting communications between Respondent DLSE and Asian

Americans Advancing Justice, that contain information otherwise protected by the attorney-client privilege and work-product doctrines.

Respondent DLSE is ordered to comply as outlined above by February 6, 2019.

Appellants are ordered to maintain all documents and information contained therein produced pursuant to this Order confidential. Appellants shall not disclose said documents and information to anyone other than their counsel and any witnesses called to testify on their behalf at the hearing. Any breach of confidentiality shall be punished as a contempt of this Order.

As to the **Renewed Request for Formal Appeal**, the request is DENIED.

As to the **Request to Continue the Current Appeal Hearing Commencement Date** for 90 days, the request is GRANTED, with modification. The Appeal Hearing commencement date is continued to March 4, 2019, and the Appeal Hearing shall proceed on the following dates, until its conclusion:

March 5, 6, 7, 8, 11, 12, 15, 26, and 28, 2019.

April 1, 2, 4, 8, 11, 12, 16, 18, 19, and 23, 2019.

Dated: January 22, 2019

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California

By: _____
JULIA FIGUEIRA-McDONOUGH
Presiding Officer

State of California
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