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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 FOR THE COUNTY OF LOS ANGELES

9 **BRUCE THOMAS MURRAY,**
10 Plaintiff
11 v.
12 **MEDICAL BOARD OF CALIFORNIA;**
13 **KIMBERLY KIRCHMEYER,** in her
14 capacity as executive director, Medical Board
15 of California;
16 **KERRIE D. WEBB,** in her capacity as staff
17 counsel, Medical Board of California; and
18 DOES 1-11, inclusive,
19 Defendants

Case No. 18STCV03576

**PLAINTIFF BRUCE T. MURRAY'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
DEFENDANTS' SPECIAL MOTION TO
STRIKE UNDER CCP 425.16 (ANTI-
SLAPP)**

Hearing Date: March 11, 2019
Time: 8:30 a.m.
Judge: Hon. Malcolm Mackey
Dept.: 55
Action Filed: Nov. 2, 2018
Trial Date: Not set

Reservation # 022790534145

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1 **SUMMARY**

2
3 Plaintiff Bruce Thomas Murray brought his action against the Medical Board of California
4 and its agents because they wrongfully refused his requests to provide him with personal and
5 medical information regarding his deceased mother, Audrey Bevan Murray.

6 Plaintiff’s case is based primarily on the California Information Practices Act (CIPA), which
7 mandates that public agencies release the personal information that they collect, upon request, to the
8 individual to whom the information pertains, or his or her representative. Cal. Civ. Code §§
9 1798.24-34.

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

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

18 Based on Plaintiff’s assertion of his lawful right to receive personal information under CIPA,
19 the Defendants now claim that Plaintiff’s lawsuit attempts to infringe on their constitutional right to
20 free speech. On this theory, they have filed a special motion to strike under California’s anti-SLAPP
21 provision, Cal. Code Civ. Proc. § 425.16. At first glance, Defendants’ assertion is far-fetched. On
22 closer examination, their motion is indeed entirely meritless. This memorandum will explain exactly
23 why.

24 Briefly, California’s anti-SLAPP provision applies to any “cause of action against a person
25 [1] *arising from* [2] any act of that person [3] in furtherance of [4] the person’s right of petition or
26 [5] free speech ...” *Id.* [Emphasis added.] This memorandum will analyze each identified element
27 and sub-element of the statute.

28 As the analysis of the first element will show, Defendants’ anti-SLAPP motion fails at the
outset, because Plaintiff’s lawsuit arises not from protected speech, but from the Medical Board’s
refusal to provide him with the information to which he is lawfully entitled. Otherwise stated,

1 Plaintiff's lawsuit is based on the Medical Board's act of refusal, not the speech its agents used in
2 conveying that refusal. Thus, the very first element is not satisfied.

3 The Defendants' anti-SLAPP motion is problematic for another reason: The element of the
4 statute marked number '4' above designates a person's right of petition as protected activity under
5 the anti-SLAPP statute. Here, Plaintiff was aggrieved at the Medical Board's refusal to release to
6 him any information in their possession regarding his deceased mother. Accordingly, Plaintiff
7 sought redress for his grievances with the Superior Court. Defendants now seek to short-circuit
8 Plaintiff's right to petition with their anti-SLAPP motion. In so doing, Defendants would deny
9 Plaintiff his basic right to due process. So as it turns out, Defendants' anti-SLAPP motion is itself a
10 thinly disguised SLAPP action. Therefore, Plaintiff requests that the court not only deny
11 Defendants' anti-SLAPP motion, but also sanction them for their abuse of the process.

12 ARGUMENT

13 **I. THE DEFINITION OF 'SLAPP' SUITS, AND THE POLICY BEHIND** 14 **CALIFORNIA'S ANTI-SLAPP PROVISION**

15 **A. Plaintiff's case against the Medical Board is not a SLAPP suit, by any definition.**

16 "A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a
17 party's exercise of constitutional rights to free speech and to petition the government for redress of
18 grievances. The Legislature enacted section 425.16—known as the anti-SLAPP statute—to provide
19 a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of
20 constitutional rights." *Tamkin v. CBS Broad., Inc.*, 193 Cal. App. 4th 133, 142 (2011).¹

21 Plaintiff brought his suit against the Medical Board and its agents because they refused his
22 requests to provide him with personal and medical information² regarding his deceased mother,

23 ¹ In *Optional Capital v. Akin Gump*, the court provided another useful definition of SLAPP suits: "A
24 SLAPP is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing
25 those who have done so. While SLAPP suits masquerade as ordinary lawsuits such as defamation and
26 interference with prospective economic advantage, they are generally meritless suits brought primarily to
27 chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the
28 defendant, and not to vindicate a legally cognizable right." *Optional Capital, Inc. v. Akin Gump Strauss,*
Hauer & Feld LLP, 18 Cal. App. 5th 95, 109 (2017).

² "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.]

1 Audrey Murray. Plaintiff is entitled to this information under the California Information Practices
2 Act (Cal. Civ. Code § 1798 et seq.) Accordingly, CIPA is the primary legal basis of Plaintiff’s suit.

3 Plaintiff challenges the Defendants’ denials of his requests, not the Defendants’ expression
4 of those denials – or their right to make such expressions under the First Amendment to the United
5 States Constitution or Article 1, Section 2 of the California Constitution.³ Plaintiff does not seek to
6 chill Defendants’ speech; in fact, he wants more of their speech in the form of more information
7 regarding the cause and circumstances of his mother’s death. Furthermore, Plaintiff’s lawsuit does
8 not seek to infringe on the right of MBC agents to interact with other California citizens and
9 consumers who contact the board. In fact, Plaintiff hopes this lawsuit will cause the MBC to be
10 more communicative with consumers. In sum, more speech, not less. Thus, Plaintiff’s action against
11 the Medical Board is quite the opposite of a SLAPP suit.

12 The public policy behind California’s anti-SLAPP provision is built right into the statute and
13 placed immediately up front, in the first paragraph of the law: “The Legislature finds and declares
14 that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of
15 the constitutional rights of freedom of speech and petition for the redress of grievances. The
16 Legislature finds and declares that it is in the public interest to encourage continued participation in
17 matters of public significance, and that this participation should not be chilled through abuse of the
18 judicial process. To this end, this section shall be construed broadly.” CCP § 425.16(a).

19 A successful outcome of Plaintiff’s action against the Medical Board would have no
20 negative impact on the Defendants’ constitutional right to speech. If anything, a positive outcome
21 would expand Defendants’ ability to communicate with consumers. Plaintiff seeks to thaw the
22 Medical Board’s speech, not to chill it.

23 **II. A. PLAINTIFF’S CLAIMS DO NOT ‘ARISE FROM’ ANY CONSTITUTIONALLY PROTECTED ACTIVITY ON THE PART OF DEFENDANTS.**

24 **1. Plaintiff’s claims stem from the Defendants’ refusal to release information that
25 Plaintiff is entitled to receive, not the Defendants’ right to express their refusal.**

26 _____
27 ³ “Every person may freely speak, write and publish his or her sentiments on all subjects, being
28 responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.” Cal.
Const. Art. I, § 2.

1 “The statutory phrase ‘cause of action ... arising from’ means simply that the defendant’s act
2 underlying the plaintiff’s cause of action must itself have been an act *in furtherance of the right* of
3 petition or free speech. In the anti-SLAPP context, the critical point is whether the plaintiff’s cause
4 of action itself was based on an act in furtherance of the defendant’s right of petition or free speech.”
5 *Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP*, 18 Cal. App. 5th 95, 110 (2017).
6 [Emphasis added.]

7 In *Wilson v. Cable News Network*, the court provided further explanation of the “arising
8 from” element: “To determine whether a cause of action arises from protected activity ... the trial
9 court must distinguish between (1) speech or petitioning activity that is mere evidence related to
10 liability and (2) liability that is based on speech or petitioning activity. Prelitigation communications
11 ... may provide evidentiary support for the complaint without being a basis of liability. The mere
12 fact that an action was filed after protected activity took place does not mean the action arose from
13 that activity for the purposes of the anti-SLAPP statute. Moreover, that a cause of action arguably
14 may have been ‘triggered’ by protected activity does not entail that it is one arising from such. Thus,
15 the statute does not automatically apply simply because the complaint refers to some protected
16 speech activities.” *Wilson v. Cable News Network, Inc.*, 6 Cal. App. 5th 822, 831–32 (2016).
17 [Citations omitted.]

18 Here, Plaintiff’s case arises from the Defendants’ denials of his requests for personal
19 information regarding his deceased mother. These denials are contained within three letters written
20 by Kerrie Webb to Bruce Murray during the course of an extended “meeting and conferring”
21 between the two regarding Plaintiff’s requests. (See Decl. of Kerrie D. Webb in Supp. of Defs.’
22 Anti-SLAPP Mot. to Strike, Exhs. A-E.)

23 In the *Wilson* court’s terminology, these letters are evidence relevant to Plaintiff’s claims
24 under CIPA, but not evidence of liability for Webb’s speech itself. Plaintiff’s claims arise from
25 Webb’s acts of denial, not her act of writing the letters and expressing her legal opinion regarding
26 Plaintiff’s request. Plaintiff may disagree with Webb’s legal opinion, but his lawsuit does not seek
27 to punish her for expressing it. The fact that Webb used the written word to convey her denials does
28 not suddenly transform Plaintiff’s case into a free speech case – subject to an anti-SLAPP motion.
Indeed, there would be no other reasonable means for Webb to convey her denials other than by
using speech, except perhaps by totally ignoring Plaintiff’s requests. To eliminate speech from this

1 course of events is an absurd proposition. Thus, using the *Wilson* court’s logic, the use of speech
2 was *necessary* in this case, but the speech involved was not *sufficient* to trigger anti-SLAPP
3 protection.

4 Other courts describe the “arising under” element in terms of the “gravamen” of the
5 complaint: “In order for a complaint to be within the anti-SLAPP statute, the critical consideration
6 is whether the cause of action is based on the defendant’s protected free speech or petitioning
7 activity. To make that determination, we look to the principal thrust or gravamen of the plaintiff’s
8 cause of action.” *Yeager v. Holt*, 23 Cal. App. 5th 450, 456 (2018).

9 Here, the gravamen of Plaintiff’s complaint is the Medical Board’s decision to deny his
10 request for information, not the speech Defendants used to make this denial. Therefore, because
11 Plaintiff’s case does not arise from any act by Defendants in furtherance of their right of free speech,
12 Defendants’ anti-SLAPP motion should be denied.

13 **2. The ‘Act’ element: Defendants’ act of refusing to release personal information to
14 Plaintiff was not an act in furtherance of Defendants’ right of free speech.**

15 “Next, we determine whether defendants’ acts are in furtherance of their exercise of the right
16 of free speech. An act is in furtherance of the right of free speech if the act helps to advance that
17 right or assists in the exercise of that right.” *Tamkin*, 193 Cal. App. 4th at 143.

18 “Where a plaintiff’s claim is based upon ‘an action or decision’ of the defendant, it is not
19 enough that some protected activity by the defendant precedes that action or decision, that some
20 protected activity is the means of communicating that action or decision, or that some protected
21 activity constitutes evidence of that action or decision. To fall under the anti-SLAPP statute, the
22 challenged action or decision itself must be protected activity. Accordingly, where a plaintiff’s claim
23 attacks only the defendant’s decision to undertake a particular act, and if that decision is not itself
24 protected activity, that claim falls outside the ambit of the anti-SLAPP statute.” *Mission Beverage
25 Co. v. Pabst Brewing Co.*, 15 Cal. App. 5th 686, 700–01 (2017).

26 Here, the acts that Plaintiff complains of are the Defendants’ refusals to release his mother’s
27 personal and medical information to him, contrary to Cal. Civ. Code § 1798.34. Plaintiff challenges
28 Defendants’ decision, but not Defendants’ right to convey their decision via speech. Defendants’
written refusals do not trigger a metamorphosis of the Information Practices Act into the First
Amendment. Defendants’ acts of denying Plaintiff’s requests do not further their right to exercise

1 free speech, nor does Plaintiff's lawsuit abridge Defendants' freedom of speech. Thus, the "act"⁴
2 element of anti-SLAPP statute is not satisfied, and Defendants' motion should be denied.

3 **3. Plaintiff's lawsuit does not attack Defendants' constitutionally protected activity – or**
4 **the furtherance of it.**

5 Elements 3, 4, and 5 of the anti-SLAPP statute, as marked above, constitute the activity that
6 the statute aims to protect, i.e., the right of [5] free speech and the right of [4] petition – and the [3]
7 furtherance of these rights. The statute then specifies four categories of protected activity, as most
8 relevant here, "any written or oral statement or writing made in connection with an issue under
9 consideration or review by a legislative, executive, or judicial body, or any other official proceeding
authorized by law." Cal. Code Civ. Proc. § 425.16(e)(2).

10 The Medical Board's rejections of Plaintiff's requests for information are contained within
11 three letters from Kerrie Webb to Bruce Murray, as included in Exhibits B, C and F in the
12 Declaration of Kerrie D. Webb. Each rejection letter has a corresponding request letter from
13 Plaintiff, also included in Kerrie Webb's declaration. This dialogue is clearly protected speech, as
14 would be generally covered by § 425.16(b)(1). Plaintiff had the constitutional right to request the
15 information, and Webb had the same right (and duty) to respond. Indeed, Plaintiff is happy she
16 responded, rather than simply ignoring him. The fact that Plaintiff disagrees with Webb's viewpoint
17 is beside the point. Plaintiff's lawsuit does not attack her freedom to express this viewpoint. He
advocates this liberty, just as he guards his own right to express his viewpoint.

18 In their discussion of protected activity, Defendants attempt to completely recast Plaintiff's
19 case not as a request for personal information, but an attack on the Medical Board's investigation
20 into Dr. James C. Matchison. (See Defs.' Mem. at 15:26-28: "Plaintiff's causes of action arise from
21 Defendants' confidential investigation and the communications 'made in connection with ...any
22 other official proceeding authored by law.'") Defendants' argument completely misstates Plaintiff's

23
24 ⁴ In an evidentiary context, Defendants' acts of refusing Plaintiff's requests would be considered *verbal*
25 *acts* or *acts of independent legal significance*, such as "I accept your offer for a contract" or "I reject your
26 offer." David P. Leonard, RULES OF EVIDENCE AND SUBSTANTIVE POLICY, 25 Loy. L.A. L. Rev. 797, 804
27 (1992). Such verbal acts are not considered "assertions" or "statements," and therefore are not considered
28 hearsay. *Id.* Thus, Kerrie Webb's verbal act of denying Plaintiff's requests for information could be admitted
into evidence as non-hearsay. *A fortiori*, an act of independent legal significance does not necessarily receive
First Amendment protection, such as maliciously shouting "Fire!" in a crowded movie theater. (See the notes
of decisions to Cal. Evid. Code § 1241.)

1 case. Plaintiff does not challenge anything about the Medical Board's investigation, including its
2 confidentiality. Plaintiff fully expects any information unrelated to his request for his mother's
3 personal and medical information to be appropriately redacted, according to the procedures set out
4 in CIPA. Cal. Civ. Code § 1798.46. Defendants' attempt to recast Plaintiff's suit as an attack on the
5 MBC's investigation of Dr. Matchison is a straw man and a red herring.

6 **4. Defendants' own featured case illustrates why Plaintiff's case is not a SLAPP suit.**

7 In their discussion of protected activity, Defendants cite *Dwight R. v. Christy B.*, 212
8 Cal.App.4th 697 (2013) as their leading case. (Defs.' Mem. at 16:4.) In fact, *Dwight* provides a good
9 example of what is and what is not a SLAPP suit. In that case, the Plaintiff, the father of two young
10 girls, alleged that the Defendant, a therapist, conspired with the Plaintiff's former mother-in-law and
11 several social workers to falsely accuse him of sexually abusing his five-year-old daughter. *Id.* at
12 409. The therapist, a mandated reporter, filed a report detailing her suspicion that Dwight was
13 sexually abusing his daughter. *Id.* at 411. The father alleged that in making this report, the therapist
14 violated his and his daughters' civil rights under 42 U.S.C. § 1983. Thus, the father directly attacked
15 the therapist's mandated report. The court rightly determined that the Plaintiff sought to infringe on
16 protected activity, and the court appropriately granted Defendants' anti-SLAPP motion.⁵

17 By contrast here, Plaintiff never challenged the Medical Board's decision to initiate the
18 investigation into Dr. Matchison; he does not challenge the outcome; nor does he challenge anything
19 about the investigation itself. Defendants' case is inapposite. Plaintiff in no way attacks the MBC's
20 investigative process. Therefore Defendants' anti-SLAPP motion should be denied.

21 **5. Analogous cases show that Plaintiff's case is not a SLAPP suit.**

22 Defendants' anti-SLAPP memorandum cites many cases, but none of them analogous. An
23 examination of the leading cases clearly shows that Plaintiff's action is not a SLAPP suit.

24 ⁵ Another case cited by Defendants also illustrates why Plaintiff's case is not a SLAPP suit. *Santa*
25 *Barbara Cty. Coal. Against Auto. Subsidies v. Santa Barbara Cty. Assn. of Gover*, 167 Cal. App. 4th 1229
26 (2008). In that case, an opponent of county ballot measure brought action against the local transportation
27 authority (SBCAG), alleging that authority unlawfully advocated and spent public funds for passage of the
28 ballot measure. *Id.* at 1234. SBCAG did in fact spend funds to draft and prepare the measure for the ballot.
The court determined that SBCAG's activity was not prohibited electoral advocacy because SBCAG had the
statutory authority to draft the ballot measure, and its activity occurred before the measure was qualified for
placement on the ballot. *Id.* at 1239. The plaintiff's suit aimed directly at SBCAG's lawful activity in
preparing a ballot measure, and therefore his claims crossed the line into protected activity. *Id.*

1 In *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement*
2 *Association*, both the Superior Court and the Court of Appeal rejected the Defendants' anti-SLAPP
3 motion – which was premised on the Defendants' erroneous contention that their decision to
4 increase employee contributions to the Fire Protection District's retirement plan constituted
5 protected activity under CCP § 425.16. The Retirement Association had voted to increase the
6 employee contributions following a discussion at a public meeting. The firefighters challenged the
7 decision. The Defendants' argued that the suit attacked their constitutionally protected right to free
8 speech. Both the superior court and the appellate court disagreed.

9 “Even if the conduct of individual public officials in discussing and voting on a public
10 entity's action or decision could constitute an exercise of rights protected under the anti-SLAPP
11 statute—an issue we need not and do not reach—this does not mean that litigation challenging a
12 public entity's action or decision always arises from protected activity. In the present case, the
13 litigation does not arise from the speech or votes of public officials, but rather from an action taken
14 by the public entity administered by those officials.” *San Ramon Valley Fire Prot. Dist. v. Contra*
15 *Costa Cty. Employees' Ret. Assn.*, 125 Cal. App. 4th 343, 346–47 (2004).

16 Like the present case, that case turned on the “arising from” element of the California anti-
17 SLAPP statute. “As our Supreme Court has put it, ‘the mere fact an action was filed after protected
18 activity took place does not mean it arose from that activity.’ The anti-SLAPP statute cannot be read
19 to mean that ‘any claim asserted in an action which arguably was filed in retaliation for the exercise
20 of speech or petition rights falls under section 425.16, whether or not the claim is based on conduct
21 in exercise of those rights.’ California courts rightly have rejected the notion ‘that a lawsuit is
22 adequately shown to be one arising from an act in furtherance of the rights of petition or free speech
23 as long as suit was brought after the defendant engaged in such an act, whether or not the purported
24 basis for the suit is that act itself.’” *Id.* at 353–54, quoting from *City of Cotati v. Cashman* 29 Cal.4th
25 69, 76–77 (2002).

26 The fact scenario in *San Ramon* bears relevant similarities to this case. There, Defendants
27 made their decision to increase employee contributions following a discussion at a public meeting
28 and a vote. Here, the Medical Board made its decision to deny Plaintiff's requests for information
following an exchange of letters between Bruce Murray and Kerrie Webb. Plaintiff's case in no way
attacks the freedom of exchange between Murray and Webb, only the Medical Board's action and

1 decision to deny the release of information. Furthermore, unlike the *San Ramon* fact scenario, the
2 exchange between Murray and Webb did not take place in public, making this case the stronger
3 argument for no infringement of free speech.

4 The California Supreme Court recently endorsed *San Ramon* in a case involving a former
5 assistant professor who brought an action against California State University Los Angeles for
6 alleged racial discrimination in a tenure decision. *Park v. Bd. of Trustees of California State Univ.*, 2
7 Cal. 5th 1057 (2017). The assistant professor was denied tenure, and he brought an action under the
8 Fair Employment and Housing Act. *Id.* at 1061. The university brought an anti-SLAPP motion,
9 arguing that Plaintiff’s case was based on the numerous communications that led up to the tenure
10 decision, and thus these communications were protected activities under the anti-SLAPP statute. *Id.*
11 The trial court disagreed and denied the motion. A divided Court of Appeal reversed. The Supreme
12 Court reversed the judgment of the Court of Appeal. As in *San Ramon*, the Court determined that
13 the Plaintiff’s case did not “arise from” any protected activity on the part of the Defendants.

14 “A claim is not subject to a motion to strike simply because it contests an action or decision
15 that was arrived at following speech or petitioning activity, or that was thereafter communicated by
16 means of speech or petitioning activity. Rather, a claim may be struck only if the speech or
17 petitioning activity itself is the wrong complained of, and not just evidence of liability or a step
18 leading to some different act for which liability is asserted.” *Id.* at 1060.

19 The Court observed that the Plaintiff’s claim did not arise from statements made during the
20 Plaintiff’s grievance proceeding, or any specific evaluations of him in the tenure process, as the
21 Defendants had argued. *Id.* at 1068. Instead, the case was based on “the denial of tenure itself and
22 whether the motive for that action was impermissible. The tenure decision may have been
23 communicated orally or in writing, but that communication does not convert Park’s suit to one
24 arising from such speech. The dean’s alleged comments may supply evidence of animus, but that
25 does not convert the statements themselves into the basis for liability. As the trial court correctly
26 observed, Park’s complaint is ‘based on the act of denying plaintiff tenure based on national origin.
27 Plaintiff could have omitted allegations regarding communicative acts or filing a grievance and still
28 state the same claims.’” *Id.*

Following the ruling in *Park*, the Court of Appeal upheld a superior court’s ruling to deny
the County of San Bernardino’s anti-SLAPP motion against a former county social worker who had

1 brought whistleblower action against county. *Whitehall v. Cty. of San Bernardino*, 17 Cal. App. 5th
2 352 (2017). Prior to the lawsuit, the county placed the employee on administrative leave while it
3 investigated suspected job misconduct. The county fired her two months later. The employee filed a
4 complaint against the County based on whistleblower liability and retaliation. In its anti-SLAPP
5 motion, the county argued that the employee’s case “arose from” its protected activity of conducting
employee investigations. The court disagreed:

6 “[The] county’s act of placing social worker on leave did not arise from protected activity
7 under anti-SLAPP law,” the court held. *Id.* “The County’s conduct of an investigation into employee
8 wrongdoing, like the public hearings in *San Ramon Valley Fire Protection Dist.*, *supra*, may be a
9 proper exercise of its speech or petition rights. However, the act of placing plaintiff on
10 administrative leave, with the intention of firing her, did not arise from the County’s protected
11 activity. It was in retaliation for plaintiff’s act of revealing to the juvenile court the manipulation of
12 evidence in a dependency case. ... [T]he plaintiff challenged the retaliatory employment decision,
13 not the process that led up to that point. The County’s act of placing plaintiff on administrative
14 leave, with the intention of terminating her employment, was not an exercise of its petitioning or
free speech rights.” *Id.* at 362.

15 Similarly in this case, the Plaintiff challenges the Medical Board’s decision to deny him
16 personal information under Cal. Civ. Code § 1798.34, not the process that led up to that point or the
17 Defendants’ communication of that denial. Thus, the Medical Board’s act of denying Plaintiff’s
18 request for information is not constitutionally protected activity subject to the anti-SLAPP statute.

19 **6. Defendants’ mini trial-by-affidavit does not defeat Plaintiff’s case on the merits.**

20 In considering anti-SLAPP motions, the court “does not weigh the moving party’s evidence
21 against the opposing party’s evidence, but addresses the factual and legal issues ...” *Slaney v.*
22 *Ranger Ins. Co.*, 115 Cal. App. 4th 306, 318 (2004). Otherwise stated, “We do not resolve the merits
23 of the overall dispute, but rather identify whether its pleaded facts fall within the statutory purpose,
24 to prevent and deter lawsuits brought primarily to chill the valid exercise of the constitutional rights
of freedom of speech and petition for the redress of grievances.” *Wilson*, 6 Cal. App. 5th at 831.

25 Here, in their discussion of the “protected activities” element, Defendants launch into an
26 extended discussion of their rationale for denying Plaintiff’s requests for information. (Defs.’ Mem.
27 at 16:17-28; 17:1-21.) Defendants’ justification for denying Plaintiff’s request for information
28

1 proceeds as follows: (1) First they deny Plaintiff’s right, as an heir and beneficiary, to receive his
2 deceased mother’s personal information, despite overwhelming law to the contrary; (2) then they re-
3 cast Plaintiff’s request for personal information as a public records request; (3) they misconstrue a
4 provision of CIPA that directs the release of public information “pursuant to the California Public
5 Records Act” § 1798.24(g) – using this subsection as a “trap-door” from CIPA to CPRA; (4) then
6 they erroneously claim a mandatory exemption under the permissive exemptions in Cal. Gov. Code
7 § 6254; (5) they ignore the fact that CIPA expressly supersedes the CPRA exemptions (Cal. Civ.
8 Code § 1798.70); and finally, (6) they use their false mandatory exemption under § 6254(f) as the
9 basis for asserting an absolute privilege for themselves under Cal. Evid. Code § 1040.

10 Defendants’ sprawling syllogism is invalid at every level:

11 **(1) Plaintiff’s beneficial right to the information he is seeking:** CIPA directs public
12 agencies to release personal information to “a person representing the individual” (§ 1798.24), but
13 the statute does not discuss how to deal with the personal information of deceased persons. The
14 standard for releasing the personal medical information of deceased persons is set out in the
15 Confidentiality of Medical Information Act: “An authorization for the release of medical
16 information by a provider of health care, health care service plan, pharmaceutical company, or
17 contractor shall be valid if it ... (c) is signed and dated by one of the following ... (4) The
18 **beneficiary or personal representative** of a deceased patient.” Cal. Civ. Code § 56.11(c).
19 [Emphasis added.] This standard is applied to the Information Practices Act: “The disclosure of
20 medical information regarding a patient that is subject to Cal. Civ. Code § 1798.24(b) requires an
21 authorization that complies with the provisions of Cal. Civ. Code §§ 56–56.37.” 37-429 California
22 Forms of Pleading and Practice--Annotated § 429.203. Plaintiff’s beneficial right to receive the
23 information he is seeking is thoroughly supported in numerous other laws. (See Pl.’s Mem. of P. &
24 A. Opp’n. to Defs.’ Dem. 12-13.)

25 **(2-4) Defendants’ “trap-door” treatment of the Information Practices Act.** CIPA
26 contains a provision that directs the release of **public information** “pursuant to the California Public
27 Records Act” § 1798.24(g), but Defendants contort this provision to mean, *an agency shall*
28 *withhold personal information pursuant to the Public Records Act*; then they jump to the
exemptions listed in the CPRA (Cal. Gov. Code § 6254); and presto, CIPA disappears, and all of

1 Audrey Murray’s personal and medical information is magically exempt, and accessible only to the
2 Medical Board and its agents.⁶ This construction of the laws is wrong for the following reason:

3 **(5) CIPA supersedes the applicable provisions of CPRA, not the other way around.**

4 Defendants’ hopscotch from CIPA to the CPRA exemptions is expressly prohibited by statute: “This
5 chapter **shall be construed to supersede** any other provision of state law, including Section 6253.5
6 of the Government Code, or **any exemption in Section 6254** or 6255 of the Government Code,
7 which authorizes any agency to withhold from an individual any record containing personal
8 information which is otherwise accessible under the provisions of this chapter.” Cal. Civ. Code §
1798.70. [Emphasis added.] Defendants want to have it exactly in reverse.

9 **(6) The qualified privilege of Cal. Evid. Code § 1040:** The Evidence Code sets forth a two-
10 tiered privilege regime for “official information ... acquired in confidence by a public employee in
11 the course of his or her duty”: (1) an unqualified privilege, when “disclosure is forbidden by an act
12 of the Congress of the United States or a statute of this state”; and (2) a qualified privilege for all
13 other official information. Here, Defendants use their erroneous absolute exemption of § 6254 to
14 claim an absolute privilege for themselves under the Evidence Code. In this way, the Defendants
15 weave a Gordian knot of absolute privilege and total exemption. In reality, Defendants have no
16 exemption as a basis for withholding the personal information Plaintiff requests; and the privilege
17 belongs to the Plaintiff, not the Defendants.

18 **[7] The missing step:** Finally and perhaps even more importantly, Defendants’ totally ignore
19 the fact that both the CIPA and CPRA contain provisions for in camera inspection and the redacting
20 of information that is exempt or privileged to someone else:

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

25 ⁶ Furthermore, the exemptions listed in Cal. Gov. Code § 6254 are permissive, not mandatory, i.e., “this
26 chapter does not require the disclosure of any of the following records ... (f) Records of complaints to, or
27 investigations conducted by, or ... any investigatory or security files compiled by any other state or local
28 agency for ... licensing purposes.” § 6254(f). Also see *Williams v. Superior Court*, 5 Cal. 4th 337 (1993); and
Register Div. of Freedom Newspapers v. County of Orange, 158 Cal. App. 3d 893, 901 (1984).

- “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.

Here, 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.⁷ But the law provides a clear process for dealing with this problem through inspection and redaction. Similarly, the MBC’s files may contain information that is privileged to someone else, such as the identity of the MBC’s consulting experts. Again, the law provides the process for sorting out and redacting this information. But the Defendants want to completely evade this process. They refuse to prepare Audrey Murray’s files for release to Plaintiff, thus forcing the Plaintiff to file a lawsuit, and forcing the court to do the document preparation that the Medical Board should be doing as a matter of routine. Defendants’ behavior is unreasonable and wasteful.

7. Controlling cases support Plaintiff’s right to receive his deceased mother’s personal information under CIPA.

As in their procedural discussion of the anti-SLAPP provision, Defendants fail to provide any analogous or controlling cases to support their version of law and facts on the merits. Unlike the heavily litigated anti-SLAPP statute, the case law on CIPA is relatively limited. Not surprisingly, the cases on point contradict Defendants’ view.

In a leading case, a group of taxpayers brought suit against the Franchise Tax Board, the Board of Equalization, former State Controller Kathleen Connell, and 12 other state employees. The Plaintiffs alleged, among many other things, that the Defendants failed to provide access to personal information, as required by CIPA. *Bates v. Franchise Tax Bd.*, 124 Cal. App. 4th 367, 376 (2004). The court expressly affirmed the provisions of Cal. Civ. Code § 1798.70, which supersede the exemptions of Cal. Gov. Code § 6254. “This interpretation is consistent with the express purpose of the IPA, to govern the collection, maintenance, and use of *personal* information.” *Id.* at 377.

⁷ Plaintiff’s written discovery is aimed at identifying what documents exist, or do not exist, and what categories of information – privileged, exempt or otherwise – are contained within them. (See Defs.’ Exhs. in Supp. of Demurrer, Exh. 3. Also see Pl.’s Exhs. in Supp. of Mot. for Sanctions Pursuant to CCP §§ 128.5 and 425.16(c)(1).

1 Here, Plaintiff seeks his mother’s personal and medical information pursuant to Cal. Civ.
2 Code §§ 1798.24-34, and Defendants can’t lawfully deny this information by invoking a blanket
3 exemption under § 6254 or asserting an absolute privilege for themselves under Cal. Evid. Code §
4 1040. The privilege belongs to Plaintiff.

5 In the context of this opposition to Defendants’ anti-SLAPP motion, Plaintiff is not required
6 to establish “that there is a probability that the plaintiff will prevail on the claim” because his case
7 does not arise from any protected activity on the part of Defendants. CCP § 425.16(b)(1). However,
8 as shown in the analysis above, and Defendants’ skewed version of the law and facts just doesn’t
9 fly.

10 **B. Defendants’ refusal to provide Plaintiff personal information under the**
11 **Information Practices Act constitutes an act that affects both the private and public**
12 **interest.**

13 Plaintiff’s action against the Medical Board has two primary aspects: One, the purely private
14 interest of Plaintiff to obtain information regarding his mother’s final days; and two, the broader
15 public interest relating to the Medical Board’s responsiveness – or lack thereof – to the general
16 public. Accordingly, Plaintiff’s seventh cause of action alleges violations of public policy, as set out
17 in the Information Practices Act, the Business & Professions Code, the California Constitution, and
18 the California Public Records Act.

19 Defendants have asserted a general demurrer to Plaintiff’s seventh cause of action (Defs.’
20 Mem. in Supp. of Dem. at 20:11-28); and in their concurrent motion to strike, Defendants call
21 Plaintiff’s seventh cause of action “irrelevant and improper.” (Defs.’ Mem. in Supp. of Mot. to
22 Strike at 10:1.) But in their anti-SLAPP motion, Defendants’ suddenly discover the public policy
23 aspect of Plaintiff’s action: “This is an issue of public concern as the Board is mandated to protect
24 the public by investigating the conduct of its licensees to determine if there were any departures
25 from the standard of care.” (Defs.’ Mem. at 18:15-16.) “Any complaint about a physician (i.e., a
26 licensee of the board), is an issue of public interest.” *Id.* at 4-5.

27 Plaintiff is pleased at the Defendants’ serendipity in discovering public policy and its
28 relevance to Plaintiff’s case. Plaintiff takes this as a ringing endorsement of his seventh cause of
action, and *a fortiori*, all six preceding causes of action.

1 Because Plaintiff's case does not arise from any protected activity on the part of Defendants,
2 the connection of his case with a public issue has no bearing on Defendants' anti-SLAPP motion.
3 But Defendants' advocacy of the public policy relevance of Plaintiff's claims only serves to support
4 Plaintiff's case in chief.

5 **III. DEFENDANTS' AFFIRMATIVE DEFENSES FAIL IN BOTH THEIR**
6 **DEMURRER AND THEIR ANTI-SLAPP MOTION.**

7 Defendants' anti-SLAPP memorandum, like their demurrer, presents two affirmative
8 defenses: res judicata and timeliness. Briefly, Defendants' res judicata defense fails because
9 Plaintiff's prior writ action was not decided on the merits. *Murray v. Medical Board of Calif. et al.*,
10 No. BS158575, Los Angeles Super. Ct. (2017). (See Defs.' RFJN, Exh. 12 at 11-12.) Defendants'
11 timeliness defense fails for a number of reasons, primarily because none of Kerrie Webb's letters to
12 Plaintiff were final for the purpose of accrual, and the parties continued to meet and confer up until
13 Webb's final letter to Plaintiff, on January 29, 2018. (See Decl. of Kerrie Webb, Exh. F.) Thus,
14 Plaintiff timely presented his claims to the Department of General Services on May 30, 2018. (V.C.
15 at 3, ¶ 14; RFJN, Exhs. 24-25.)

16 The remainder of Defendants' points regarding "step 2" of the anti-SLAPP statute
17 ("probability that the plaintiff will prevail on the claim") are addressed in part II(A)(6)-(7) above.

18 **CONCLUSION**

19 Plaintiff's claims against the Medical Board of California and its agents do not arise from
20 any act relating to the furtherance of Defendants' constitutional right to free speech. However,
21 Defendants' anti-SLAPP motion aims squarely at Plaintiff's right to seek redress for his grievances.
22 Thus, Defendants' anti-SLAPP motion is itself a SLAPP motion. Therefore, Defendants motion and
23 their tactics should be rejected in the strongest terms.

Dated: February 11, 2019

24 By: 

26 Bruce T. Murray,

27 Plaintiff *in propria persona*
28