

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

|                         |   |                            |
|-------------------------|---|----------------------------|
| KING CITY NURSERY, LLC, | ) | Case No. 2019-CE-040-SAL   |
|                         | ) |                            |
| Respondent,             | ) | ORDER DENYING RESPONDENT'S |
|                         | ) | APPEAL OF ORDER DENYING    |
| and                     | ) | PETITION TO REVOKE         |
|                         | ) |                            |
| ELISABED MARTINEZ,      | ) |                            |
|                         | ) |                            |
| Charging Party.         | ) | Admin. Order No. 2020-01-P |
|                         | ) |                            |
|                         | ) | (January 9, 2020)          |
|                         | ) |                            |

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**ORDER**

On December 2, 2019, respondent King City Nursery, LLC (King City) filed with the executive secretary of the Agricultural Labor Relations Board (ALRB or Board) a “request for appeal” of an order by principal administrative law judge Mark R. Soble (ALJ) denying its petition to revoke a subpoena from the General Counsel. We will consider the appeal, and DENY it on the merits. Pursuant to Board regulation<sup>1</sup> 20287, we designate this order as precedential to provide guidance in future cases.

**BACKGROUND**

On August 29, 2019, charging party Elisabed Martinez (Martinez) filed an unfair labor practice charge against King City, alleging as follows:

On or about August 28, 2019, King City Nursery, LLC, through its agents including but not limited to HR Representative Beatriz last name unknown, and Jennifer

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<sup>1</sup> The Board’s regulations are codified at California Code of Regulations, title 8, section 20100 et seq.

Lopez, retaliated against Elisabed Martinez, Belen Delgado and others by transferring them to a different job after they engaged in protected concerted activity when they complained about working conditions including, but not limited to sexual harassment.

The General Counsel commenced an investigation, and requested via email various records from King City, including contact information (names, addresses, and telephone numbers) and payroll records for employees in foreman Mario Huerta's crew. King City objected to these requests for employee contact information and payroll records. The General Counsel reiterated its request for this information, stating she would proceed with a subpoena duces tecum to obtain the records if King City did not produce them. King City subsequently provided the employees' names and home addresses, but did not provide their telephone numbers or payroll records. Pursuant to Board regulation 20217, the General Counsel followed with a subpoena asserting the following two requests:

1. Telephone numbers for each agricultural employee in Foreman Mario Huerta's crew from August 1, 2019 to September 1, 2019.
2. Payroll records for each agricultural employee supervised by Foreman Mario Huerta from August 1, 2019 to the present.

King City timely filed a petition to revoke the subpoena. (See Board reg. 20217, subd. (d).) In its petition, King City objected to production of the employees' telephone numbers on privacy grounds, citing article I, section 1, of the California Constitution. It further argued the charging party and other alleged discriminatees are members of a local gang, and disclosure of the employees' telephone numbers would

subject the employees to possible threats and intimidation. King City also alleged it has declarations from four employees expressing concerns for their safety due to fear of the alleged discriminatees, and stating they would quit if the discriminatees were returned to work. King City objected to production of the payroll records on grounds the request is overbroad and seeks information not relevant to the charge.

The ALJ denied the petition. The ALJ was not persuaded by King City’s safety and privacy arguments, noting that the information is being sought by the General Counsel and not the alleged discriminatees, and also that the employees’ home addresses already have been produced. The ALJ further found the payroll records relevant to the issue of potential backpay if King City is found liable.

King City filed a timely request to appeal the ALJ’s order, to which the General Counsel has filed an opposition. While this request has been pending with the Board, Martinez filed an amended charge on December 16, 2019. Insofar as is relevant here, the amended charge specifically names a third discriminatee, Daniel Gonzalez (Gonzalez), and alleges King City’s retaliatory conduct included transferring Martinez and Belen Delgado (Delgado) to a different crew and terminating Gonzalez’s employment.

**DISCUSSION**

**I. Propriety of Interlocutory Review**

Under Board regulation 20242, subdivision (b), interlocutory appeals are not allowed except upon special permission from the Board. As a general rule, the Board will entertain interlocutory appeals only when the issues raised cannot be

addressed effectively through exceptions pursuant to regulations 20282 or 20370, subdivision (j). (*Premiere Raspberries, LLC* (2012) 38 ALRB No. 11, pp. 2-3.)

A party applying for special permission to appeal an interlocutory ruling must “set[] forth its position on the necessity for interim relief.” (Board reg. 20242, subd. (b).) King City fails to do so. Nevertheless, it is apparent from its request King City asserts privacy objections under the California Constitution in resisting the General Counsel’s subpoena. Because a violation of such privacy rights could not be remedied effectively at a later date, we will consider the merits of King City’s appeal from the ALJ’s ruling denying its petition to revoke. (*Gerawan Farming, Inc.* (Nov. 8, 2016) ALRB Admin. Order No. 2016-13, p. 5, citing *Raytheon Co. v. Superior Court* (1989) 208 Cal.App.3d 683, 686.)

## **II. The Merits of King City’s Objections to the Subpoena**

The Agricultural Labor Relations Act (ALRA or Act)<sup>2</sup> vests in the General Counsel final authority with respect to the investigation of unfair labor practice charges and the issuance of complaints. (Lab. Code, § 1149; *ALRB v. Superior Court* (2016) 4 Cal.App.5th 675, 683; *United Farm Workers of America (Garcia)* (2019) 45 ALRB No. 4, p. 12.) To aid in the performance of these functions, the Act grants the Board access “at all reasonable times” to any evidence of any person subject to investigation or an unfair labor practice proceeding. (Lab. Code, § 1151, subd. (a).) This grant of authority is reinforced by the power to issue subpoenas requiring the testimony or

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<sup>2</sup> The Act is codified at Labor Code section 1140 et seq.

production of evidence. (*Ibid.*) The authority of the General Counsel to obtain records or testimony from a respondent via subpoena to aid in its investigation of an unfair labor practice charge before issuance of a complaint is settled. (*Coastal Vineyard Care Associates* (June 7, 2019) ALRB Admin. Order No. 2019-01, pp. 1-2; *Four Seasons Vineyard Management* (Nov. 30, 2018) ALRB Admin. Order No. 2018-16, pp. 2-3; *NLRB v. North Bay Plumbing, Inc.* (9th Cir. 1996) 102 F.3d 1005, 1008; *Link v. NLRB* (4th Cir. 1964) 330 F.2d 437, 439-440; *NLRB v. Kingston Trap Rock Co.* (3d Cir. 1955) 222 F.2d 299, 301-302; *NLRB v. Anchor Rome Mills, Inc.* (5th Cir. 1952) 197 F.2d 447, 448, citing *NLRB v. Barrett Co.* (7th Cir. 1941) 120 F.2d 583, 586 [“We are satisfied that the Board’s right (as well as its duty) to investigate, and in the course of its investigation, if need be, to issue subpoenas before it files a complaint, is clear”].)

The General Counsel’s investigative subpoena power is broad and “limited only by the requirement that the information sought must be relevant to the inquiry.” (*Link, supra*, 330 F.2d at p. 440; *NLRB v. Carolina Food Processors* (4th Cir. 1996) 81 F.3d 507, 511; see *ALRB v. Laflin & Laflin* (1979) 89 Cal.App.3d 651, 664.) We conclude the subpoena presently before us falls within the scope of this requirement.

#### **A. The Request for Telephone Numbers**

The first category of information sought by the General Counsel’s subpoena is the telephone numbers of employees from the crew of foreman Mario Huerta (Huerta). King City asserts in its request for appeal that this information is not relevant to the charge and is subject to the employees’ constitutional privacy rights (see Cal. Const., art. I, § 1.) We reject both claims.

1. Relevance

King City's relevancy objection is based on its claim the charging party and other alleged discriminatees never worked for nor were transferred to Huerta's crew, and thus information regarding the employees on Huerta's crew is not relevant and beyond the scope of the charge. We find King City waived any objection on this ground. King City never objected to production of the employees' telephone numbers on relevancy grounds in its petition to revoke, and it is barred from raising this new objection for the first time on appeal. (Board reg. 20217, subd. (d) [a party who does not intend to comply with an investigatory subpoena must file a petition to revoke and "shall explain with particularity the grounds for objecting to each item covered by the petition"]; *Coastal Vineyard Care Associates, supra*, ALRB Admin. Order No. 2019-01, p. 2, fn. 2; see *Henry Mayo Newhall Memorial Hospital v. Superior Court* (1978) 81 Cal.App.3d 626, 636 ["The failure to make timely objection constitutes a waiver"]; *Scottsdale Ins. Co. v. Superior Court* (1997) 59 Cal.App.4th 263, 266 [failure to assert objection on basis of privilege in initial response to request for production of documents resulted in waiver].) In addition, King City's newly articulated relevancy objection is inconsistent with its prior voluntary production of the employees' names and home addresses.

We further would find King City's relevancy objection without merit even if considered on its merits. The record before us identifies three discriminatees: Martinez, Delgado, and Gonzalez. While Gonzalez was not specifically named in the original charge, the circumstances of his termination were part of the General Counsel's

investigation before issuance of the subpoena and are referenced in the declaration in support of it.

The fact the charge does not specifically reference Gonzalez is immaterial. The charge is not a pleading and “need not be technically precise.” (*Rogers Food, Inc.* (1982) 8 ALRB No. 19, ALJ Dec. p. 5.) It is merely an administrative step which sets in motion an investigation and will be deemed sufficient “so long as it informs the party charged of the general nature of the alleged violations.” (*Ibid.*, emphasis in original; *NLRB v. Fant Milling Co.* (1959) 360 U.S. 301, 308 [“Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge”].) The original charge alleged King City retaliated against Martinez, Delgado, “and others” for engaging in protected concerted activity, and the General Counsel’s investigation before issuing the subpoena appears to have led it to identify Gonzalez as among the “others” subjected to King City’s alleged unlawful conduct as described in the charge. The General Counsel avers that Gonzalez was employed on Huerta’s crew. We find the contact information of other employees from that crew is relevant to the General Counsel’s investigation of the charge allegations and the identification of potential witnesses.<sup>3</sup>

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<sup>3</sup> The General Counsel further asserts that while Martinez and Delgado did not work on Huerta’s crew, they worked on a separate crew that “frequently worked alongside” Huerta’s crew. As we conclude the contact information of the employees on Huerta’s crew is relevant to the General Counsel’s investigation of the circumstances of

## 2. Privacy

King City objects to disclosure of the employees' telephone numbers on the basis this information is subject to the employees' privacy rights. Courts have recognized employees have a legitimate expectation of privacy in their telephone numbers. (*Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1252.) Nevertheless, we conclude the General Counsel is entitled to this information under Labor Code section 1151, subdivision (a).

At the outset, we find King City has waived its privacy objection to disclosure of the telephone numbers. King City already produced voluntarily to the General Counsel the employees' names and home addresses, conduct certainly inconsistent with its refusal to produce their telephone numbers on privacy grounds. (See *O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 577 [voluntary disclosure, as opposed to inadvertent disclosure, of list of employees slated for termination would demonstrate "a bona fide consensual waiver"]; *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 599-601 [party waived claims of confidentiality in records by conduct inconsistent with alleged intent to protect them].)

Even if not waived, we would reject King City's privacy objection. In the context of discovery in civil litigation, the identification of potential witnesses and their contact information "is a routine and essential part of pretrial discovery." (*Puerto,*

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Gonzalez's alleged unlawful termination, it is unnecessary for us to consider whether such information for the members of Huerta's crew is relevant to the charge allegations concerning Martinez and Delgado.

*supra*, 158 Cal.App.4th at pp. 1249-1250, quoting *People v. Dixon* (2007) 148 Cal.App.4th 414, 443.) “Nothing could be more ordinary in discovery than finding out the location of identified witnesses so that they may be contacted and additional investigation performed.” (*Puerto, supra*, 158 Cal.App.4th at p. 1254.) The contact information of potential witnesses undoubtedly would assist the General Counsel in investigating charges of unfair labor practices. Federal courts applying Section 11(1) of the National Labor Relations Act [29 U.S.C. § 161(1)], on which Labor Code section 1151, subdivision (a) is modeled, have found the statute “clearly provides that the Board shall have access to employer records ‘at all reasonable times,’ whether the records belong to one merely ‘being investigated’ or to one already ‘proceeded against.’” (*Carolina Food Processors, supra*, 81 F.3d at p. 512, citing *NLRB v. G.H.R. Energy Corp.* (5th Cir. 1982) 707 F.2d 110, 114.) The analysis and result under Labor Code section 1151, subdivision (a) is no different; the information sought by the General Counsel’s subpoena is well within the scope of her investigation of the unfair labor practice charge, and King City must produce it. (*Link, supra*, 330 F.2d at p. 440.)<sup>4</sup>

King City’s assertion we must balance the employees’ privacy interests against the General Counsel’s need for the information likewise lacks merit. Labor Code section 1151, subdivision (a) directs that the General Counsel “shall” have access to

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<sup>4</sup> King City suggests notice to its employees may be required when the General Counsel subpoenas employee information from an employer, citing Code of Civil Procedure section 1985.6. Neither Labor Code section 1151, subdivision (a) nor Board regulation 20217 imposes such a requirement. (See also Code Civ. Proc., § 1985.6, subd. (a)(5); Gov. Code, § 7465, subd. (e).)

the records of a party subject to an investigation without any requirement of balancing alleged competing interests. Moreover, such balancing in the context of civil discovery is required only when it first is established the information sought is subject to (1) a “legally protected privacy interest,” (2) for which there is a “reasonable expectation of privacy” under the circumstances, and (3) the privacy invasion from disclosure is “serious in nature.” (*Puerto, supra*, 158 Cal.App.4th at pp. 1250-1251, citing *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 35-37; *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 370-371.)

No balancing of opposing interests is required if this showing is not made, as is the case here. (*Puerto, supra*, 158 Cal.App.4th at p. 1256, citing *Pioneer, supra*, 40 Cal.4th at p. 373.) The General Counsel’s request for the employees’ telephone numbers to assist in contacting potential witnesses is a basic request and does not pose any serious transgression of the employees’ privacy interests, especially here where the employer already has produced their names and home addresses.<sup>5</sup> (*Puerto, supra*, 158 Cal.App.4th at p. 1253; *Williams v. Superior Court* (2017) 3 Cal.5th 531, 543-544; see also *Kingston Trap Rock Co., supra*, 222 F.2d at p. 302 [rejecting employer’s objection to subpoena seeking information regarding employer’s customers where employer

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<sup>5</sup> We reject King City’s assertion that disclosure of the employees’ telephone numbers is not warranted because the General Counsel already has their addresses and may individually subpoena their testimony. Obviously, calling the individuals over the telephone would be far less intrusive than Board agents arriving unannounced at their homes or issuing testimonial subpoenas to each of the employees compelling their attendance at a certain time and location, which also would result in an unnecessary consumption of administrative resources and likely great inconvenience to the witnesses.

expressed concern the information would be used by the union against the employer and its customers].) Moreover, King City's primary basis for its privacy objection, i.e., that its employees fear retribution from the discriminatees, is mollified by the fact it is the General Counsel seeking this information and not the charging party. The General Counsel represents she "and her staff will not share the telephone numbers with any member of the public." No basis exists on this record to suggest the General Counsel will not maintain the employees' contact information in confidence. (See *Jasmine Vineyards, Inc. v. ALRB* (1980) 113 Cal.App.3d 968, 983; *Kingston Trap Rock Co., supra*, 222 F.2d at p. 302.)

#### **B. The Request for Payroll Records**

King City objects to production of the employees' payroll records in its request for appeal on both relevance and privacy grounds. However, it only objected in its petition to revoke on relevancy grounds. Its privacy objection in its request for appeal thus is waived. (Board reg. 20217, subd. (d).)

King City asserts in its request for appeal the payroll records are not relevant because the charging party and alleged discriminatees never worked on Huerta's crew. King City never raised this issue in its petition to revoke, and we find it is waived. It also is inconsistent with King City's prior voluntary production of records for Huerta's crew.

We further would reject King City's relevancy objection on its merits even if it were not waived. As discussed above, Gonzalez worked on Huerta's crew, and the General Counsel asserts the payroll records are relevant to her inquiry in determining the

amount of potential backpay possibly owed. We agree with this assertion with respect to Gonzalez. The issue of backpay falls well within the scope of the General Counsel's investigatory authority (Lab. Code, § 1149), and she is entitled to this information under Labor Code section 1151, subdivision (a).<sup>6</sup> Moreover, as the ALJ noted, the General Counsel may consolidate an unfair labor practice proceeding with a compliance proceeding to determine both liability and, if liability is established, the amount of backpay owed in a single hearing. (Board reg. 20290, subd. (b).) Finally, King City asserts that, as a general matter, there is "no legal authority supporting a request for payroll records by the General Counsel" during the investigation of an unfair labor practice charge before issuance of a complaint. King City is wrong. (*Carolina Food Processors, supra*, 81 F.3d 507 [enforcing NLRB General Counsel pre-complaint investigatory subpoena for production of various employment records, including payroll, W-4s, and I-9s, for all bargaining unit employees].) The court in *Carolina Food Processors* described a similar objection to that asserted here by King City as "frivolous." (*Id.* at p. 512, citing *G.H.R. Energy Corp., supra*, 707 F.2d at p. 114.)

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<sup>6</sup> The General Counsel also asserts it needs the payroll records from Huerta's crew to determine whether an adverse action occurred by virtue of King City transferring Martinez and Delgado to a different crew, as well as to calculate potential backpay to them. However, the General Counsel concedes Martinez and Delgado did not work on Huerta's crew. Ultimately, we find it unnecessary to determine the relevance of this information to Martinez and Delgado as we conclude the information is relevant to the General Counsel's investigation concerning Gonzalez.

**CONCLUSION**

For the foregoing reasons, King City's appeal from the ALJ's ruling denying its petition to revoke the General Counsel's subpoena is DENIED.

DATED: January 9, 2020

Isadore Hall, III, Member

Barry D. Broad, Member

Ralph E. Lightstone, Member