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Plaintiff, *in propria persona*

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

BRUCE THOMAS MURRAY,

Plaintiff

v.

MEDICAL BOARD OF CALIFORNIA;

KIMBERLY KIRCHMEYER, in her capacity as executive director, Medical Board of California;

KERRIE D. WEBB, in her capacity as staff counsel, Medical Board of California; and

DOES 1-11, inclusive,

Defendants

Case No. 18STCV03576

PLAINTIFF BRUCE T. MURRAY'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER

Hearing Date:	March 12, 2019
Time:	8:30 a.m.
Judge:	Hon. Malcolm Mackey
Dept.:	55
Action Filed:	Nov. 2, 2018
Trial Date:	Not set

Reservation # 954591626596

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INTRODUCTION

Plaintiff Bruce Thomas Murray brought his action against the Medical Board of California and its agents because they wrongfully refused his requests to provide him with personal and medical information relating to his deceased mother, Audrey Bevan Murray.

Plaintiff's case is based primarily on the California Information Practices Act (CIPA), which mandates that public agencies release the personal information that they collect, upon request, to the individual to whom the information pertains, or his or her representative. Cal. Civ. Code §§ 1798.24-34.

In addition to wrongfully refusing to provide his mother's personal information, Defendants also failed to assist Plaintiff in the identification of records, in violation of Cal. Gov. Code § 6253.1, as stated in Plaintiff's third cause of action. Furthermore, Plaintiff alleges violation of the California Constitution and public policy.

Plaintiff requests that the court enjoin the named agents of the Medical Board to release the information he seeks, and he requests damages against the Medical Board, as allowed by Cal. Civ. Code § 1798.48. Plaintiff further requests attorney's fees pursuant to Cal. Civ. Code § 1798.48(b), Cal. Code Civ. Proc. § 1021.5, and/or equitable principles.

In their demurrer, Defendants present two affirmative defenses (timeliness and res judicata); they assert a general demurrer to six of Plaintiff's seven causes of action (CCP § 430.10(e)); and they assert governmental immunity as to Plaintiff's fifth cause of action. As applied to the facts of this case, none of Defendants' grounds for demurrer are meritorious. Indeed, some of the points raised by the Defendants are beyond meritless – in particular, their defense based on res judicata – because Plaintiff's prior writ action against the Medical Board was not decided on the merits. Additionally, Plaintiff never alleged personal liability for damages against the two named agents of the Medical Board. Rather, he seeks to enjoin them. Defendants demur to a fictional complaint of their own creation.

This memorandum will demonstrate that Plaintiff has pleaded more than sufficient facts to support his prima facie case. Accordingly, he requests that the court overrule Defendants' demurrer in its entirety.

ARGUMENT

II. DEFENDANTS' AFFIRMATIVE DEFENSE BASED ON TIMELINESS SHOULD BE OVERRULED, BECAUSE DEFENDANTS ASSIGN AN ERRONEOUS ACCRUAL DATE TO PLAINTIFF'S CAUSES OF ACTION.

A. Plaintiff made a timely presentation of claims after he exhausted all possible reasonable administrative remedies.

In terms of justiciability, a party may pursue an action when it is ripe for review; and, if necessary, the party has exhausted administrative remedies. "A decision attains the requisite administrative finality when the agency has exhausted its jurisdiction and possesses no further power to reconsider or rehear the claim … Until a public agency makes a 'final' decision, the matter is not ripe for judicial review." *Cal. Water Impact Network v. Newhall County Water Dist.* 161 Cal. App. 4th 1464, 1485 (2008). [Citations omitted.]

Here, Defendants base their preferred accrual date on Defendant Kerrie Webb's first letter to Plaintiff (May 26, 2017), in which she denied Plaintiff's request for his mother's personal information under CIPA. (Verif. Compl. at 8, ¶¶ 55-56; RFJN, Exh. 19.) However, nothing in Webb's letter indicates that her denial was final, in any sense. All of Webb's rejections are qualified – with conditions to potentially overcome the rejections. *Id.* For example, in her May 26 letter, Webb states, "At this time, the Board lacks sufficient documentation that the Board is authorized to release personal information to you, as opposed to Ms. Murray's trustee. Should such documentation be produced, the Board will evaluate the documentation to determine whether release of this personal information is permitted." *Id.*

Again, in her Aug. 4, 2017 letter to Plaintiff, Webb raises the possibility of "authorization" as a condition for the release of the information Plaintiff is seeking.[1] (Verif. Compl. at 9, ¶ 59; RFJN, Exh. 21.) And yet again, in her Jan. 29, 2018 letter to Plaintiff, Webb stated, "If you provide a proper written authorization from Peter Murray, the Board will consider releasing Ms. Murray's

[1] Plaintiff attempted to satisfy these conditions by (1) citing Peter B. Murray's Sept. 9, 2014 letter to the Medical Board, authorizing it to communicate directly with Plaintiff (RFJN, Exh. 5); (2) providing evidence of the termination of the Audrey B. Murray Trust, thus mooting any "authorization" issue (RFJN, Exh. 23); and (3) citing various provisions of the Information Practices Act, the Probate Code, the Confidentiality of Medical Information Act, the Public Health & Safety Code, and the Business & Professions Code. (V.C. at 10, ¶ 62; RFJN, Exh. 22.) As the record shows, Webb rejected all of these reasons. (RFJN, Exhs. 21, 24.)

medical records to you." (V.C. at 10, ¶ 63; RFJN, Exh. 24.) As with all of her letters to Plaintiff, Webb leaves open the possibility of some kind of release of information (although Webb suggested that she would only release medical documents that already happen to be in Plaintiff's possession, thus making the entire exercise somewhat futile and illusory). *Id.*

Theoretically, Plaintiff could have continued meeting and conferring with Webb, but he decided to call an end to it after her third letter. As Plaintiff concluded, "I think it is fair to say that at this point, administrative remedies have been exhausted; and this matter is ripe for judicial review." (V.C. at 11, ¶ 64; RFJN, Exh. 25.) Based on this set of facts and circumstances, assigning the accrual date as of Webb's third letter – Jan. 29, 2018 – is reasonable and appropriate. Thus, Plaintiff's Presentation of Claims four months later was timely.[2]

B. Defendants should be estopped from asserting an accrual date as of Webb's first letter to Plaintiff, because Defendants had previously insisted that Plaintiff was required to continue meeting and conferring with them after a first denial letter.

"Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." Cal. Evid. Code § 623 (Estoppel by own statement or conduct).

In Plaintiff's prior writ action against the Medical Board, Defendants strenuously argued that Petitioner had failed to meet and confer with them following their first denial of his request for information (V.C. at 6, ¶ 39; Defs.'s RFJN, Exh. 4 at 4:5-9.) In their Demurrer to the Amended Petition, the Respondents quoted Kerrie Webb's Feb. 20, 2015 letter to Bruce Murray, in which Webb stated, "Please feel free to contact me if you have any further questions." (Def.'s RFJN, Exh. 4, at 4:5-9.) Respondents interpreted this statement as follows: "The letter then invited Petitioner to contact the Board with any questions. [citation] In spite of Respondents' invitation to discuss further the response to Petitioner's request for records, petitioner failed to meet and confer with Respondents relating to any perceived inadequacies in the response, and **he received no final response**. As such, Petitioner's claim is not ripe for review …" *Id.* [Emphasis added.]

[2] An important note on the timeliness issue: The question of timeliness is only applicable to Plaintiff's claim for damages, which attaches to the Government Claims Act, and not his claims for injunctive and declaratory relief. Those claims are unconnected to the GCA and entirely timely under Cal. Civ. Code § 1798.49.

In between then and now, Plaintiff made a substantial effort to meet and confer with Webb, presenting his case to her over the course of three letters. In all of her reply letters, Webb always concludes by saying, "Please feel free to contact me if you wish to discuss this matter further." (V.C. at 9, ¶ 59; RFJN, Exhs. 18, 20, 22.) Somehow, those parting words that meant so before are now meaningless. Defendants now want to say that Plaintiff should **not** have attempted to meet and confer with them after their first denial letter. Instead, he should have declared the case "accrued" at the first resistance. "See you in court," he should have said, based on this line of reasoning.

Defendants' 180 reversal is highly ironic indeed. Irony aside, they should be estopped from asserting this position in order to establish an erroneous early accrual date.

C. Plaintiff's pleaded accrual date is also proper based on the doctrine of equitable tolling.

"Under California law, the doctrine of equitable tolling suspends or extends a statute of limitations as necessary to ensure fundamental practicality and fairness. It applies 'when an injured person has several legal remedies and, reasonably in good faith, pursues one.'" *Byrd v. Masonite Corp.*, 215 F. Supp. 3d 859, 866 (C.D. Cal. 2016), quoting from *McDonald v. Antelope Valley Community College Dist.*, 45 Cal.4th 88, 100 (2008).

Here, Plaintiff strenuously attempted, over the course of three letters, to persuade Kerrie Webb to release the information he is seeking. (V.C. ¶¶ 16, 55-64; RFJN, Exhs. 18-25.) Webb replied to each of his letters, leaving the door open to future communications and possibilities regarding Plaintiff's requests for information. Everything in the record indicates an ongoing meeting and conferring between the two, up until Plaintiff's final letter to Webb on Feb. 9, 2018. (RFJN, Exh. 25.) Plaintiff reasonably pursued administrative remedies in order to resolve the matter out of court. Defendants' attempt to assign an early accrual date based on Webb's first reply letter defies equitable principles, and therefore should be rejected.

III. PLAINTIFF'S CLAIMS ARE NOT BARRED BY EITHER CLAIM OR ISSUE PRECLUSION, BECAUSE HIS PRIOR WRIT ACTION AGAINST THE MEDICAL BOARD WAS NOT DECIDED ON THE MERITS.

A. Plaintiff's petition for writ of mandate was denied on procedural grounds – mootness and failure to exhaust administrative remedies (ripeness) – and therefore no theory of res judicata applies.

"Claim and issue preclusion have different requirements and effects. Claim preclusion prevents relitigation of entire causes of action … Issue preclusion, by contrast, prevents relitigation of previously decided issues, rather than causes of action as a whole." *Samara v. Matar*, 5 Cal. 5th 322, 326–27 (2018). Claim and issue preclusion have three overlapping elements: They both require (1) a final judgment (2) on the merits (3) involving the same parties or privies in the prior case. *Id.*

Here, Plaintiff's petition for writ of mandate was denied entirely on procedural bases – mootness and failure to exhaust administrative remedies (ripeness). Therefore, the "on the merits" element fails on two counts. As Judge Mary H. Strobel analyzed in that case, "The pivotal question in determining if a case is moot is therefore whether the court can grant the plaintiff any effectual relief. [Citation] Here, the court cannot grant any effective relief with respect to the documents requested, as they do not exist. Neither party shows grounds for the court to exercise its discretion to decide a moot case." *Murray v. Medical Board of Calif. et al.,* No. BS158575, Los Angeles Super. Ct. (2017). (See Defs.' RFJN, Exh. 12 at 11-12.)

Judge Strobel further explained: "Both parties brief the court on their legal positions on whether the Outpatient Report of Death, if it existed, would be exempt from disclosure pursuant to the official information privilege under section 1040(b)(2). As stated, with respect to the Outpatient Report of Death, **there is no justiciable controversy** because the record does not exist with respect to Mrs. Murray. To the extent the parties make these arguments with respect to other information about Mrs. Murray within the Medical Board's files, Petitioner did not make a CPRA request for such information/records and has not exhausted his administrative remedies." *Id.* at 17. [Emphasis added.]

Further analysis of claim preclusion would indicate that Plaintiff's two actions do not rest on the same claim or involve the same primary rights, thus extinguishing another basis for claim preclusion. And additional analysis of issue preclusion would reveal non-identical issues, not actually litigated or necessary to the decision, thus eliminating three other bases for issue preclusion.

Most critically, the "on the merits" element is not satisfied, and can never be satisfied. It is an objective fact that Plaintiff's writ action ended on purely procedural grounds. This is not an arguable point. At this juncture, Defendants' res judicata argument crosses the line from meritless to frivolous.

IV. DEFENDANTS HAVE A PRESENT DUTY TO PROVIDE PLAINTIFF WITH ANY PERSONAL AND MEDICAL INFORMATION IN THEIR POSSESSION PERTAINING TO PLAINTIFF'S DECEASED MOTHER.

Defendants' justification for denying Plaintiff's request for information proceeds as follows: (1) First they deny Plaintiff's right, as an heir and beneficiary, to receive his deceased mother's personal information, despite overwhelming law to the contrary; (2) then they re-cast Plaintiff's request for personal information as a public records request; (3) they misconstrue a provision of CIPA that directs the release of public information "pursuant to the California Public Records Act" § 1798.24(g) – using this subsection as a "trap-door" from CIPA to CPRA; (4) then they erroneously claim a mandatory exemption under the permissive exemptions in Cal. Gov. Code § 6254; (5) they ignore the fact that CIPA expressly supersedes the CPRA exemptions (Cal. Civ. Code § 1798.70); and finally, (6) they use their false mandatory exemption under § 6254(f) as the basis for asserting an absolute privilege for themselves under Cal. Evid. Code § 1040.

Defendants' sprawling syllogism is invalid at every level:

1. As an heir of his deceased mother, Plaintiff entitled to receive her personal and medical information.

The Information Practices Act states: "An agency shall not disclose any personal information[3] in a manner that would link the information disclosed to the individual to whom it pertains **unless** the information is disclosed … (a) To the individual to whom the information pertains [or] … (c) To the duly appointed guardian or conservator of the individual or a **person representing the individual** if it can be proven with reasonable certainty through the possession of agency forms, documents or correspondence that this person is the authorized representative of the individual to whom the information pertains." Cal. Civ. Code § 1798.24. [Emphasis added.]

The statute does not discuss how to deal with the personal information of deceased persons. Nor does the statute make any distinctions between beneficiaries, trustees or executors for assigning the right of authorized representatives to receive the personal information of deceased parents. Nor does any case law interpreting this statute read such distinctions into the law.

[3] "The term 'personal information' means any information that is maintained by an agency that identifies or describes an individual, including, but not limited to … **medical** or employment history." Cal. Civ. Code § 1798.3(a). [Emphasis added.]

The standard for releasing the personal medical information of deceased persons is set out in the Confidentiality of Medical Information Act: "An authorization for the release of medical information by a provider of health care, health care service plan, pharmaceutical company, or contractor shall be valid if it … (c) is signed and dated by one of the following … (4) **The beneficiary or personal representative of a deceased patient**." Cal. Civ. Code § 56.11(c). [Emphasis added.] This standard is applied to the Information Practices Act: "The disclosure of medical information regarding a patient that is subject to Cal. Civ. Code § 1798.24(b) (disclosure with prior written consent of individual under Information Practices Act) requires an authorization that complies with the provisions of Cal. Civ. Code §§ 56–56.37." 37-429 California Forms of Pleading and Practice--Annotated § 429.203.

As Plaintiff pointed out in his Jan. 8, 2018 letter to Kerrie Webb (RFJN, Exh. 22), no law makes a distinction between beneficiaries, trustees and executors for the purpose of authorizing and receiving the personal information of deceased persons. (V.C. ¶¶ 62, 80.) For example, "Any patient representative shall be entitled to inspect patient records." Cal. Health & Saf. Code § 123110. "'Patient's representative'" or 'representative' means any of the following … (4) The **beneficiary** as defined in Section 24 of the Probate Code **or personal representative** as defined in Section 58 of the Probate Code, of a deceased patient." Cal. Health & Saf. Code § 123105(e). [Emphasis added.]

The Medical Board's own section of the Business & Professions Code places beneficiaries and personal representatives on equal footing: "[I]n any investigation that involves the death of a patient, the board may inspect and copy the medical records of the deceased patient without the **authorization of the beneficiary or personal representative** of the deceased patient … Nothing in this subdivision shall be construed to allow the board to inspect and copy the medical records of a deceased patient without a court order when the **beneficiary or personal representative** of the deceased patient has been located and contacted but has refused to consent." Cal. Bus. & Prof. Code § 2225(c)(1). [Emphasis added.] Thus, the code enables either a beneficiary or the personal representative to authorize or refuse the MBC's access to medical records of a deceased patient. The beneficiary and personal representative have the equal right of consent or refusal.

Even if the law did place trustees above beneficiaries in this context, the termination of trust equals them: "When the patient's estate has no interest in preserving confidentiality, or when the estate has been distributed and the representative discharged, the importance of providing complete

access to information relevant to a particular proceeding should prevail over whatever remaining interest the decedent may have had in secrecy." Cal. Evid. Code § 993, Law Revision Commission Comments (1965).[4]

It is noteworthy that throughout Bruce Murray's writ action against the Medical Board, at no point during the proceedings – from the demurrer to the trial – did the Medical Board ever challenge Petitioner's standing or his beneficial right to receive the information he was seeking. (V.C. at 15, ¶ 83; Defs.' RFJN, Exhs. 2-9.) But now, Defendants deny Plaintiff's rights as an heir, beneficiary and authorized representative to receive his mother's personal medical information. Defendants' position is arbitrary, capricious and entirely lacking any legal or factual support. Therefore Defendants' general demurrer on this basis should be overruled.

2. Plaintiff is entitled to receive his mother's personal and medical information under the California Information Practices Act, but Defendants erroneously deny him this information under the Public Records Act.

The California Information Practices Act (CIPA) states: "[E]ach agency shall permit any individual upon request and proper identification to inspect all the personal information in any record containing personal information." Cal. Civ. Code § 1798.34(a).

In his April 27, 2017 letter to Kerrie Webb, Plaintiff made a valid request under CIPA, asking that the Medical Board provide him "with all information in the Medical Board's possession regarding Audrey B. Murray's medical condition, treatment and the circumstances and cause(s) of her death." (V.C. at 11, ¶ 70; RFJN, Exh. 18.)

But instead of disclosing the requested information or providing a redacted version of the documents containing Audrey Murray's personal information, Webb responded to Plaintiff's CIPA request by switching to the Public Records Act and then claiming a blanket exemption under Cal. Gov. Code § 6254(f). (V.C. at 8, ¶ 55; RFJN, Exh. 19.) In their demurrer, Defendants' make the same switch, choosing their own preferred law, and superimposing it upon Plaintiff's lawsuit.

[4] On August 30, 2017, the Audrey B. Murray Trust account went down to zero – thus triggering the operation of Cal. Prob. Code § 15407 (Termination of trust; Trustee's powers on termination), i.e., "A trust terminates when … (2) the trust purpose is fulfilled." (V.C. at 9, ¶ 60; RFJN, Exh. 23.) On September 8, 2017, R. Thomas Peterson, attorney for the trustee of the Audrey B. Murray Trust, reported to the beneficiaries that "the trust has been dissolved" (but with the trust bank account remaining open in order to receive refunds from the IRS). (V.C. at 10, ¶ 61.)

3. CIPA contains no "trap door" provision from CIPA to CPRA.

CIPA contains a brief subsection that directs the release of **public information** "pursuant to the California Public Records Act." Cal. Civ. Code § 1798.24(g).

Defendants misconstrue this subsection as the basis for withholding **personal information** under the Public Records Act. This rationale is logically and legally invalid.

The California Supreme Court clarified that § 1798.24(g) refers only to **public information** releasable under CPRA, and CIPA applies only to personal information. *State Dep't of Pub. Health v. Superior Court,* 60 Cal. 4th 940 (2015). In that case, the Department of Public Health had similarly attempted to pick and choose among laws in order to withhold information they were obliged to disclose. DPH also attempted to use CIPA as the basis for withholding information that was releasable pursuant to another statute. But the Court drew the line between CIPA and CPRA: If a record is disclosable pursuant to the CPRA, then CIPA does not apply. *Id.* at 960. Otherwise stated, if CIPA applies, then the record is not disclosable to CPRA.

Here, CIPA is the basis of Plaintiff's primary causes of action. He seeks personal information that is disclosable pursuant to CIPA and not CPRA – and therefore Defendants' coveted CPRA exemptions do not apply. And like the Department of Public Health in the earlier case, the Medical Board cannot cherry-pick their preferred law and paste it into Plaintiff's lawsuit.

4. The CPRA exemptions are permissive not mandatory.

Although the CPRA exemptions do not apply to CIPA, it is noteworthy that the section of the Public Records Act that Defendants rely on for their exemption is permissive, not mandatory: "[T]his chapter **does not require the disclosure** of any of the following records … (f) Records of complaints to, or investigations conducted by, or … any investigatory or security files compiled by any other state or local agency for … licensing purposes." [Emphasis added.] Cal. Gov. Code § 6254. (Also see *Register Div. of Freedom Newspapers v. County of Orange*.)

5. CIPA supersedes the applicable provisions of CPRA, not the other way around.

Defendants' hopscotch from CIPA to the CPRA exemptions is invalid for an even stronger reason: It is expressly prohibited by statute. "This chapter **shall be construed to supersede** any other provision of state law, including Section 6253.5 of the Government Code, or **any exemption in Section 6254** or 6255 of the Government Code, which authorizes any agency to withhold from an individual any record containing personal information which is otherwise accessible under the

provisions of this chapter." Cal. Civ. Code § 1798.70. [Emphasis added.] The appellate court expressly affirmed this construction of the two laws in *Bates v. Franchise Tax Bd.*, 124 Cal. App. 4th 367, 376 (2004). "This interpretation is consistent with the express purpose of the IPA, to govern the collection, maintenance, and use of *personal* information." *Id.* at 377.

But Defendants attempt to construct the laws precisely the opposite: They make CPRA supersede CIPA, rather than the other way around. This construction has no grounding in law or logic. Defendants' Demurrer to Plaintiff's first and second causes of action should be overruled.

V. DEFENDANTS HAD A DUTY TO ASSIST PLAINTIFF IN THE IDENTIFICATION OF RECORDS; INSTEAD, THEY CARELESSLY DISREGARDED HIS REQUESTS AND THEN STONWALLED.

A. Defendants didn't even bother confirming the existence of the documents that Plaintiff initially requested before they denied his request for these documents; and Defendants continue this pattern of indifference, evasion and obfuscation.

The California Public Records Act (CPRA) states that a public agency "***shall*** … (1) Assist the member of the public to **identify records** and information that are responsive to the request or to the purpose of the request, if stated … [and] (3) Provide suggestions for overcoming any practical basis for denying access to the records or information sought." [Emphasis added.] Cal. Gov. Code § 6253.1.

The emphasis in this provision of the CPRA is not the disclosure of records, but simply the identification of records and assistance to the public. Here, the long arc of Plaintiff's interactions with the Medical Board – stretching all the way back to his initial requests for information[5] in late 2014 to his renewed requests in 2018 – display a troubling pattern ranging from indifference, negligence to stonewalling. The examples abound. (V.C. at 5-11, ¶¶ 31-64.) Most egregiously, when Defendant Webb denied Plaintiff's initial request for copies of any reports made by Dr. Matchison regarding the death of Plaintiff's mother, Webb didn't even bother looking into the existence of these documents before refusing their release to Plaintiff. (V.C. at 8, ¶ 52; Defs.' RFJN, Exh. 12 at

[5] Plaintiff had initially requested that the Medical Board provide him with documents filed pursuant to Cal. Bus. & Prof. Code § 2240 (Report for Death of Patient) and 16 C.C.R. § 1356.4 (Outpatient Surgery-Reporting of Death). Plaintiff believed that Dr. Matchison had filed such documents regarding Audrey Murray's death, and therefore Plaintiff requested these documents pursuant to the Public Records Act.

20.) As the court observed in Plaintiff's prior writ action, "Webb denied the CPRA request based on an exemption, as if the report existed. If the report did not exist, there was no reason for Webb to claim that the report was exempt. As stated by Petitioner, perhaps 'mistakes were made.'" (Defs.' RFJN, Exh. 12 at 11.)

Unfortunately, it took the entire process of pursuing a writ of mandate in order for Plaintiff to discover that the documents he requested did not exist. If Defendants had only taken the minimal effort to assist Plaintiff in the identification of records, he would have pursued another course – and certainly not one that led him down the wasteful path of a dead end writ. Since then, Defendants have only continued their pattern of failing to assist Plaintiff in the identification of documents. (V.C. at 8-11, ¶¶ 55-64; RFJN, Exhs. 19-25.) Plaintiff's third cause of action contains an unfortunate over-abundance of facts to support it, and therefore Defendants' demurrer should be overruled.

B. Neither the CIPA nor the CPRA provide absolute exemptions – all documents are redactable and subject to in camera inspection.

"In any suit brought under the provisions of subdivision (a) of Section 1798.45: (a) The court may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld as being exempt from the individual's right of access and the burden is on the agency to sustain its action." Cal. Civ. Code § 1798.46.

"Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law." Cal. Gov. Code § 6253. Furthermore, in cases under CPRA, the law empowers the court to "to decide the case after examining the record in camera." Cal. Gov. Code § 6259.[6]

It is plausible and quite probable that some of Audrey Murray's personal and medical information may be contained in MBC investigatory files that are otherwise subject to an exemption. But just as hearsay can be contained within hearsay – with exceptions at each level – one

[6] Defendants' own featured case demonstrates that the exemptions in § 6254 are not absolute. *Williams v. Superior Court*, 5 Cal. 4th 337 (1993). In that case, the San Bernardino County sheriff even went so far as to refuse to produce records for examination by the court, although he later abandoned this position. *Id.* at 353, 347. "Throughout this litigation the Sheriff has resisted public disclosure on the ground that the subdivision (f) exemption is 'absolute.' However, it is clear that the exemption is not literally 'absolute.' In the first place, subdivision (f), itself, requires the disclosure of certain specified information. In the second place, section 6259 expressly authorizes the superior court, upon a sufficient showing, to examine records in camera to determine whether they are being improperly withheld." *Id.* at 346.

person's exemption can contain someone else's privilege. Here, some of the MBC documents that might be subject to an exemption may also contain personal medical information that is privileged to Plaintiff – and thus segregable and releasable to Plaintiff. And just as a hearsay-within-hearsay problem requires a careful analysis at both levels, the documents Plaintiff seeks are subject to analysis in order to determine which information is exempt and which information is privileged to the Plaintiff, and thus releasable to the Plaintiff. But Defendants refuse to provide such an analysis. Instead, they stonewall Plaintiff; force Plaintiff to file a lawsuit in order to obtain the information he is lawfully entitled to; and in so doing they force the court to do the work that they should be doing as a matter of routine – responding to citizen requests for personal information, and properly segregating their exempt information from information that is privileged to the people requesting it.

Defendants' demurrer appears to be yet another attempt by Defendants to avoid their legal duties, and therefore it should be overruled.

VII. PLAINTIFF'S FOURTH CAUSE OF ACTION STATES A VALID, ALTERNATE CAUSE OF ACTION UNDER THE CPRA, ALLEGING THAT DEFENDANTS FAILED TO PROVIDE PUBLIC INFORMATION.

Plaintiff's Verified Complaint states, "If and to the extent that any of the information that Plaintiff seeks is public information, Plaintiff seeks injunctive relief under Cal. Gov. Code § 6258, compelling the release of the information Plaintiff seeks …" (V.C. ¶ 99.) Plaintiff properly pleads this cause of action as an alternate theory to his primary causes of action under CIPA. Defendants' general demurrer to Plaintiff's Fourth Cause of Action should therefore be overruled.

VIII. DEFENDANTS WRONGFULLY ASSERT AN ABSOLUTE PRIVILEGE FOR THEMSELVES AS A BASIS FOR DENYING PLAINTIFF'S REQUESTS FOR PERSONAL AND MEDICAL INFORMATION (FIFTH CAUSE OF ACTION).

A. Plaintiff seeks information that is privileged to him, not the Medical Board.

California Evidence Code section 1040 creates a two-tiered privilege regime for "official information … acquired in confidence by a public employee in the course of his or her duty": (1) an unqualified privilege, when "disclosure is forbidden by an act of the Congress of the United States or a statute of this state"; and (2) a qualified privilege for all other official information.

The qualified privilege in Cal. Evid. Code § 1040(b)(2) sets forth a balancing test for the withholding of official information "if … disclosure of the information is against **the public interest** because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." Moreover, "in determining whether disclosure of the information is against the public interest, **the interest of the public entity as a party in the outcome of the proceeding may not be considered**." *Id.* [Emphasis added.]

In her letters to Plaintiff, Defendant Webb invokes Cal. Evid. Code § 1040 to justify withholding Plaintiff's requests for information. (V.C. at 6-10, ¶¶ 39-63; RFJN, Exhs. 12, 19, 21, 24.) In a two-step process, first she wrongfully asserts a mandatory exemption under Cal. Gov. Code § 6254 (See section VII above); and then she invokes the absolute privilege of § 1040. Defendants' repeat this maneuver in their demurrer memorandum.

First of all, Plaintiff does not seek information that is statutorily exempt under § 6254. Rather, he seeks personal and medical information that is privileged to him as an heir of his mother, under Cal. Civ. Code §§ 1798.24-34. But Defendants attempt to illicitly convert Plaintiff's Information Practices Act request into a Public Records Act request, and then claim an absolute exemption and privilege for themselves. Defendants' legal fiction-making is arbitrary, capricious and entirely self-serving. Their demurrer should therefore be overruled.

B. Plaintiff properly requests injunctive relief against the Medical Board's managing agents, and he properly requests damages against the Medical Board as a state agency, pursuant to Cal. Civ. Code §§ 1798.45-46.

Section 1798.45 of the Information Practices Act states, "An individual may bring a civil action against an agency whenever such agency does any of the following: (a) Refuses to comply with an individual's lawful request to inspect pursuant to subdivision (a) of Section 1798.34." As remedies, the CIPA sets forth liability for actual damages and attorney's fees (Cal. Civ. Code § 1798.48), as well as injunctive relief (Cal. Civ. Code § 1798.46).

Defendants misconstrue Plaintiff's complaint as an action for damages against the Medical Board's agents. (Def.'s Mem. at 18:21-28.) However, nowhere in Plaintiff's complaint does he allege personal liability for damages against the two named agents of the Medical Board. Rather, he seeks to enjoin them. Defendants' objections to Plaintiff's fifth cause of action are misplaced and erroneous. Therefore, Defendants' demurrer to Plaintiff's fifth cause of action should be overruled.

IX. PLAINTIFF'S CLAIM UNDER THE CALIFORNIA CONSTITUTION IS APPROPRIATE IN THE CONTEXT OF DETERMINING THE PUBLIC (OR PRIVATE) INTEREST IN RELEASING THE INFORMATION PLAINTIFF SEEKS.

Article I, Section 3(b) of the California Constitution, provides that "the people have the **right of access** to information concerning the conduct of **the people's business**, and, therefore … the writings of public officials and agencies shall be open to public scrutiny." [Emphasis added.]

Defendants misconstrue Plaintiff's sixth cause of action as a constitutional tort, which it is not. Rather, Plaintiff seeks declaratory and injunctive relief with respect to his constitutional claim, as the Court has deemed appropriate: "As we observed more than a century ago, 'every constitutional provision is self-executing to this extent, that everything done in violation of it is void.' (*Oakland Paving Co. v. Hilton* (1886) 69 Cal. 479, 484 [11 P. 3].) … Furthermore, it also is clear that, like many other constitutional provisions, this section [article I, section 7] supports an action, brought by a private plaintiff against a proper defendant, for declaratory relief or for injunction." *Katzberg v. Regents of Univ. of California*, 29 Cal. 4th 300, 307 (2002). Similarly here, it is appropriate for Plaintiff to request equitable relief under Article I, Section 3.

Additionally, Plaintiff introduced his constitutional claim in order to guide his statutory causes of action; or, as the Court has termed it, when "statutory interpretation is augmented by a constitutional imperative." *City of San Jose v. Superior Court*, 2 Cal. 5th 608, 617 (2017). Here, in their denials of Plaintiff's requests for information, Defendants frequently invoke "the public interest" to justify their denials. (V.C. at 6-11, ¶¶ 39-63; RFJN, Exhs. 12, 19, 21, 24.) Not surprisingly, in Defendants' analysis, their version of the "public interest" always outweighs Plaintiff's interest in receiving the information that he seeks. For this reason, Plaintiff invokes this provision of the California Constitution that addresses "right of access" and "the people's business." If any balancing test is to be applied, the constitutional priority as to what constitutes the public interest should be given due consideration. Accordingly, Defendants' demurrer to Plaintiff's sixth cause of action should be overruled.

X. PUBLIC POLICY IS DIRECTLY AT ISSUE IN THIS CASE, AND PUBLIC POLICY FAVORS DISCLOSURE AND TRANSPARENCY.

The Information Practices Act begins by declaring public policy: "The Legislature declares that the right to privacy is a personal and **fundamental right** protected by Section 1 of Article I of

the Constitution of California and by the United States Constitution and that all individuals have a right of privacy in information pertaining to them." Cal. Civ. Code § 1798.1. [Emphasis added.] Thus, public policy is relevant to all of Plaintiff's claims under CIPA.

Plaintiff's complaint goes on to cite relevant public policy statements from the Business & Professions Code (Cal. Bus. & Prof. Code § 2001.1); the California Public Records Act (Cal. Gov. Code § 6250); and the California Constitution (Cal. Const., Art. I § 3(b)(2)). (V.C. ¶¶ 115-122.)

In her Aug. 4, 2017 letter to Plaintiff, Defendant Webb states, "The Board has evaluated your request to determine if public policy weighs in favor of releasing the documents." (V.C. ¶ 59; RFJN, Exh. 21). And in her May 26, 2017 letter to Plaintiff, Webb states, "The public interest in non-disclosure clearly outweighs the public interest in disclosure here." (V.C. ¶ 55; RFJN, Exh. 19).

Somehow, when the Defendants' discern public policy or the public interest, it is always revealed according to their own interests. It is for this reason that Plaintiff brings his case before this court for an impartial determination.

Public policy is directly at issue in this case, and Plaintiff properly pleads it. Therefore, Defendants' general demurrer to Plaintiff's seventh cause of action should be overruled.

CONCLUSION

Plaintiff has presented a timely and well-pleaded complaint to establish his prima facie case that the Medical Board of California and its agents wrongfully denied him access to his deceased mother's personal and medical information. Plaintiff has documented his case extensively, and he has pleaded substantial facts sufficient to sustain all seven causes of action contained in his complaint. Accordingly, Plaintiff respectfully asks that this Court to overrule Defendants' demurrer in its entirety.

Dated: February 11, 2019

By:

Bruce T. Murray,

Plaintiff *in propria persona*