

N O. 50235-6

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**COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON**

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BRELVIS CONSULTING, LLC,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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**BRIEF OF RESPONDENT STATE OF WASHINGTON**

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## I. INTRODUCTION

This is not a case of first impression. Under the Consumer Protection Act, RCW 19.86, the Washington Legislature grants the Attorney General (the State) broad authority to conduct civil investigations of unfair and deceptive acts in the marketplace, which includes the authority to issue Civil Investigative Demands (CIDs). For nearly a year, Appellant Brelvis Consulting, LLC d/b/a The Student Loan Help Center (Brelvis Consulting), a Florida-based student loan consolidation company, has refused to respond to a CID lawfully served upon it by the State. The State's petition to enforce its CID was granted and Brelvis Consulting now appeals, raising a series of constitutional and statutory objections related to *criminal* proceedings, none of which properly apply to corporate entities. Such objections fail to overcome the State's well-settled authority to issue demands for information in civil investigations conducted pursuant to the CPA.

In refusing to respond to even a single request for information contained in the State's CID, Brelvis Consulting attempts to hide behind the Fourth and Fifth Amendments to the United States Constitution, and sections 7 and 9 of article I to the Washington State Constitution. However, these constitutional provisions largely protect individual interests, not the interests of corporations like Brelvis Consulting.

Consequently, the United States Supreme Court has rejected such theories. Moreover, Brelvis Consulting chose not to move to set aside or otherwise modify the CID in superior court in accordance with RCW 19.86.110(8) and thus waived these issues.

Brelvis Consulting repeatedly raises arguments rooted in criminal law, but based upon its designation as a civil investigative demand, the State's CID is a civil subpoena. The State is conducting a civil investigation, much like the Federal Trade Commission (FTC), Consumer Financial Protection Bureau (CFPB), or any other of the myriad state and federal regulators similarly charged with consumer protection enforcement. Moreover, the responses to a CID cannot be used in a criminal proceeding. Thus, Brelvis Consulting's continued appeal to purported rights in criminal proceedings is futile.

In sum, Brelvis Consulting's refusal to honor the State's investigative demand is nothing more than obstruction wrapped in unavailing constitutional arguments. Accordingly, because the CID issued by the state was reasonable, lawfully issued, and requested information that was not too indefinite, for the reasons detailed below, the Court should affirm the trial court's order directing Appellant to respond to the State's CID.

## II. COUNTERSTATEMENT OF THE ISSUES ON APPEAL

- A. **Did the Trial Court Abuse its Discretion by Granting the State’s Petition to Enforce its Civil Investigative Demand Under RCW 19.86.110 When the Demand Was Within the State’s Authority, Reasonably Related to Its Investigation, and Not too Indefinite?**
- B. **Did the Trial Court Correctly Rule That the State’s Civil Investigative Demand Did Not Violate the Fourth or Fifth Amendments to the United States Constitution or Sections 7 and 9 of Article I to the Washington State Constitution?**

## III. COUNTERSTATEMENT OF THE CASE

Similar to the hundreds of mortgage rescue companies that preyed on desperate homeowners during the 2008 mortgage crisis, during the past five years, in response to the burgeoning level of student loan debt held by American consumers, scores of similar “debt adjustment” firms began aggressively marketing services to student loan debtors, promising loan forgiveness. Many of these debt adjustment firms are little more than scams; few debtors are eligible for forgiveness. Consumers are lured in by false promises and misrepresentations concerning the difficulty of applying for loan consolidation, which these companies offer to perform in exchange for exorbitant fees. The debtors are not informed that these consolidation services are offered *for free* on the Department of Education website<sup>1</sup>. In addition to increasing the debt burden shouldered by

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<sup>1</sup> <https://studentloans.gov/myDirectLoan/launchConsolidation.action> (last accessed 10/23/2017)

consumers – in many cases, by hundreds or thousands of dollars – these business practices violate Washington’s Debt Adjustment Act, RCW 18.28, violations of which are *per se* violations of the CPA.

Investigations of student loan consolidators like Brelvis Consulting are nothing new for the State. During the past two years, the Washington Attorney General has placed a special focus on ensuring compliance with the State’s Debt Adjustment Act. As part of this effort, the State has investigated (including the issuance of CIDs), litigated, and/or settled with dozens of student loan consolidation businesses operating nationwide. Ironically, in an attempt to justify its refusal to respond to the State’s CID, in its appeal, Brelvis Consulting references a press release issued by the State in January 2017 summarizing settlements with over a dozen student loan consolidation companies, ostensibly in an attempt to demonstrate that the State is seeking “penalties” against it. However, that the companies 1) cooperated during the respective investigations, and 2) entered into settlements, speaks directly to the State’s well-settled, *decades-long* authority to conduct investigations that protect Washingtonians from unfair and deceptive acts or practices in the marketplace.

Brelvis Consulting is a Florida company whose principal place of business is located in Wesley Chapel, Florida. CP 4. Bruce Mesnekoff is the owner, manager and registered agent of the company. CP 4. Through

its website and other marketing techniques including telephone calls, Brelvis Consulting markets to consumers who are interested in consolidating their student loans or seeking information about managing their loans, including consumers in Washington. CP 158-161.<sup>2</sup>

Under the “Legal” tab of Respondent’s website, Brelvis advertises a document preparation fee of \$495.00 to \$1,495.00<sup>3</sup>. Brelvis’ fees appear to exceed the amount allowed under the State’s Debt Adjustment Act, RCW 18.28.080 (“The debt adjuster may make an initial charge of up to *twenty-five dollars...*”) (emphasis added). At the time the State issued its CID, Brelvis Consulting had been the subject of 82 Better Business Bureau (BBB) complaints, and as a result, had been awarded a “D” rating. CP 162-65.

### **BBB Rating Scorecard**

**THIS BUSINESS IS NOT BBB ACCREDITED**

**The Student Loan Help Center**

**D**

**BBB Rating System Overview (<https://www.bbb.org/council/overview-of-bbb-grade/>)**

Given the high number of complaints submitted to the BBB relating to Brelvis Consulting’s business practices, it issued the following alert:

“BBB files indicate that The Student Loan Help Center has a pattern of complaints stating that the business does not consolidate loans after

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<sup>2</sup> <http://thestudentloanhelpcenter.com/> (last accessed 10/23/2017)

<sup>3</sup> <http://thestudentloanhelpcenter.com/document-preparation-fee/> (last accessed 10/23/2017)

the consumer pays an initial fee. Complaints further show that consumers request for refunds go unanswered by the business.

In September 2014, July 2015, and December 2016, BBB sent a request to The Student Loan Help Center to address the pattern and what actions the business has taken to help eliminate the causes of complaints. As of today's date, BBB has not received a response from the business."

CP 164.

As part of a special investigatory focus on businesses that provided student loan consolidation services in Washington, and as a result of a complaint submitted by a Washington consumer (see below), the State served a CID on Brelvis Consulting on October 21, 2016. CP 31.

"I received a phone call from this company stating that my "student loans were eligible to receive loan forgiveness," for up to 60%. I do NOT have any student loans and I thought you should know about this company. There are many complaints already out there."

CP 160.

Actual delivery was made on October 24. CP 40. Brelvis Consulting was required to respond to the CID by November 28, 2016. CP 19; CP 40.

After serving the CID, attorneys for the State met and conferred with three (3) different law firms representing Brelvis Consulting. CP 13; CP 41-73. During these interactions, the parties engaged in at least three (3) telephone calls and the State sent numerous emails to the various counsel providing information and seeking the production of documents. *Id.* The State also granted multiple extensions to Brelvis Consulting to

respond to the CID, running from November 28, 2016, through February 10, 2017. CP 13; CP 59.

During the five-month period between service of the CID and the State's filing of the petition to enforce, at no point during any of the numerous telephone calls and e-mails exchanged between the State and Brelvis Consulting's three different attorneys did Brelvis Consulting ever raise a constitutional objection related to the CID. In fact, during those five months, its counsel never raised any of the objections currently before this Court. Instead, Brelvis Consulting's first attorney attempted to rebuff the State by sending the email below:

John,

Our office was closed for the last ten days as I was in the Florida Keys (without my phone or laptop). I will be speaking with my client later this week. AS you know we do not acknowledge the Washington AG's demands because our position is that it lack jurisdiction as to the CID. However, in the interests of professionalism, I intend to respond on my client's behalf. You are on the list, just not at the top."

CP 64.

### **The Trial Court's Decision**

When the deadlines to respond to the CID passed and no documents or written responses were received, the State filed a petition to enforce its CID in Thurston County Superior Court on February 24, 2017. CP 4-11. After considering the parties' briefings and oral argument, on March 24, 2017, the trial court issued a ruling from the bench granting the

State's motion and ordering Brelvis Consulting to respond in full to the State's CID within 60 days. CP 171-72. On April 12, 2017 the trial court denied Brelvis Consulting's motion for reconsideration. CP 251. On May 1, 2017 the trial court granted a motion staying its order. CP 354-55.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

Appellate courts review a trial court's ruling on a motion to compel for an abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002). An abuse of discretion occurs when the trial court's decision rests on untenable grounds or when no reasonable judge would have reached the same conclusion. *Mayer v. STO Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

Appellate review of constitutional issues is de novo. *Olympic Stewardship Found. v. State Env'tl. & Land Use Hearings Office through W. Wash. Growth Mgmt. Hearings Bd.*, 199 Wn. App. 668, 710, 399 P.3d 562 (2017); *see also State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016) ("We review constitutional issues de novo.").

##### **B. RCW 19.86.110 Affords the State Broad Investigative Authority**

The State has wide latitude to investigate potential violations of the CPA, and Washington courts are called upon by the legislature to broadly

construe the CPA and to be guided by applicable FTC decisions. *See* RCW 19.86.920 (“It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters...To this end this act shall be liberally construed that its beneficial purposes may be served.”). A CID can be set aside only if the information sought is “plainly irrelevant.” *See FTC v. Church & Dwight Co., Inc.*, 665 F.3d 1312, 1315 (D.C. Cir. 2011) (“[A] district court must enforce a federal agency’s investigative subpoena if the information sought is ‘reasonably relevant’—or, put differently, ‘not plainly incompetent or irrelevant to any lawful purpose of the [agency]’—and not ‘unduly burdensome’ to produce.”) (internal citation omitted); *FTC v. Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980) (test is whether “the documents sought are “not plainly irrelevant” to the investigative purpose. We have also stated that the Commission’s determination of relevance should be accepted if not ‘obviously wrong’.”) *See also Steele v. State ex rel. Gorton*, 85 Wn.2d 585, 537 P.2d 782 (1975).

**C. As a Corporate Entity, Brelvis Enjoys No Fifth Amendment Protections**

While corporate entities may enjoy limited First Amendment and Fourth Amendment protections, unlike individuals, they may not avail themselves of the Fifth Amendment right against incrimination. In *Braswell v. United States*, 487 U.S. 99, 110, 108 S. Ct. 2284 (1988), the Court rejected an argument raised by a president of a corporation that responding to a government-issued subpoena for corporate documents would violate his Fifth Amendment protection against incrimination. The Court explained:

Artificial entities such as corporations may act only through their agents,...and a custodian's assumption of his representative capacity leads to certain obligations, including the duty to produce corporate records on proper demand by the Government. Under those circumstances, the custodian's act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation—*which of course possesses no such privilege.*

*Id.* (internal citations omitted) (emphasis added).

Indeed, it is well settled that corporations do not enjoy Fifth Amendment protections. Decades before *Braswell*, the Supreme Court explained “the fair distillation... seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether

for the corporation or for its officers...” *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208, 66 S. Ct. 494 (1946).

Unable to overcome Supreme Court precedent, Brelvis Consulting is left to cite an out-of-state court interpreting that state’s constitution. *Com. v. Doe*, 405 Mass. 676, 544 N.E.2d 860 (1989). In *Doe*, the Massachusetts Supreme Court reinforced the principle that Fifth Amendment protections do not extend to corporations, explaining, “The witness in this case [a corporate records custodian] concedes, as he must, that the privilege under the Fifth Amendment to the United States Constitution does not extend to one in his position. . . . In Fifth Amendment jurisprudence, it is settled that a corporation cannot resist compelled production of its documents by claiming that such documents will incriminate the corporation.” *Id.* at 678 & n.3 (internal citations omitted). Instead, the *Doe* court ruled that in where the state is investigating corporate criminal conduct, an individual cannot be held in contempt for refusing to turn over records when the act of doing so would incriminate him personally. *Id.* at 680. But where the act of production is not incriminating to a witness, that witness has no privilege. *Id.* Nontestimonial evidence can be demanded. *Id.* Finally, even where a record custodian has a valid privilege against self-incrimination – which Mr. Mesnekoff does not in this civil investigation – it “does not excuse the

corporation from its obligation” to comply with the CID. *Id.* at 681. In fact, *Doe* actually supports the State’s position that Brelvis Consulting must fully respond to the State’s CID, because an LLC has no privilege against self-incrimination.

Next, Brelvis Consulting attempts to find support in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. \_\_\_, 134 S. Ct. 2751 (2014), but in that case, the Supreme Court held that corporations enjoy *some* constitutional protections, namely, the right to free speech. Significantly for this case, the *Hobby Lobby* court did not consider whether corporations had Fifth Amendment protections. The Court’s ruling did not create such protections and thus Brelvis Consulting’s appeal to *Hobby Lobby* as support for extending Fifth Amendment protections to a corporate entity should be rejected.

**1. The CID Does Not Implicate Mr. Mesnekoff’s Privilege against Self-Incrimination**

Brelvis Consulting repeatedly and incorrectly contends that a CID issued to it and lawfully served upon Mr. Mesnekoff in his capacity as registered agent and managing member of the company somehow translates into a CID issued to Mr. Mesnekoff in his individual capacity. This contention has no merit. First, the heading of the State’s CID clearly demonstrates that the CID was issued to Brelvis Consulting, LLC, and not

to Mr. Mesnekoff in any personal, private capacity. CP 18. Moreover, if any doubt existed as to whether or not the CID was issued to Mr. Mesnekoff, the “c/o” reference makes it clear that the receipt of the CID was in his capacity solely as registered agent for the company:

OFFICE OF THE ATTORNEY GENERAL  
STATE OF WASHINGTON

IN THE MATTER OF:  
BRELVIS CONSULTING, LLC,

CIVIL INVESTIGATIVE DEMAND FOR  
ANSWERS TO INTERROGATORIES AND  
REQUESTS FOR PRODUCTION OF  
DOCUMENTS

**THE STATE OF WASHINGTON TO:** Brelvis Consulting, LLC  
2660 Cypress Ridge Blvd., Ste. 101  
Wesley Chapel, FL 33544

and

c/o Bruce Mesnekoff  
27203 Fern Glade Ct.  
Wesley Chapel, FL 33544

*Id.*

Brelvis Consulting also argues that the definitions of the terms “You” and “Your” in the State’s CID includes, and therefore implicates, Mr. Mesnekoff in his individual capacity. However, the definitions of “You” and “Your” contained in the CID (see below) in no way apply to Mr. Mesnekoff in his individual capacity. Instead, these definitions apply to him as an officer and principal of the LLC.

“You,” “Your,” and “Brelvis” refer to Brelvis Consulting, LLC, whether doing business as The Student Loan Help Center, National Student Loan Help Center, or any other fictitious business name and any parent, affiliate, subsidiary, predecessor, successor or assignee of it, and its

principals, operating divisions, present or former owners, employees, servants, officers, directors, agents, representatives, attorneys, accountants, independent contractors, distributors, and any other persons or entities acting on behalf of or under the direction, authorization or control of Brelvis Consulting, LLC, including any foreign or overseas affiliates.

CP 20.

By refusing to produce documents in his capacity as an agent of Brelvis Consulting, Mr. Mesnekoff seeks to prevent the State from conducting a routine, lawful civil investigation. The *Braswell* Court acknowledged the dangers of this gamesmanship to law enforcement. “We note further that recognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute ‘white-collar crime,’ one of the most serious problems confronting law enforcement authorities.” *Braswell*, 487 U.S. at 115. A corporate representative cannot seek an end run around the State’s civil investigation of Brelvis Consulting and prevent the State from lawfully inspecting corporate records by hiding behind an improper and unrecognized privilege against self-incrimination.

**2. Information Produced In Response to a CID Issued Pursuant to RCW 19.86 May Not Be Used In a Criminal Proceeding, Therefore Fifth Amendment Protections Are Not Implicated**

Even assuming *arguendo* that Brelvis Consulting could assert a right against self-incrimination under the Fifth Amendment – which it

cannot – RCW 19.86 clearly prohibits the use of any documents or information obtained pursuant to a CID in any criminal prosecution. *See* RCW 19.86.110(1) (“This section shall not be applicable to criminal prosecutions.”); *see also* RCW 19.86.110(7)(b) (“The material provided under this subsection... may not be introduced as evidence in a criminal prosecution.”). Accordingly, to argue that providing information in response to a CID – information that could not be used to prosecute a target – affords Fifth Amendment protections to a corporate representative acting on behalf of an entity, is both illogical and unsupported by the law.

### **3. Brelvis Consulting’s Blanket Invocation of the Fifth Amendment is Improper**

Finally, Brelvis Consulting’ blanket refusal to comply with the State’s CID is improper. *State v. Jordan*, 160 Wn.2d 121, 126–27, 156 P.3d 893 (2007); *see also United States v. Malnik*, 489 F.2d 682 (5th Cir. 1974), cert. denied, 419 U.S. 826 (1974).

“The Fifth Amendment privilege is only applicable where the defendant has ‘reasonable cause to apprehend danger from a direct answer.’” *State v. Levy*, 156 Wn.2d 709, 731-32, 132 P.3d 1076 (2006) (quoting *United States v. Goodwin*, 625 F.2d 693, 700 (5th Cir.1980)). “The court must determine whether the privilege is applicable and a witness cannot establish the privilege merely by making a ‘blanket

declaration... that he cannot testify for fear of self-incrimination.” *Id.* at 732 (quoting *United States v. Gomez-Rojas*, 507 F.2d 1213, 1220 (5th Cir.1975)). Instead, “[t]he trial judge must inquire into the legitimacy of the assertion and the scope may not extend to all relevant questions.” *Id.* The *Levy* Court therefore held that it was error to allow a “blanket” assertion of the privilege through counsel without taking steps to determine whether assertion of the privilege was proper, and because it was possible that the witness could have answered at least some questions without potentially incriminating herself. *Id.*

Brelvis Consulting’s blanket assertion of the Fifth Amendment is not only improper, but odd given that the State’s investigation is civil in nature, and any information obtained by the State pursuant to its CID cannot be used in a criminal proceeding. Moreover, even if the Fifth Amendment applied in this context, Brelvis Consulting has yet to articulate a proper basis for its invocation and no reasonable person or entity could fear criminal prosecution in this context.

**D. The State’s CID Does Not Implicate Article I, Section 9 of the Washington State Constitution**

Corporations such as Brelvis Consulting neither enjoy protections against self-incrimination under Fifth Amendment of the United States Constitution, nor under article I, section 9 of the Washington State

Constitution. Accordingly, a *Gunwall* analysis (see *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)) is not required. The law on this issue is clear. In upholding Washington’s Implied Consent Law under article I, section 9, the Washington Supreme Court explained “The Washington constitutional provision against self-incrimination envisions the *same* guarantee as that provided in the federal constitution. *There is no compelling justification for its expansion.*” *State v. Moore*, 79 Wn.2d 51, 57, 483 P.2d 630 (1971) (emphasis added).

Twenty years later, our Supreme Court reached the same conclusion, stating “[a] *Gunwall* analysis is unnecessary because this court has already held that the protection of article I, section 9 is co-extensive with, not broader than, the protection of the Fifth Amendment.” *State v. Earls*, 116 Wn.2d 364, 374–75, 805 P.2d 211 (1991) (internal citations omitted). In 2016, citing *Earls*, this Court held “our Supreme Court has already determined that the state constitution's article I, section 9, is co-extensive with the Fifth Amendment. It is not broader.” *State v. Horton*, 195 Wn. App. 202, 216, 380 P.3d 608 (2016) (internal citations omitted), *review denied*, 187 Wn.2d 1003 (2017).

Given Washington jurisprudence addressing this issue, it is abundantly clear that Brelvis Consulting enjoys no greater protections under the Washington Constitution than it does under the United States

Constitution. The protections are identical, and neither provides self-incrimination protections for corporations nor for those who are not in criminal jeopardy.

**E. The State’s CID is Not Prohibited by the Fourth Amendment**

In the context of a CID, “the Fourth Amendment’s restrictions are limited.” *Reich v. Montana Sulphur & Chem. Co.*, 32 F.3d 440, 448 (9th Cir. 1994).

It is a longstanding principle that law enforcement agencies are empowered to enforce this nation’s consumer protection laws, even in situations where wrongdoing is not readily apparent. In upholding a compliance order issued by the FTC, the Supreme Court explained, “Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.” *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). Of course, in the case before this Court, the indicia of unlawful practices evidenced by dozens of consumer complaints – as well as through the contents of the Student Loan Help Center website – go well beyond “official curiosity.”

To withstand Fourth Amendment scrutiny, the State need not demonstrate probable cause. Rather, a CID must be within the authority of

the agency, must not be too indefinite, and the information sought must be reasonably relevant to the investigation. *See Steele v. State ex rel. Gorton*, 85 Wn.2d 585, 594-95, 537 P.2d 782 (1975) (noting in upholding the CID that “[t]he result reached . . . affords the Attorney General some latitude in embarking upon investigations without absolute assurances that violations of the Consumer Protection Act have occurred.”). Thus, in the case of Brelvis Consulting, complying with the legal standards articulated in *Steele* was an exceptionally low hurdle for the State to overcome.

**1. The State’s Request Was Made Pursuant to Its Authority under RCW 19.86**

The CPA forbids “unfair or deceptive acts or practices in the conduct of any trade or commerce.” RCW 19.86.020. The State has *express* statutory authority to investigate such suspected unfair and deceptive acts or practices and bring actions in the name of the state or as *parens patriae* on behalf of persons residing in the state to restrain and prevent violations of the CPA. RCW 19.86.080; RCW 19.86.110. The Legislature intended that the CPA be “liberally construed that its beneficial purposes may be served.” RCW 19.86.020. The Washington Supreme Court reiterated this liberal construction directive in order to ensure protection of the public and the existence of fair and honest

competition. *Thornell v. Seattle Serv. Bur., Inc.*, 184 Wn.2d 793, 799, 363 P.3d 587 (2015).

Among the investigative tools, the Legislature authorized the State to issue CIDs under RCW 19.86.110, which the State has done for decades as part of its efforts to ferret out unfair or deceptive conduct from the marketplace. In furtherance of its intent to liberally construe the CPA to fulfill its beneficial purposes, the Legislature purposefully set a low bar for the State to meet before issuing a CID. RCW 19.86.110(1) provides:

(1) Whenever the attorney general believes that any person  
(a) may be in possession, custody, or control of any original or copy of any ... document ... wherever situate, which he believes to be relevant to the subject matter of an investigation of a possible violation of ... 19.86.020, ... or federal statutes dealing with the same or similar matters that the attorney general is authorized to enforce, or

(b) may have knowledge of any information which the attorney general believes relevant to the subject matter of such an investigation, he may, prior to the institution of a civil proceeding thereon, execute in writing and cause to be served upon such a person, a civil investigative demand requiring such person to produce such documentary material and permit inspection and copying, to answer in writing written interrogatories, to give oral testimony, or any combination of such demands pertaining to such documentary material or information: PROVIDED, That this section shall not be applicable to criminal prosecutions.

Similar CID or administrative subpoena powers are long-standing, lawful investigative tools granted to other state attorneys general and to state and federal regulatory agencies around the country. Like them, the

State now, as it has done in the past, issues a CID to a target of a civil enforcement investigation pursuant to its authority under RCW 19.86.110.

## **2. The State’s Request for Information Was Narrow**

The documents and information requested in the State’s CID represented a narrow subset of business records maintained by Brelvis Consulting. Put another way, the State did not broadly request all of Brelvis Consulting’s business records (*e.g.*, all records relating to consumers nationwide), nor did its CID contain requests for information that went beyond the marketing and provision of student loan services to Washington consumers. For example, the CID requested the identities of Brelvis Consulting’s Washington consumers, copies of those consumers’ files, telemarketing scripts, call recordings, and other information and documents relevant to its interactions with Washington consumers. CP 17-38.

## **3. The State’s Request Sought Reasonably Relevant Information**

The *Steele* court does not require that a CID “specify precisely the activity or transaction giving rise to the investigation.” *Steele*, 85 Wn.2d at 594. The CID issued to Brelvis Consulting clearly states that the investigation involves unfair or deceptive acts or practices occurring in the conduct of any trade or commerce, including “possible past or current violations of RCW 19.86.020 (unfair or deceptive acts or practices in the

conduct of any trade or commerce), specifically practices associated with the marketing and sale of services relating to the adjusting or consolidation of student loan debt owed by Washington consumers.” CP 18. Neither *Steele* nor RCW 19.86.110 require further specificity.

Not surprisingly, in both its briefings before the trial court and this Court, Brelvis Consulting fails to identify a single request for information or request for production contained in the State’s CID that does not relate to information relevant to its marketing and business activities in Washington. *Cf. Steele*, 85 Wn.2d at 595 (upholding CID and noting that “respondents themselves have not pointed to any Particular aspect of the civil investigative demand that would not be relevant to unfair and deceptive practices”). Thus, information concerning Brelvis Consulting’s practices in Washington is reasonably relevant to the State’s civil investigation.

Taken together, the State has satisfied all of the requirements under *Steele* to issue a CID against Brelvis Consulting and withstand Fourth Amendment scrutiny.

**F. The State’s CID Does Not Implicate Article I, Section 7 of the Washington State Constitution**

The CID issued to Brelvis Consulting does not involve protected privacy interests afforded to Washington citizens under article I, section 7

of the Washington Constitution. Washington’s Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. This Court applies a two-step analysis to questions involving article I, section 7. First, the Court determines whether a “private affair” has been disturbed. *State v. Miles*, 160 Wn.2d 236, 244, 156 P.3d 864 (2007). If a “private affair” has been disturbed, the Court determines whether “authority of law” justifies the disturbance. *Id.* Because the State’s CID was 1) not issued to an individual in his/her individual capacity, and 2) did not request documents or information revealing intimate facts about one’s personal, private affairs, there is not an article I, section 7 violation. Put another way, because the State’s CID does not implicate private affairs, no article I, section 7 violation has occurred and no further analysis is necessary.

The “privacy interests” identified in Brelvis Consulting’s authorities almost exclusively belong to natural persons and records that may reveal their associations, financial dealings, or movements, not the records of a corporate entity. Not surprisingly, Brelvis Consulting fails to cite a single case extending greater privacy rights to limited liability corporations under article I, section 7 than are afforded under the Fourth Amendment.

To the contrary, Washington courts have made it clear that protections under article I, section 7 involve *individual* privacy interests. For example, in *Matter of Maxfield*, 133 Wn.2d 332, 339–40, 945 P.2d 196 (1997), the Washington Supreme Court explained “We have previously found cognizable privacy interests under article I, section 7 in telephone numbers called, garbage, and thermal heat waste.” (internal footnotes omitted). According to our Supreme Court, when Washington courts must determine whether a certain interest is a *private* affair subject to article I, section 7 protections, “a central consideration is the nature of the information sought—that is, whether the information obtained via the governmental trespass reveals intimate or discrete details of a person's life.” *State v. Jordan*, 160 Wn.2d 121, 126–27, 156 P.3d 893 (2007).

The State's CID made no inquiries into the private affairs of Brelvis Consulting or its officers. The requests contained therein relate only to conduct and matters *wholly* within the ordinary course of business at Brelvis Consulting. The State's CID did not include requests for Mr. Mesnekoff's personal bank records, tax returns, credit cards statements, or any other information that could reveal his private affairs. Brelvis Consulting's argument that consumer contracts, corporate information, or the identities of Brelvis Consulting's Washington consumers could

somehow be classified as *private* affairs is neither logical nor supported by the case law.

Moreover, the scope of Brelvis Consulting's proposed constitutional interpretation (CIDs issued under the CPA violate the Washington Constitution) would cripple well-established state investigative functions. For example, if all of a corporation's "business records" are constitutionally protected as urged by Brelvis Consulting, no corporate entity would ever have to respond to a CID issued by the State. This proposed constitutional interpretation would have far-reaching, negative implications for numerous State regulators that conduct investigations to protect Washington citizens (*e.g.*, investigations into violations of the Medicaid Fraud False Claims Act (RCW 74.66.120) and investigations into violations of The Service Members Civil Relief Act (RCW 38.42.150)). The Washington Constitution neither requires nor contemplates such a result.

Finally, the CPA explicitly provides for judicial review of CIDs, either through a petition by the Respondent to set the CID aside, RCW 19.86.110(8), or as here when the State brings a petition to enforce the CID. RCW 19.86.110(9). The CPA includes significant due process rights for the recipient of a CID. Most noteworthy, a recipient may petition a court to set aside or otherwise modify a CID. Such a protection

serves as a bulwark against 1) the issuance of a CID that constitutes an unreasonable search and seizure, and 2) individual privacy interests being infringed upon. The CID statute passes constitutional muster under article I, section 7 of the Washington Constitution, and Brelvis Consulting has established no constitutionally protected privacy concern excusing it from answering interrogatories and producing documents.

**G. Consumer Complaints Are Not a Prerequisite to Issuing a CID**

As noted above, the Legislature has instructed the Attorney General to protect Washingtonians from unfair or deceptive acts or practices, including certain acts related to debt adjustment. Further, it is the State's responsibility to deter deceptive conduct before Washington consumers are injured. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986). ("The purpose of the capacity-to-deceive test is to deter deceptive conduct before injury occurs.").

Other than Brelvis Consulting's naked assertion that the receipt of a single complaint does not justify the issuance of a CID, there is simply no requirement under the CPA or related case law quantifying the issuance of a CID on a requisite number of consumer complaints. While consumer complaints may be one of many factors for a court to consider in determining the reasonableness of a CID, there are certainly countless

situations where the State might issue a CID despite not having received a single complaint – for example, where a member of the Attorney General’s staff observes deceptive or unfair conduct occurring.

Even if complaints were a predicate to issuing a CID, Brelvis Consulting has been the subject of *dozens* of Better Business Bureau complaints and two complaints received by the State. CP 162-65; CP 95-98. The State received one complaint relating to The Student Loan Help Center on August 3, 2016 – before issuing the CID. CP 158-61. The State received another consumer complaint on November 26, 2016 – after issuing the CID. CP 95-98. Brelvis Consulting’s business practices resulted in the issuance of the Better Business Bureau consumer alert notifying consumers of a perceived pattern or practice of failing to consolidate student loans and failing to issue consumer refunds.

Moreover, the number of consumer complaints is not relevant to the State’s exercise of its authority to issue a CID to help determine whether Brelvis’ conduct violated the CPA. This is an investigation. To the extent that Brelvis Consulting believes that the limited number of consumer complaints received by the State somehow suggest that its consumers have not been deceived or are otherwise satisfied (and therefore, the State should be precluded from even investigating), such evidence would not be relevant to rebut accusations that its conduct has

the capacity to deceive consumers. *See Indep. Directory Corp. v. FTC*, 188 F.2d 468, 471 (2d. Cir. 1951). (“[T]he fact that petitioners had satisfied customers was entire[ly] irrelevant. They cannot be excused for the deceptive practices here shown and found, and be insulated from action by the Commission in respect to them, by showing that others, even in large numbers, were satisfied with the treatment petitioners accorded them.”).

Finally, even if Brelvis Consulting had not received a single complaint related to its services, its website alone would serve as sufficient grounds to issue a CID. For example, under the “Legal” tab of Respondent’s website, it advertises a document preparation fee of \$495.00 to \$1,495.00. Such fees appear to exceed the amount allowed under RCW 18.28.080 (“The debt adjuster may make an initial charge of up to *twenty-five dollars...*”) (emphasis added). At a minimum, the website provides reason to believe that Brelvis Consulting “may” have documents relevant to an investigation into “possible” CPA violations. *See* RCW 19.86.110(1).

**H. RCW 10.52.090 Is Not Applicable to Investigation Conducted Pursuant to the Consumer Protection Act**

RCW 10.52.090 – a statute passed by the Legislature in 1909 – has no application to actions brought pursuant to the CPA, which are civil

proceedings. Indeed, our state Supreme Court has made it clear that RCW 10.52.090 is limited to criminal prosecutions and investigations. (“It is apparent from the language of RCW 9.18.080 and RCW 10.52.090 that, when applicable, the legislative intent was to withdraw the privilege against self-incrimination in criminal proceedings revolving about laws relating to bribery and corruption and to substitute in lieu of that privilege ‘full transactional immunity’....”) *State v. Carroll*, 83 Wn.2d 109, 113, 515 P.2d 1299 (1973).

A review of the note following RCW 10.52.090 further solidifies that the statute applies only to criminal offenses. This is hardly surprising since RCW 10.52.090 is located in Title 10 of the Revised Code of Washington, which relates to criminal procedure. Accordingly, the statute has no bearing on actions brought by the State seeking civil penalties authorized under RCW 19.86.140. Moreover, even if it did, it would be improper to grant immunity to Mr. Mesnekoff because the CID in question was not issued to him, but rather, a corporate entity.

Further, common sense dictates that this statute does not apply to actions brought under the CPA. Indeed, it would be absurd for the legislature to create a statute – the CPA – that included mandatory penalties for violations, but also an investigative method that required law

enforcement to grant immunity to those very penalties in order to obtain the information needed to establish violations in the first place.

The absurdity created by Brelvis Consulting's interpretation would not be limited to CPA enforcement because numerous Washington regulatory agencies possess similar investigatory and civil penalty powers. As one example of many, under RCW 70.94.141(2), the Washington Air Pollution Control Authority has the power to "*issue subpoenas to compel the attendance of witnesses and the production of evidence*, administer oaths and take the testimony of any person under oath." (emphasis added). Further, under RCW 70.94.431(1), the Air Pollution Control Authority may assess civil penalties for violations of the Act. Of course, such investigatory and civil penalty schemes are commonplace among state and federal regulators. Thus, in the context of air pollution prevention, to follow Brelvis Consulting's line of reasoning would require the Authority to grant a polluter immunity prior to subpoenaing documents, and as a result, waive any civil penalty liability. The Court should reject such absurd results.

**I. Brelvis Consulting Failed to Move to Set Aside the CID within 20 Days**

As noted earlier, RCW 19.86.110 affords certain procedural safeguards to persons or entities who receive CIDs. Chief among them is the right to ask a court to set aside the CID. RCW 19.86.110(8) states:

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

(emphasis added).

Despite being lawfully served with the State's CID on October 27, 2016 (Brelvis Consulting) and November 2, 2016 (Mr. Mesnekoff as registered agent) respectively, Brelvis Consulting never moved to set aside the CID; it simply refused to produce anything in response, despite receiving the extensions of time it requested. Brelvis Consulting raised objections to the State's CID only after the State filed its petition to enforce. Thus, Brelvis Consulting waived any objections to the CID.

Strong policy reasons support foreclosing on a respondent's right to set aside a CID after 20 days of service. The existence of a 20-day window within which one must file a motion to set aside a CID under the CPA promotes expedited and efficient resolution of an investigation. Indeed, both the State and any recipient of a CID benefit from speedy

resolution of a matter. Eliminating consideration of late objections by respondents outside of the 20-day window is also consistent with our Legislature's stated intent that the CPA be broadly construed. This principle was reinforced by the Idaho Supreme Court in *State By & Through Alan G. Lance v. Hobby Horse Ranch Tractor & Equip. Co.*, 129 Idaho 565, 568, 929 P.2d 741 (1996). In ruling that the recipient of a CID issued by the Idaho Attorney General waived its right to object to the CID when it failed to respond within the requisite 20-day period, the Court explained:

The statute clearly sets forth a time limit for objections and petitions, as well as the procedure for doing so. Hobby Horse chose not to comply with clear requirements of the statute, and instead waited for the State to file an Application for Order Compelling Response. Only then did Hobby Horse object to the Demand. Such tactics effectively contravene the Legislature's intent to deter unfair or deceptive trade practices, and to provide relief to consumers who may have been victims of proscribed behavior. Given such a clear expression of legislative intent, we hold that a party upon whom an Investigative Demand is served must respond or object within the statutory time period, or else the party has waived its right to object.

*Id.*; see also *F.T.C. v. O'Connell Assocs., Inc.*, 828 F. Supp. 165 (E.D.N.Y. 1993) (granting a FTC petition for enforcement of a CID and deeming as waived, a series of substantive objections brought by respondent who

failed to first make a petition to limit or quash the CID before the FTC under 15 U.S.C. § 57b-1).

Brelvis Consulting cites *Dick v. Attorney General*, 83 Wn.2d 684, 521 P.2d 702 (1974), in support of its argument that it did not waive any rights by failing to object to the CID in a timely fashion. However, the facts of *Dick* are inapposite. In *Dick*, because respondent notified the State (two days after being served with the CID) that it would not comply with the demand, the State *immediately* moved to enforce its CID. Accordingly, the 20 day deadline mandated by RCW 19.86.110(8) was not implicated and therefore, never addressed by the court. Moreover, the Court did not ultimately address various objections raised by respondent because it ruled that the conduct under investigation was “otherwise regulated” and therefore exempt from the CPA under RCW 19.86.170. Consequently, the CID was set aside on that ground.

Because Brelvis Consulting did not bring a motion to set aside the CID – and instead, chose to ignore the CID in its entirety – it should not be afforded an additional opportunity to bring its objections before a court. To do so would incentivize recipients of CIDs to engage, in a “catch-me-if-you-can” approach to responding to lawfully issued demands, clearly the type of behavior the Legislature was seeking to avoid when drafting this provision.

**J. The Court Should Award the State Attorney Fees and Costs Incurred in this Appeal**

Pursuant to RAP 18.1(b), the State respectfully requests the Court to exercise its discretion and award the State its reasonable attorneys' fees and costs on appeal. A prevailing party is entitled to attorneys' fees and costs on appeal if requested in the party's opening brief and if "applicable law grants to a party the right to recovery." RAP 18.1(a). The CPA provides the Court with discretion to award the State reasonable fees and costs as the prevailing party on appeal. RCW 19.86.080(1); *see State v. Kaiser*, 161 Wn. App. 705, 726, 254 P.3d 850 (2011). Should the Court grant the State's request, the State will file an affidavit detailing the fees and costs incurred. RAP 18.1(d).

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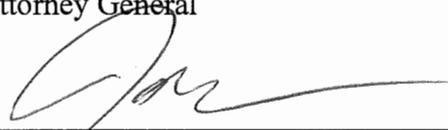
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**V. CONCLUSION**

The State respectfully requests that the Court affirm the trial court order directing Brelvis Consulting to comply in full with the State's CID, and award the State its reasonable attorneys' fees and costs pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of October, 2017.

ROBERT W. FERGUSON  
Attorney General



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CERTIFICATE OF SERVICE

I certify that on the 23<sup>rd</sup> day of October 2017, I caused a true and correct copy of respondent's brief to be filed with the Court, via electronic filing, and caused to be served, via email, on the following counsel of record:

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