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CASE NUMBER:
RG20050135

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF ALAMEDA**

10 CITY OF OAKLAND PUBLIC EHTICS
11 COMMISSION,

12 Petitioner,

13 v.

14 ANNA WONG,

15 Defendant.

Case No. RG20050135

RESPONDENT'S OPPOSITION TO
PETITIONS TO ENFORCE SUBPOENAS
FOR DOCUMENTS AND IN-PERSON
INTERVIEW

Judge: The Hon. Patrick McKinney
Dept.: 511

16 **TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:**

17 Respondent Anna Wong hereby opposes (1) the Petition to Enforce Investigative Subpoena filed
18 on January 24, 2020 (the "Records Petition" or "Records Pet."); and (2) the Petition to Enforce
19 Investigative Subpoena for In-Person Interview filed on July 28, 2020 (the "Testimony Petition" or
20 "Testimony Pet.," and, together with the Records Petition, the "Petitions").

21 This Opposition is based upon Ms. Wong's right under the Fifth Amendment to the United
22 States Constitution to be free from being compelled to incriminate herself and her right under the
23 Fourth Amendment to the United States Constitution to be free from unreasonable searches and
24 seizures.

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1 This Opposition is based upon the complete files and records in this action, the following
2 Memorandum of Points and Authorities, and any documentary and/or oral evidence as may be
3 presented at the time of the hearing of the Petition.

4 Dated: September 1, 2020

THE STOUT FIRM

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7 By: THOMAS D. STOUT
8 Attorney for Respondent ANNA
9 WONG
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Based on nothing more than conclusory assertions and misguided suppositions, the Oakland
3 Public Ethics Commission has publicly accused Anna Wong, a local small businesswoman and officer
4 in the Oakland Vietnamese Chamber of Commerce, of participating in “campaign money laundering”
5 scheme. It now seeks to compel her to respond to Subpoenas that violate her Fourth Amendment
6 right to be free from unreasonable searches and seizures and her Fifth Amendment right to be free
7 from being compelled to incriminate herself.

8 The Records Subpoena seeks documents well outside the Commission’s jurisdiction, imposes
9 wholly unreasonable burdens, is wildly overbroad, unreasonably vague, and irrelevant to whatever
10 portion of its investigation is legitimate. For all these reasons, it fails to meet the Fourth
11 Amendment’s standard for reasonableness as applied to administrative subpoenas, and the Court
12 should refuse to enforce it.

13 The Records Subpoena and Testimony Subpoena both seek to compel incriminating statements
14 from Ms. Wong in violation of her Fifth Amendment rights. For reasons that are wholly unclear, the
15 Commission appears to view Ms. Wong as a target of its investigation. As violations of the Oakland
16 Campaign Reform Act may be criminal and the Commission has a mandate to refer evidence of
17 crimes to law enforcement, Ms. Wong has a reasonable apprehension that any statements will be used
18 against her in a misguided criminal proceeding and may rely on the Fifth Amendment to refuse to
19 comply with the Subpoenas.

20 **I. BACKGROUND**

21 **A. Anna Wong**

22 Anna Wong is the owner of Saigon Printing Shop, a small business located in Oakland. Ms.
23 Wong is the Secretary of the Oakland Vietnamese Chamber of Commerce.

24 **B. The Public Ethics Commission Investigation**

25 According to the Petitions, the City of Oakland Public Ethics Commission (the “Commission”) is
26 conducting an investigation of a “suspected campaign money laundering activity.” (Records Pet. at.
27 1:26). Although the Commission has provided a broad overview of the alleged scheme in conclusory
28

1 terms, (Records. Pet. at 1:25–2:7), as discussed below, the Commission provides scant detail regarding
2 Ms. Wong’s supposed participation in any illicit activity.

3 In August 2019, the Commission issued a Subpoena for Testimony (the “Testimony Subpoena”),
4 and a Subpoena for Records (the “Records Subpoena”).

5 **II. THE COURT SHOULD NOT ENFORCE THE SUBPOENAS.**

6 Powers of state and local governments to compel evidence and testimony through administrative
7 subpoenas have limits. Agencies cannot compel individuals to incriminate themselves in violation of
8 the Fifth Amendment to the United States Constitution, and the Fourth Amendment to the United
9 States Constitution requires a subpoena to be (1) within the jurisdiction of the demanding agency; (2)
10 not too indefinite; and (3) reasonably relevant to the agency’s investigation. *See Brovelli v. Super. Ct.*, 56
11 Cal. 2d 524, 529 (1961).

12 For the reasons discussed below, the Commission ignored these limitations when it issued the
13 Subpoenas, and this Court should thus decline to enforce them.

14 **A. The Subpoenas Violate Ms. Wong’s Fourth Amendment Rights.**

15 Although agencies may obtain records via administrative subpoena, “the Fourth Amendment
16 requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in
17 directive so that compliance will not be unreasonably burdensome.” *See v. City of Seattle*, 387 U.S. 541,
18 544 (1967); *Cal. Rest. Ass’n v. Henning*, 173 Cal. App. 3d 1069, 1075–76 (1985). Furthermore, the
19 agency’s demand must be on it is “authorized to make.” *Brovelli*, 56 Cal. 2d at 529. “The gist of the
20 protection is in the requirement . . . that the disclosure sought shall not be unreasonable.” *United*
21 *States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

22 1. The Commission fails to explain relevance of the Subpoenas to a legitimate
23 investigation.

24 The Court should “not allow the [agency] to bootstrap itself when justifying an investigation into
25 every record and document [the subject] possesses. A legitimate, proper purpose and relevancy are
26 required. The burden lies with the [agency].” *Sunshine Gas Co. v. Dep’t of Energy*, 524 F. Supp. 834, 841
27 (N.D. Tex. 1981). Here, the Petition contains a great deal of “bootstrapping,” but very little of
28 substance. Relevance may be a low bar, but the Commission fails to clear it.

1 The Commission cannot identify a single reimbursement that Ms. Wong has either made or
 2 received for a political contribution. The Commission cannot identify any instance in which Ms.
 3 Wong contributed in a name other than her own or aided anyone else in doing so. The City cannot
 4 identify a single instance in which Ms. Wong has violated any provision of the Act. Apparently
 5 lacking any facts implicating Ms. Wong, the Commission instead turns to claiming guilt by association
 6 or by simple declaration of the Commission. Each fact the Commission alleges is either irrelevant,
 7 innocent, or consists of wholly conclusory vouching, and fails to establish relevance for the following
 8 reasons:

Fact Alleged	Deficiency
<p>10 “Anna Wong contributed \$1,500 on October 11 25, 2016, to Kalra For California — Assembly 12 2016. This was the same day as her \$700 13 contribution to Dan Kalb.” (Records Pet. at 14 3:12–13).</p>	<p>There is nothing even remotely untoward about making two political contributions to different candidates on the same day. Moreover, State Assemblyman Ash Kalra was not a candidate for Oakland City Office at the time, and contributions to his campaign are beyond the Commission’s authority to investigate.</p>
<p>15 “She also contributed \$500 to San Leandro 16 candidate Benny Yee on March 4, 2017, along 17 with other suspect contributors in this case, 18 possibly in conjunction with a fundraiser held 19 by David Duong.” (Records Pet. at 3:13–15).</p>	<p>The Commission fails to define “suspect contributor” or how it arrived at this determination. The label is meaningless without explanation. Furthermore, there is nothing unseemly about contributing during a fundraiser. That is, after all, the very point of holding a fundraiser. There is no suggestion that Ms. Wong was reimbursed for this contribution. Moreover, San Leandro City Councilmember Benny Yee was not a candidate for Oakland City Office at the time, and contributions to his campaign are beyond the Commission’s authority to investigate.</p>
<p>22 “Respondent’s association with David Duong, 23 and the fact that she reportedly contributed a 24 total of \$2,200 on October 24, 2016 to Kalb 25 and Kalra, which seems like a suspiciously large 26 amount of disposable personal cash¹ for the 27 owner of a small business to have on hand, both give rise to suspicion.” (Records Pet. at 3:15–18).</p>	<p>\$2,200 is by no means a “suspiciously large” amount of disposable income for even a modestly successful small business owner. By the Commission’s standard, almost any significant political contribution by a small business owner is inherently suspicious. Furthermore, the Commission fails to so much as attempt to explain Ms. Wong’s “association” with David Duong, or why it is relevant to her political contributions.</p>

¹ The Commission’s suggestion that this contribution was made in “cash” is false and misleading.



Fact Alleged	Deficiency
<p>“Her contributions to Guillen, Kalb and McElhaney appear to have come in bundles with contributions from other people that are suspected to be laundered, based on those committees’ internal records.” (Records Pet. at 3:18–20).</p>	<p>This is utterly conclusory. The Commission fails to explain what it means by “bundle,” why it “suspects” those bundles to be “laundered,” or how the internal records of campaign committees could shed light on the question of whether a contributor received an unlawful reimbursement for a contribution.</p>

In sum, all the Commission can allege is that Ms. Wong made three political contributions in 2016 and 2017, two of which are completely outside the jurisdiction of the Commission. The Commission does not claim to have any specific evidence suggesting that Ms. Wong was reimbursed for any of these contributions, presumably because it cannot. The Commission cannot be allowed to proceed on such a barebones, conclusory showing of relevance, or

2. The Records Subpoena is well beyond the scope of the Commission’s authority.

Assuming that the Commission were able to establish Ms. Wong’s relevance to its investigation, the Records Subpoena is nevertheless unenforceable because the Commission demands records pertaining both to political campaigns that are outside its jurisdiction and substantive conduct outside its jurisdiction. The Act authorizes the Commission to oversee compliance with the Act by (1) referring criminal violations of the Act to “the appropriate law enforcement agency;” (2) filing civil enforcement actions in Superior Court; or (3) initiating civil administrative enforcement proceedings before the Commission. Oakland Municipal Code §§ 3.12.260(A), 3.12.270. The Commission has no authority to oversee or enforce any other state or federal campaign finance law or enforce any contribution limitation for any candidate’s political campaign other than a candidate for City Office.²

Disregarding its jurisdictional limitations, the Commission asks this Court to compel Ms. Wong to provide communications pertaining to *all* campaign contributions made in her name or the name of her “associates,” and pertaining to “payment or reimbursement” for *all* campaign contributions. In its own proffer of relevance, two of the three contributions it asserts are “suspicious” were to candidates over whom the Commission has absolutely no authority—a state assembly representative

² The Act defines “City Office” as the Mayor of Oakland, the City Attorney of Oakland, the City Auditor of Oakland, any Oakland City Councilmember, or any member of the Oakland School Board. Oakland Municipal Code § 3.12.040(D).

1 and a city councilmember for the City of San Leandro. The Records Subpoena on its face requires
2 Ms. Wong to produce communications pertaining to all of her federal, state, county, and city
3 campaign contributions (and any contributions made to a candidate for office in a different city) and
4 all such contributions of all of her associates. The Commission has no lawful authority to inspect
5 records pertaining to any candidate other than a candidate for Oakland City Office. As the
6 Commission is not authorized to demand the records it seeks, the Records Subpoena constitutes an
7 unreasonable search and seizure barred by the Fourth Amendment.

8 The Commission also attempts to reach conduct beyond its jurisdiction. The Records Subpoena
9 demands communications pertaining to “*proposed* and actual” campaign contributions of Ms. Wong
10 and her associates. The Act, however, does not prohibit conspiracies or agreements to circumvent
11 campaign contribution limits or “launder” contributions. The Act speaks only to completed offenses
12 in the form of principal and aider and abettor liability. *See* Oakland Municipal Code § 3.12.270.
13 Accordingly, the Commission lacks jurisdiction to oversee any activity that does not rise to a
14 completed violation of the Act and has no authority to demand records of any merely proposed
15 campaign contribution that was not actually made.

16 As the Records Subpoena demands documents pertaining to non-city campaigns and conduct
17 that is beyond its power to oversee, the Records Subpoena constitutes an unreasonable search and
18 seizure and enforcement is barred by the Fourth Amendment. *See Brovelli*, 56 Cal. 2d at 529; *Resolution*
19 *Trust Corp. v. Thornton*, 41 F. 3d 1539, 1545–48 (D.C. Cir. 1994) (finding administrative subpoena used
20 for unauthorized purpose unenforceable); *E.E.O.C. v. ABM Janitorial-Midwest, Inc.*, 671 F. Supp. 2d
21 999, 1005 (N.D. Ill. 2009) (refusing to enforce EEOC subpoena seeking records from a party outside
22 its jurisdiction).

23 3. The directive of the Records Subpoena is too indefinite.

24 Furthermore, the Records Subpoena is so indefinite as to constitute an undue burden on Ms.
25 Wong in violation of the Fourth Amendment. The Commission demands communications relating
26 to campaign contributions of “family, friends, or associates” of Ms. Wong. While Ms. Wong is
27 undoubtedly able to identify members of her family and can decide who her friends are, it is entirely
28 unclear what the Commission means by “associate.” By “associate,” the Commission could mean any

1 person ranging from someone with whom Ms. Wong has regular recurring contact to literally anyone
2 she has ever met. The Commission effectively places no discernable limit on persons with whom it
3 views Ms. Wong as having responsive communications. The Records Subpoena thus fails as
4 unreasonably vague or, if taken to its broadest possible definition of requiring communications with
5 everyone Ms. Wong knows, unreasonably burdensome. In either event, the Records Subpoena fails
6 the standard of the Fourth Amendment.

7 4. The scope of the Records Subpoena is not reasonable, and compliance would
8 impose a substantial, unjustified burden.

9 Finally, the Records Subpoena imposes a tremendous and unreasonable burden. “A summons
10 will be deemed unreasonable and unenforceable if it is overbroad and disproportionate to the end
11 sought.” *United States v. Theodore*, 479 F. 2d 749, 754 (4th Cir. 1979) (“The Government cannot go on
12 a ‘fishing expedition’ through appellants’ records.”). The Records Subpoena demands that Ms.
13 Wong, a small business owner with no employees, take the time to search through four years of email,
14 text, and other written communications with potentially every single person with whom she
15 corresponded in that time for any sliver of a reference to a contribution to a candidate for any office,
16 whether an Oakland City Office or otherwise. Though the Records Subpoena seeks communications
17 dating back to January 1, 2016, the Commission fails to identify in even conclusory terms any
18 suspected illicit contributions associated with Ms. Wong and anyone connected to her before October
19 24, 2016 or after March 4, 2017. The Commission thus seeks more than three years of
20 communications that have no alleged relevance to its investigation, or more than 75% of the period
21 for which it demands communications. The impossibly time-consuming task of searching for such
22 records is in no way justified by the wholly conclusory allegations the Commission has made in the
23 Petitions and is unreasonable under any view of the Fourth Amendment, regardless of whether the
24 Commission has otherwise met its burden. Particularly given the Commission’s paltry showing as to
25 the relevance of the Records Subpoena, there is a substantial danger that the Commission is
26 attempting exactly the sort of “fishing expedition” against which the Fourth Amendment is designed
27 to protect. Compliance would undoubtedly “threaten the normal operation of [Ms. Wong’s]
28 business” and the Court should not require it. *EEOC v. Quad/Graphics, Inc.*, 63 F. 3d 642, 645 (7th

1 Cir. 1995) (“A subpoena will not be enforced if the demand is ‘excessively burdensome,’ that is, if
2 ‘compliance would threaten the normal operation of a respondent’s business.’”).

3 **B. The Subpoenas Violate Ms. Wong’s Fifth Amendment Rights.**

4 The Supreme Court has recognized that the privilege against self-incrimination “can be asserted in
5 any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it
6 protects against any disclosures which the witness reasonably believes could be used in a criminal
7 prosecution or could lead to other evidence that might be so used.” *Kastigar v. United States*, 406 U.S.
8 441, 444–45 (1972); *Warford v. Medeiros*, 160 Cal. App. 3d 1035, 1042 (1984). Although the privilege
9 “protects against real dangers, not remote and speculative possibilities,” *Zicarelli v. New Jersey State*
10 *Comm’n of Investigation*, 406 U.S. 472, 478 (1972), when a witness “can show any possibility of
11 prosecution which is more than fanciful, [s]he has demonstrated a reasonable fear of prosecution
12 sufficient to meet constitutional muster.” *Warford*, 160 Cal. App. 3d at 1044.

13 The Commission has made clear that the danger to Ms. Wong is very real, however ill-conceived
14 or unfounded. Without producing—or even discussing—an iota of evidence, the Commission has
15 publicly announced that Ms. Wong is a participant in a “campaign money laundering” scheme.
16 Despite being unable to articulate a single illegal act committed by Ms. Wong, the Commission has
17 chosen to publicly impugn her reputation, assert in purely conclusory fashion that she has broken the
18 law, and haul her before this Court. The Commission’s allegations make clear that the Commission
19 views Ms. Wong as a target of its investigation. The Commission, moreover, is authorized by the Act
20 to forward information pertaining to criminal violations of the Act “to the appropriate law
21 enforcement agency.” Oakland Municipal Code § 3.12.270. Given the strong language of the
22 Petitions and the Commission’s mandate to uncover and refer criminal violations, Ms. Wong faces a
23 very real danger of criminal prosecution that is in no way remote or speculative. Accordingly, she can
24 avail herself of her Fifth Amendment rights against compelled statements and intends to do so.

- 25 1. Producing any documents in response to the records subpoena would be
26 tantamount to an incriminating factual admission.

27 The Supreme Court has long recognized that the act of producing records in response to a
28 subpoena may be testimonial and thus protected by the Fifth Amendment’s guarantee against self-

1 incrimination. See *United States v. Doe*, 465 U.S. 605, 610 (1984); *United States v. Hubbell*, 530 U.S. 27, 36
2 (2000). “A witness’ production of documents in response to a subpoena may have incriminating
3 testimonial aspects . . . ; [b]y producing records in compliance with a subpoena, the witness admits
4 that the documents exist, are in [her] possession or control, and are authentic.” *In re Grand Jury*
5 *Subpoena*, 383 F. 3d 905, 909 (9th Cir. 2004). Such admissions “implicitly communicate statements of
6 fact that may lead to incriminating evidence.” *Id.* The state thus may not compel a person to
7 produce records where “the act of production itself would be testimonial.” *United States v. Sideman &*
8 *Bancroft, LLP*, 704 F. 3d 1197, 1201 (9th Cir. 2013) (citing *Doe*, 465 U.S. at 691). In order to compel
9 production of records where the act of production would effectively concede potentially incriminating
10 facts such as authenticity of and control over records, the government has the burden of showing that
11 the “‘existence and location’ of the documents under subpoena are a ‘foregone conclusion’ and the
12 witness ‘adds little or nothing to the sum total of the Government’s information by conceding that
13 [s]he in fact has the documents.’” *In re Grand Jury Subpoena*, 383 F. 3d at 910 (quoting *Fisher v. United*
14 *States*, 425 U.S. 391, 401 (1976)).

15 Due to the language the Commission chose in describing the categories of communications
16 demanded, Ms. Wong cannot produce responsive communications without acknowledging the
17 existence of inherently incriminating records, her possession of such records, and that such records
18 are genuine. The Records Subpoena seeks communications discussing or referencing: “(i) proposed
19 or actual campaign contributions made in the name of Anna Wong; or (ii) proposed or actual
20 campaign contributions made in the name of family, friends or associates of Anna Wong; or (iii)
21 payment or reimbursement for campaign contributions.” The Commission could have chosen any
22 number of neutral, yet relevant, ways to describe the requested communications. Instead, the
23 Commission chose to define these communications by reference to whether they referred to a crime.
24 By producing records that discuss or refer to “payment or reimbursement for campaign
25 contributions,” Ms. Wong would in effect be admitting that she participated in potentially criminal
26 violations of Oakland Municipal Code §§ 3.12.050, 3.12.065, and based on the described nature of the
27 investigation, Oakland Municipal Code § 3.12.140. Admitting to possession of communications
28 pertaining to campaign contributions made “in the name of” Ms. Wong or her associates gives rise to

1 the implication that the true source of the contribution was someone other than the individual in
2 whose name it was made. The Commission cannot compel Ms. Wong to implicate by describing
3 documents in inherently criminal terms and compelling her to respond.

4 2. Ms. Wong has a Fifth Amendment right to refuse to testify in response to the
5 Testimony Subpoena.

6 For reasons that are unclear, the Commission appears very certain that Ms. Wong violated the Act
7 and is intent on proving that Ms. Wong has criminal liability for these violations. Accordingly, the
8 Commission will likely seek to use Ms. Wong's against her and may very well provide those
9 statements to law enforcement agencies who may use them in criminal proceedings. Ms. Wong thus
10 has a Fifth Amendment right to refuse to answer questions from the Commission, which she intends
11 to invoke. Ms. Wong thus cannot be compelled to respond to the Testimony Subpoena.

12 **III. CONCLUSION**

13 The Records Subpoena requires a potentially self-incriminating act of production in violation of
14 Ms. Wong's Fifth Amendment rights and is an unreasonable search and seizure in violation of her
15 Fourth Amendment rights. Similarly, the Testimony Subpoena seeks to compel testimony from Ms.
16 Wong that the Commission seeks to use to incriminate Ms. Wong in violation of her Fifth
17 Amendment rights. Accordingly, the Court should refuse to enforce both Subpoenas.