

1 XAVIER BECERRA
Attorney General of California
2 ROBERT MCKIM BELL
Supervising Deputy Attorney General
3 COLLEEN M. MCGURRIN
Deputy Attorney General
4 State Bar Number 147250
California Department of Justice
5 300 South Spring Street, Suite 1702
Los Angeles, California 90013
6 Telephone: (213) 269-6546
Fascimile: (213) 897-9395
7 E-mail: Colleen.McGurrin@doj.ca.gov
Attorneys for Defendants
8 *Medical Board of California, Kimberly Kirchmeyer,*
and Kerrie D. Webb

Attorney General is exempt from
filing fees per Gov. Code, § 6103.5

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF LOS ANGELES
12 CIVIL DIVISION

14 BRUCE THOMAS MURRAY,
15
16 Plaintiff,
17 v.
18 MEDICAL BOARD OF CALIFORNIA, et al.
19 Defendants.
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Case No. 18STCV03576
**NOTICE OF DEMURRER AND
DEMURRER TO VERIFIED COMPLAINT
FOR DAMAGES, INJUNCTIVE RELIEF
AND DECLARATORY RELIEF;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRER; DECLARATION OF
COLLEEN M. MCGURRIN; [PROPOSED]
ORDER**

[Concurrently Filed Herewith: Request for
Judicial Notice & Motion to Strike Plaintiff's
Complaint]

Reservation ID: 954591626596

Date: March 12, 2019
Time: 8:30 a.m.
Dept: 55

Judge: Hon. Malcolm Mackey

Trial Date: None set
Action Filed: November 6, 2018

1 TO PLAINTIFF IN PRO PER, BRUCE THOMAS MURRAY:

2 PLEASE TAKE NOTICE that on March 12, 2019, at 8:30 a.m., or as soon thereafter as the
3 matter may be heard, in Department 55 of the Los Angeles County Superior Court, Central
4 District, located at 111 North Hill Street, Los Angeles, California 90012, Defendants Medical
5 Board of California (Board), Kimberly Kirchmeyer (Kirchmeyer), Executive Director of the
6 Medical Board of California, and Kerrie D. Webb (Webb), Staff Counsel of the Medical Board of
7 California (Defendants), will demur to the Verified Complaint for Damages, Injunctive Relief and
8 Declaratory Relief pursuant to Code of Civil Procedure § 430.10 on the grounds the Plaintiff is
9 requesting disclosure of information which is statutorily exempt and privileged and on other
10 grounds as stated below:

11 1. Plaintiff failed to timely present a government claim within six months of the date the
12 damages allegedly accrued, pursuant to Government Code § 911.2. (See Request for Judicial
13 Notice ["RFJN"], Exhibit 13, concurrently filed herewith.)

14 2. The Complaint is barred by the doctrine of Res Judicata and/or Collateral Estoppel to
15 the extent that Plaintiff previously litigated essentially the same causes for action and judgment
16 and an adverse decision was issued in this Court against Plaintiff on February 17, 2017. (See
17 RFJN, Exhibits 1-12.)

18 3. Plaintiff has failed to state a cause of action upon which relief can be granted in that
19 the documents he seeks pursuant to the California Public Records Act are statutorily exempt from
20 disclosure under Government Code § 6254 and Evidence Code § 1040, and are privileged.

21 4. Plaintiff has failed to state a cause of action upon which relief can be granted in that
22 the documents he seeks pursuant to the Information Practices Act are statutorily exempt from
23 disclosure under Evidence Code § 1040 and Government Code § 6254, and are privileged.

24 5. Plaintiff has failed to state a cause of action upon which relief can be granted in that
25 there is no obligation for Defendants to assist him in the identifying records and information
26 when the public agency has determined that the request should be denied based upon an
27 exemption listed in Government Code § 6254.

28 6. Plaintiff has failed to state a cause of action upon which relief can be granted in that

1 Defendants are granted immunity for any injury resulting from an investigation by a public entity
2 and its employees under Government Code § 821.6.

3 7. Plaintiff has failed to state a cause of action upon which relief can be granted in that
4 the complaint fails to cite any statute which authorizes him to file suit against a government entity
5 and its employees. (Government Code § 815, subd. (a).)

6 8. Plaintiff has failed to state a cause of action upon which relief can be granted in that
7 no damages are available under the California Constitution under the circumstances of this action.

8 9. Defendants properly interpreted and applied Evidence Code § 1040 and Government
9 Code § 6255 in their response to Plaintiff's earlier records requests.

10 10. Contrary to Plaintiff's allegations, it is not Defendants' legal obligation or
11 requirement to provide Plaintiff with an explanation of or the cause of his mother's death.¹
12 Defendant are obligated to investigate complaints of violations of the Medical Practice Act by its
13 licensees and to take disciplinary action, if warranted. They did that. (See Business and
14 Professions Code § 2004² and 2220.5³)

15 ¹ Plaintiff has failed to establish that he is unable to obtain complete copies of his
16 mother's medical records directly from the hospital or medical provider, and thereafter submit
17 them to an expert physician who can provide him with an explanation about the reasons for and
18 cause of his mother's death. Thus, some of the information Plaintiff requests is equally available
to him upon the presentation of a valid authorization for release of his mother's medical records
to her medical providers and medical facilities.

19 ² Business and Professions Code § 2004 provides that the "board shall have the
responsibility for the following: (a) The enforcement of the disciplinary and criminal provisions
20 of the Medical Practice Act; (b) The administration and hearing of disciplinary actions; (c)
Carrying out disciplinary actions appropriate to findings made by a panel or an administrative law
21 judge; (d) Suspending, revoking, or otherwise limiting certificates after the conclusion of
disciplinary actions; (e) Reviewing the quality of medical practice carried out by physician and
22 surgeon certificate holders under the jurisdiction of the board; (f) Approving undergraduate and
graduate medical education programs; (g) Approving clinical clerkship and special programs and
23 hospitals for the programs in subdivision (f); (h) Issuing licenses and certificates under the
board's jurisdiction; and (i) Administering the board's continuing medical education program."

24 ³ Business and Professions Code § 2220.5, provides: "(a) The Medical Board of
25 California is the only licensing board that is authorized to investigate or commence disciplinary
actions relating to physicians and surgeons who have been issued a certificate pursuant to Section
26 2050. (b) For purposes of this section, 'investigate or commence disciplinary actions' shall mean
written, oral, or telephonic communication with a physician or surgeon concerning his or her
27 violation of the Medical Practice Act or any other provision of this division. (c) Written
complaints that are subject to Section 43.96 of the Civil Code, relating to the professional conduct
28 or professional competence of physicians and surgeons, shall be processed in accordance with
that section."

1 Pursuant to Code of Civil Procedure section 430.41, the parties have met and conferred
2 regarding this demurrer. (See Declaration of Colleen M. McGurrin attached hereto as Exhibit
3 "1.") This Demurrer will be based upon this Notice of Demurrer, the Demurrer, the Memorandum
4 of Points and Authorities filed and served herewith, the Declaration of Colleen M. McGurrin, the
5 Request for Judicial Notice concurrently filed herewith, the Motion to Strike Plaintiff's
6 Complaint concurrently filed herewith, the files and records of this Court and upon such and
7 further evidence as may be properly presented to the Court.

8
9 Dated: December 17, 2018.

Respectfully Submitted,

10 XAVIER BECERRA
11 Attorney General of California
12 ROBERT MCKIM BELL
13 Supervising Deputy Attorney General



14 COLLEEN M. MCGURRIN
15 Deputy Attorney General
16 *Attorneys for Defendants*
17 *Medical Board of California, Kimberly*
Kirchmeyer, and Kerrie D. Webb

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1 **DEMURRER**

2 Defendants demur to the Verified Complaint for Damages, Injunctive and Declaratory
3 Relief on the grounds that his Complaint on the following grounds:

4 **Demurrer to the Entire Complaint**

5 1. Plaintiff's Complaint is barred in that he failed to file a government claim timely
6 pursuant to Government Code § 911.2.

7 2. Plaintiff's Complaint is barred under the doctrine of Res Judicata and/or Collateral
8 Estoppel to the extent that it litigates issues that were, or could have been, raised in Los Angeles
9 Superior Court Case number BS158575, decided on February 17, 2017.

10 **Demurrer to the First Cause of Action Entitled "Failure to Provide Personal**
11 **Information."**

12 1. The First Cause of Action fails to state a cause of action upon which relief can be
13 granted in that the information Plaintiff seeks, pursuant to the Information Practices Act, is
14 statutorily exempted from disclosure under Government Code § 6254 and Evidence Code § 1040,
15 and are privileged. (Code Civ. Proc., § 430.10, subd. (e).)

16 2. The First Cause of Action fails to state a cause of action upon which relief can be
17 granted in that the information Plaintiff seeks shall not be disclosed by Defendants pursuant to
18 Civil Code §§ 1798.24 and 1798.42. (Code Civ. Proc., § 430.10, subd. (e).)

19 **Demurrer to the Second Cause of Action Entitled "Denial of Personal Information."**

20 1. The Second Cause of Action fails to state a cause of action upon which relief can be
21 granted in that the information Plaintiff seeks, pursuant to the California Public Records Act, are
22 statutorily exempt from disclosure under Government Code § 6254 and Evidence Code § 1040
23 and are privileged. (Code Civ. Proc., § 430.10, subd. (e).)

24 2. The Second Cause of Action fails to state a cause of action upon which relief can be
25 granted in that the information Plaintiff seeks shall not be disclosed by Defendants pursuant to
26 Civil Code §§ 1798.24 and 1798.42. (Code Civ. Proc., § 430.10, subd. (e).)

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1 **Demurrer to the Third Cause of Action Entitled “Failure to Assist in the Identification**
2 **of Records.”**

3 1. The Third Cause of Action fails to state a cause of action upon which relief can be
4 granted in that there is no obligation for Defendants to assist Plaintiff in identifying records and
5 information when the public agency has determined that the request should be denied based upon
6 an exemption listed in Government Code § 6254. (Code Civ. Proc., § 430.10, subd. (e).)

7 **Demurrer to the Fourth Cause of Action Entitled “Failure to Provide Public**
8 **Information.”**

9 1. The Fourth Cause of Action fails to state a cause of action upon which relief can be
10 granted in that the information Plaintiff seeks, pursuant to the California Public Records Act, is
11 statutorily exempt from disclosure under Government Code § 6254 and Evidence Code § 1040.
12 (Code Civ. Proc., § 430.10, subd. (e).)

13 **Demurrer to the Fifth Cause of Action Entitled “Erroneous Interpretation and**
14 **Application.”**

15 1. The Fifth Cause of Action fails to state a cause of action upon which relief can be
16 granted in that the information Plaintiff seeks, pursuant to the California Public Records Act and
17 the Information Practices Act, is exempt from disclosure under Government Code § 6254 and
18 Evidence Code § 1040, and is privileged. (Code Civ. Proc., § 430.10, subd. (e).)

19 2. The Fifth Cause of Action fails to state sufficient facts to constitute a cause of action
20 against Defendants because Plaintiff cannot overcome the applicable statutory immunity under
21 Government Code section 821.6. (Code Civ. Proc., § 430.10, subd. (e).)

22 **Demurrer to the Sixth Cause of Action Entitled “Failure to Provide Access to the**
23 **People’s Business.”**

24 1. The Sixth Cause of Action fails to state a cause of action upon which relief can be
25 granted in that the information Plaintiff seeks, pursuant to the California Public Records Act, is
26 exempt from disclosure under Government Code § 6254 and Evidence Code § 1040, and is
27 privileged. (Code Civ. Proc., § 430.10, subd. (e).)

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1 **Demurrer to the Seventh Cause of Action Entitled "Violation of Public Policy."**

2 1. The Seventh Cause of Action fails to state a cause for action upon which relief can be
3 granted in that Plaintiff fails to state the statutory basis upon which he can sue Defendants, a
4 public entity and public employees. (Code Civ. Proc., § 430.10, subd. (e).)

5 2. The Seventh Cause of Action fails because it is uncertain and repeats the other causes
6 of action. (Code Civ. Proc., § 430.10, subd. (f).)

7
8 Dated: December 17, 2018.

Respectfully Submitted,

9 XAVIER BECERRA
10 Attorney General of California
11 ROBERT MCKIM BELL
12 Supervising Deputy Attorney General



13 COLLEEN M. MCGURRIN
14 Deputy Attorney General
15 Attorneys for Defendants
16 Medical Board of California, Kimberly
17 Kirchmeyer, and Kerrie D. Webb

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 In his Verified Complaint (V.C.) for Damages, Injunctive Relief and Declaratory Relief,
4 Bruce Thomas Murray (Plaintiff or Petitioner) seeks issuance of an injunction
5 commanding the Medical Board of California (Board), Kimberly Kirchmeyer, Executive Director
6 of the Board and Kerrie D. Webb (Webb), Staff Counsel of the Board (Defendants) to release all
7 information contained in the Board's possession regarding his mother's medical condition,
8 treatment and death pursuant to the Information Practice Act (IPA), Civil Code § 1798.46, and
9 the Public Records Act (PRA), Government Code § 6250, et eq. Plaintiff further contends that
10 California Constitution, Article I, section 3, and Government Code §§ 6253.1 and 6258 require
11 release of that information.

12 Defendants demur to the entirety of the Complaint because Plaintiff's claims are barred by
13 the doctrine of Res Judicata (see RFJN), his claim for damages was filed untimely, pursuant to
14 Government Code § 911.2, and because the information Plaintiff requests is privileged and
15 exempt from disclosure pursuant to Government Code § 6254, Civil Code §§ 1798.24, 1798.42,
16 and Evidence Code 1040. Thus, the claims contained in the Complaint state no cause of action
17 under any legal cognizable theory pursuant to Code of Civil Procedure § 430.10, subdivision (e).

18 **STATEMENT OF FACTS**

19 According to the Verified Complaint, Plaintiff lodged a complaint with the Board relating
20 to the care and treatment of his mother who died on June 5, 2013, at Torrance Memorial Medical
21 Center. (V.C. at 4, ¶¶ 17-23.) The Complaint alleges that prior to her death, Plaintiff's mother
22 had undergone a cardiac catheterization procedure. (V.C. at 4, ¶¶ 1-23.) On May 15, 2014,
23 Plaintiff filed a complaint with the Board. (V.C. at 4, ¶ 25.) Plaintiff's brother, Peter Murray
24 (Peter M.), was listed as the informant on his mother's death certificate and was the successor
25 trustee of his mother's estate. (V.C. at 4, ¶ 28.) Thereafter, on September 9, 2014, Peter M. sent
26 the Board an authorization to obtain his mother's medical records. (V.C. at 5, ¶ 30.) Thereafter,
27 the Board acknowledged receipt of all records and documentation required for a review of
28 Plaintiff's complaint. (V.C. at 5, ¶ 36.) On February 10, 2015, Plaintiff requested that the Board,

1 pursuant to Government Code § 6253.1, provide him with copies of the “Report for Death of a
2 Patient,” under Business and Professions Code § 2240, and the “Outpatient Surgery-Reporting of
3 Death,” under California Code of Regulations title 16, section 1356.4.” (V.C. at 6, ¶ 38.) On
4 February 20, 2015, the Board responded, through its senior staff counsel Defendant Webb,
5 partially stating that “Unfortunately, the Medical Board of California (Board) is unable to comply
6 with your request. Records of complaints to, and investigations conducted by, state licensing
7 agencies are not subject to disclosure pursuant to Government Code section 6254(f). In addition,
8 records of complaints and investigations of state licensing agencies are privileged under Evidence
9 Code section 1040. Reports for death of a patient are treated as complaints to the Board, and will
10 not be disclosed. Please feel free to contact me if you have any further questions.” (V.C. at 6, ¶
11 39.)

12 On April 14, 2015, the Board sent a letter to Plaintiff advising him that the Board’s
13 authority, as a licensing agency, is to ensure that its licensees abide by the provisions of the
14 Business and Professions Code (e.g., the Medical Practice Act). It further advised Plaintiff that
15 “Your complaint and all relevant medical records were reviewed by the Board’s Medical
16 Consultant. It was the opinion of our consultant that the treatment rendered did not constitute a
17 violation of the law as it related to the practice of medicine. Therefore, the Board is unable to
18 proceed with further action and has closed its case in this matter. Thank you for contacting the
19 Medical Board of California.” (V.C. at 6, ¶ 42.)

20 On October 5, 2015, Plaintiff filed a Petition for Writ of Mandate and Declaratory and
21 Injunctive Relief against the Board, Ms. Kirchmeyer and Ms. Webb in the Los Angeles Superior
22 Court. (V.C. at 7, ¶ 44; See RFJN, Exh. 1.) On November 23, 2015, the Respondents in that
23 action filed a Demurrer to the Writ, which was overruled with leave to amend. (V.C. at 7, ¶ 46;
24 See RFJN, Exh. 2.) On January 2, 2016, Petitioner filed an Amended Writ. (V.C. at 7, ¶ 47; See
25 RFJN, Exh. 3.) The Amended Writ set forth five causes of action relating to the alleged failure of
26 the Respondents to provide information pursuant to the IPA and the PRA. On February 8, 2016,
27 Respondents filed a demurrer to the Amended Writ. (V.C. at 7, ¶ 49; See RFJN, Exh. 4.) On May
28 3, 2016, the demurrer was overruled in its entirety. (V.C. at 8, ¶ 50; See RFJN, Exh. 6.) On

1 November 17, 2016, Petitioner filed a Motion for Judgment on the Writ. (V.C. at 8, ¶ 51; See
2 RFJN, Exh. 7.) On January 17, 2017, the trial on the amended writ was heard before the
3 Honorable Mary H. Strobel, Judge presiding in Department 82. (V.C. at 8, ¶52; See RFJN, Exh.
4 12). After the trial on the amended writ, the petition was denied it in its entirety and a judgment
5 against Petitioner was filed on February 17, 2017. (See RFJN, Exh. 12.)

6 On April 27, 2017, Plaintiff sent Defendant Webb a letter requesting that she provide him
7 with “all information in the Medical Board’s possession regarding” his mother’s “medical
8 condition, treatment and the circumstances and cause(s) of her death.” (V.C. at 8, ¶ 54.) On May
9 26, 2017, Defendant Webb responded to Plaintiff’s request in detail denying his request stating
10 that the information requested was privileged and exempt from disclosure pursuant to, *inter alia*,
11 Civil Code § 1798.24, 1798.24, subdivisions (c) and (g), Government Code § 6254, subdivisions
12 (f) and (k), Government Code § 6255, Evidence Code § 1040, numerous Business and
13 Professions Code sections, and relevant case law supporting Defendants’ denial. (V.C. at 8-9, ¶¶
14 55-57.)

15 On July 10, 2017, Plaintiff responded to Defendant Webb’s letter disputing her
16 justifications for denying his request and concluding that “Because I am entitled to the
17 information I seek as the beneficiary of my mother, and because I am entitled to it as a member of
18 the public, please release to me the information that I seek.” (V.C. at 9, ¶ 58.) On August 4,
19 2017, Defendant Webb responded to Plaintiff’s letter again explaining in detail the reasons for the
20 denial. Plaintiff replied to Defendant Webb on January 8, 2018, again demanding disclosure of
21 the information. Defendant Webb replied on January 29, 2018. (V.C. at 9, ¶ 59, at 10, ¶¶ 62-63.)

22 On May 30, 2018, Plaintiff submitted a Government Claim Form and Presentation of
23 Claims with 25 attached exhibits to the Department of General Services (DGS). (V.C. at 11, ¶
24 66.) DGS rejected Plaintiff’s claim on July 12, 2018, as untimely pursuant to Government Code
25 § 911.2, indicating that his cause of action accrued on May 26, 2017, the date when he was
26 notified that Defendants denied his request.

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1 **ARGUMENT**

2 **I. APPLICABLE LEGAL STANDARDS**

3 A defendant may object to a whole complaint or to any of the purported causes of action
4 within a complaint by demurrer. (Code Civ. Proc., § 430.50, subd. (a).) On demurrer, the trial
5 court considers the properly pled material facts and those matters that may be judicially noticed
6 and tests their sufficiency. (*Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th
7 1150, 1158-1159; Code Civ. Proc. § 430.30 subd. (a).) On demurrer, a court may consider
8 matters shown in exhibits attached to the complaint (*Frantz v. Blackwell* (1987) 189 Cal.App.3d
9 91, 94) and matters which may be judicially noticed (*American Distilling Co. v. Johnson* (1955)
10 132 Cal.App.2d 73, 77). In its consideration of a demurrer, Courts treat all of the complaint's
11 material factual allegations as true, but not the contentions, deductions, or conclusions of fact or
12 law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

13 A demurrer may be sustained without leave to amend where the facts are not in dispute and
14 the nature of the plaintiff's claim is clear but, under substantive law, no liability exists. (*Keyes v.*
15 *Bowen* (2010) 189 Cal.App.4th 647, 655.) Further, a demurrer should be sustained where the
16 complaint discloses some defense that would bar recovery. (*In re Estate of Moss* (2012) 204
17 Cal.App.4th 521, 535.) A demurrer for failure to state a cause of action may properly be sustained
18 against a complaint for declaratory relief (*State Farm Fire & Cas. Co. v. Super. Ct.* (1987) 191
19 Cal.App.3d 74, 76-78).

20 **II. PLAINTIFF'S COMPLAINT IS BARRED BECAUSE HE FAILED TO TIMELY FILE A**
21 **GOVERNMENT CLAIM**

22 Plaintiff was required to file a claim for money or damages within six months of the accrual
23 of the cause of action. Failure to timely file a claim bars Plaintiff from bringing suit against the
24 public entity. (Government Code, § 911.2; RFJN, Exhibit 13.) A Plaintiff who suspects that he
25 has suffered an injury caused by the wrongdoing of another is charged with the knowledge that a
26 reasonable investigation would reveal, and the limitations period begins to run at that time. (*Fox*
27 *v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807-808.) Here, Plaintiff alleges that
28 Defendants inaccurately and unlawfully refused to provide him with information he believed he

1 was entitled to. (V.C. at 8, ¶ 54, at 9, ¶ 58.) On April 27, 2017, Plaintiff sent a letter to
2 Defendants requesting “all information in the Medical Board’s possession regarding [his
3 mother’s] medical condition, treatment and the circumstances and cause(s) of her death . . . in
4 accordance with the Information Practices Act (Ca. Civ. Code § 1798.34 et seq.) and all other
5 applicable laws of this state.” (V.C. at 8, ¶ 54.) On May 26, 2017, Defendants denied Plaintiff’s
6 request on numerous grounds, including that the information he was requesting was privileged
7 and exempt from disclosure. (V.C. at 8-9, ¶¶ 55-56.) In the letter, Defendants provided Plaintiff
8 with documents which were non-privileged and not exempt from disclosure as they related to
9 communications directly with him. (V.C. at 9, ¶ 57.) On July 10, 2017, Plaintiff objected to
10 Defendants’ denial for disclosure of the requested information and demanded that the information
11 be disclosed to him. (V.C. at 9, ¶ 58.)

12 Accordingly, Plaintiff was aware, as of Defendants’ May 26, 2017 letter, that his request
13 was being denied by Defendants, and according to him that denial was improper. However,
14 Plaintiff did not file a government claim until May 30, 2018, more than a year later. (V.C. at 11,
15 ¶ 66.) Thus, since Plaintiff failed to file his government claim within six months of May 26,
16 2017, his claim was untimely and the Complaint is barred by Government Code § 911.2.

17 **III. PLAINTIFF’S COMPLAINT IS BARRED BY RES JUDICATA /COLLATERAL ESTOPPEL**
18 **TO THE EXTENT IT LITIGATES ISSUES THAT WERE, OR COULD HAVE BEEN, RAISED**
19 **IN LOS ANGELES SUPERIOR COURT CASE NUMBER BS158575**

20 Plaintiff brought and litigated the same case against the same individuals and a judgment
21 was found against him, as stated in the Statement of Fact section. In that case, after a trial, the
22 Court denied his amended writ petition in its entirety and a judgment against him was filed on
23 February 17, 2017. (See RFJN, Exh. 12.) That judgment acts as res judicata and/or collateral
24 estoppel in this case. A prior judgment is res judicata on matters that “were raised or could have
25 been raised, on matters litigated or litigable.” (*Warga v. Cooper* (1996) 44 Ca.App.4th 371, 378.)

26 Whether res judicata applies to bar a lawsuit depends on affirmative answers to three
27 questions: (1) was the issue decided in the prior adjudication identical with the one presented in
28 the action in question? (2) was there a final judgement on the merits? and (3) was the party
against whom the plea is asserted a party or in privity with a party to the prior adjudication?

1 (Aronow v. Lacroix (1990) 219 Cal.App.3rd 1039, 1046; Witkin, *California Procedure*, 5th Ed.,
2 Judgment, § 456.) Here, Defendants contend the answer is “yes.”

3 The entire complaint in this action seeks to compel Defendants to provide information to
4 Plaintiff which are exempt from disclosure and privileged, and for alleged injuries and damages
5 arising out of the Defendants’ refusal to provide such information. To the extent that these issues
6 were adjudicated in case number BS158575, and a final judgment in that action was found against
7 Plaintiff, this action is barred by the doctrines of res judicata and/or collateral estoppel.

8 **IV. THE DEMURRER TO PLAINTIFF’S FIRST AND SECOND CAUSES OF ACTION SHOULD**
9 **BE SUSTAINED BECAUSE THE INFORMATION PLAINTIFF REQUESTS IS STATUTORILY**
10 **EXEMPT FROM DISCLOSURE AND THE CAUSES FAIL TO STATE FACTS SUFFICIENT**
11 **TO CONSTITUTE A CAUSE OF ACTION**

12 In his First and Second Causes of Action, Plaintiff alleges that Defendants acted improperly
13 and wrongfully in denying his request for information and acted arbitrarily and erroneously in its
14 interpretation and application of law.

15 Civil Code § 1798.42 provides that when responding to a request for information an agency
16 **shall not disclose any personal information relating to another individual which may be**
17 **contained in the record.** Likewise, Civil Code § 1798.24 provides, in pertinent part, that an
18 **“agency shall not disclose any personal information in a manner that would link that**
19 **information disclosed to the individual to whom it pertains unless”** it is disclosed “(a) to the
20 individual to whom the information pertains. (b) With the prior written voluntary consent of the
21 individual to whom the records pertain. (c) To the duly appointed guardian or conservatorship of
22 the individual or the person representing the individual if it can be proven with reasonable
23 certainty through the possession of agency forms, documents or correspondence that this person
24 is authorized representative of the individual to whom the information pertains.” or “(g) Pursuant
25 to the California Public Records Act” (Emphasis added.)

26 Government Code § 6254, provides, in pertinent part, that “this chapter **does not require**
27 **the disclosure of any of the following records: (f) Records of complaints to, or investigations**
28 **conducted by . . . or any other state or local agency for . . . law enforcement, or licensing**
purposes. . .” and “(k) **Records, the disclosure of which is exempted or prohibited pursuant**

1 to . . . state law, including, but not limited to, provisions of the Evidence Code relating to
2 **privilege.** (Emphasis added.) Evidence Code § 1040 provides, in pertinent part, that ‘official
3 information’ means information acquired in confidence by a public employee in the course of his
4 or her duty and not open, or officially disclosed, to the public prior to the time the claim of
5 privilege is made.” Subdivision (b) provides that “**A public entity has a privilege to refuse to**
6 **disclose official information,** and to prevent another from disclosing official information, if the
7 privilege is claimed by a person authorized by the public entity to do so and . . . the following
8 apply: (1) **Disclosure is forbidden by . . . a statute of this state.**” (Emphasis added.)

9 Here, Plaintiff was not the trustee of his mother’s estate, nor was he the duly appointed
10 guardian, conservator or authorized representative of his mother. Plaintiff also did not possess a
11 prior written voluntary consent from his mother. According to his mother’s death certificate, his
12 brother Peter M. was listed as the informant on the certificate and was the successor trustee of
13 their mother’s estate. (V.C. at 4, ¶ 28.) Further, the information Plaintiff seeks are records of
14 complaints to and information gathered during the investigation of Plaintiff’s complaint
15 conducted by the Board, a state agency, for its enforcement and licensing purposes. Thus, the
16 information Plaintiff requests is statutorily exempt from disclosure and is privileged as it is not
17 public information.

18 On May 23, 2014, the Board sent Plaintiff a letter with a blank authorization form for the
19 release of his mother’s medical records and for a copy of death certificate indicating that the
20 authorization must be signed by the “next of kin as shown on the death certificate.” (V.C. at 4, ¶
21 27.) On September 9, 2014, Peter M., the person authorized to sign the release for his mother’s
22 medical records, sent a signed authorization to the Board to allow them to obtain copies of his
23 mother’s medical records. (V.C. at 5, ¶ 30.)

24 On February 10, 2015, Plaintiff sent a letter to Defendant Webb requesting that all
25 documents filed with the Board in accordance with Business and Professions Code section 2240⁴

26 ⁴ Business and Professions Code section 2240, subdivision (a), provides that a physician
27 and surgeon who performs a medical procedure outside of a general acute care hospital that
28 results in the death of a patient is required to report the death in writing within 15 days after the
occurrence. Subdivision (c) provides that the physician and surgeon and patient information are

1 and California Code of Regulations, title 16, section 1356.4.⁵ be released to him; however, these
2 statutes did not apply to Plaintiff's mother's death as she died in a hospital setting. (V.C. at 4, ¶¶
3 17-23, at 6, ¶38.)

4 On February 20, 2015, Defendant Webb responded stating, *inter alia*, "Unfortunately, the
5 Medical Board of California (Board) is unable to comply with your request. Records of
6 complaints to, and investigations conducted by, state licensing agencies are not subject to
7 disclosure pursuant to Government Code section 6254(f). In addition, records of complaints and
8 investigations of state licensing agencies are privileged under Evidence Code section 1040.
9 Reports for death of a patient are treated as complaints to the Board, and will not be disclosed.
10 Please feel free to contact me if you have any further questions." (V.C. at 6, ¶ 39.)

11 On April 14, 2015, Plaintiff was sent a letter stating, *inter alia*, that the Board had
12 completed its review of his complaint and that his "complaint and all relevant medical records
13 were reviewed by the Board's Medical Consultant. It was the opinion of our consultant that the
14 treatment rendered did not constitute a violation of the law as it relates to the practice of
15 medicine. Therefore, the Board is unable proceed with further action and has closed its case in
16 this matter." (V.C. at 6, ¶ 42.) Plaintiff did not contact Defendants to discuss the matter further,
17 but instead filed a 1085 Writ of Mandate against all the Defendants named in this action on
18 October 5, 2015. (V.C. at 6, ¶ 39, at 7, ¶ 44; See RFJN, Exh. 1.)

19 As indicated above, the records Plaintiff seeks are privileged and statutorily exempt from
20 disclosure pursuant to the Government Code, the Civil Code, and the Evidence Code.

21 _____
22 anonymous, and their identifying information is not transmitted to the Board and further that the
23 entire form containing the information shall be placed in the patient's medical record. Here,
Plaintiff's mother did not die outside of a general acute care hospital. (V.C. at 4, ¶ ¶ 17-20.)

24 ⁵ California Code of Regulations title 16, section 1356.4 requires that a patient report of
25 death under Business and Professions Code section 2240, subdivision (a), include the following:
26 the patient's identifying information; the physician and surgeon's full name, license number and
27 specialty certifications; the outpatient surgery center name and the name of the entities which
28 license, certify or accredit the outpatient setting; the name and address of the hospital or
emergency center to which the patient was transferred or admitted, the date of the report and the
name of the person completing the report. Here, Plaintiff's mother did not die in an outpatient
surgery center. (V.C. at 4, ¶ ¶ 22-23.)

1 Furthermore, the records in this case were obtained by the Board for the purposes of determining
2 whether a violation of the Medical Practice Act had occurred in the care and treatment of
3 Plaintiff's mother.⁶ No such violation was detected. (V.C. at 6, ¶ 42.) The records of
4 investigation are privileged, and Defendants properly and in compliance with the law denied
5 Plaintiff's request for such records.

6 Thus, for the reasons stated above, Defendants' demurrer to Plaintiff's First and Second
7 Causes of Action should be sustained without leave to amend.

8 **V. THE DEMURRER TO PLAINTIFF'S THIRD CAUSE OF ACTION SHOULD BE SUSTAINED**
9 **BECAUSE DEFENDANTS WERE NOT OBLIGATED TO ASSIST PLAINTIFF IN**
10 **IDENTIFYING RECORDS AND INFORMATION RESPONSIVE TO HIS REQUEST AND IT**
11 **FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION**

12 In his third cause of action, Plaintiff alleges that Defendants did not assist him to identify
13 records or information that was responsive to his request nor did they provide suggestions for
14 overcoming any practical basis for denying access to the records and information he seeks. The
15 PRA provides that "every person has a right to inspect any public record, except as hereafter
16 provided." (Government Code § 6253, subd. (a).) Hence, "all public records are subject to
17 disclosure unless the Legislature has expressly provided to the contrary." (*Haynie v. Superior*
18 *Court* (2001) 26 Cal.4th 1061, 1068 (citing *Williams v. Superior Court* (1993) 5 Cal.4th 337,
19 346).) However, Government Code § 6254, expressly exempts certain records from disclosure
20 following a request for public records.

21 The PRA, as stated in Government Code § 6253.1, subd. (d)(2), provides, in pertinent
22 part, that "this section shall not apply to a request for public records if the public agency
23 determines that the request should be denied and bases that determination solely on an exemption
24 listed in Section 6254." Government Code § 6254, subd. (f), provides, in pertinent part, that an
25 agency is not required to disclose any records of complaints to, or investigations conducted by
26 any state agency for law enforcement, or licensing purposes. Further, Government Code § 6254,
27 subd. (k), provides that disclosure is not required when such disclosure is exempt or prohibited
28 per state law, including provisions of the Evidence Code relating to privilege. Additionally,

⁶ See Business and Professions Code §§ 2004 and 2220.5 above, footnotes 2 and 3.

1 Evidence Code § 1040 provides that a public entity has a privilege to refuse to disclose official
2 information, and to prevent another from disclosing official information, if the privilege is
3 claimed by a person authorized by the public entity to do so and disclosure is forbidden by a
4 statute of this state.

5 In *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1275, a journalist submitted a
6 PRA to the county coroner requesting access to a murder victim's autopsy records as the
7 journalist was writing a book about the murder. Dixon argued that the section 6254(f) exemption
8 does not expressly exempt coroner and autopsy reports and that coroners are not police or law
9 enforcement agencies designated by section 6254(f). (*Dixon*, supra, at p. 1275.) However, the
10 appellate court rejected this argument and affirmed the decision to deny her request. The
11 appellate court reasoned that the coroner's records are investigatory files compiled for law
12 enforcement purposes. (*Id.* at p. 1279.) Additionally, the appellate court rejected the journalist's
13 argument that denying her access to the coroner's reports was unconstitutional and restricted
14 freedom of the press. (*Ibid.*) "It is irrelevant that the party requesting public records is a
15 newspaper or other form of media, because it is well established that the media has no greater
16 right of access to public records than the general public." (*Ibid.*)

17 Here, as discussed above, the information Plaintiff seeks is statutorily exempt from
18 disclosure pursuant to Government Code § 6254 and Evidence Code 1040 and is privileged.
19 Thus, because the records of investigation are privileged and exempt, Defendants properly and in
20 compliance with the law denied Plaintiff's request for such information. Therefore, Defendants'
21 demurrer to Plaintiff's Third Cause of Action should be sustained without leave to amend.

22 **VII. THE DEMURRER TO PLAINTIFF'S FOURTH CAUSE OF ACTION SHOULD BE**
23 **SUSTAINED BECAUSE DEFENDANTS WERE WITHIN THEIR RIGHTS NOT TO**
24 **RELEASE THE INFORMATION PLAINTIFF SOUGHT AS THEY ARE STATUTORILY**
25 **EXEMPT AND THIS CAUSE FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A**
26 **CAUSE OF ACTION**

27 In his fourth cause of action, Plaintiff contends that Defendants failed to provide him with
28 public information in violation of Government Code § 6253. As discussed above, the information
requested is statutorily exempt from disclosure as it prohibits the disclosure of records of
complaints to, or investigations conducted by any state agency for law enforcement, or licensing

1 purposes. Here, the records and information were obtained during an investigation of a complaint
2 received by the Board for licensing purposes and potential disciplinary action, if warranted.

3 Thus, the records of which Plaintiff requested were records obtained during Defendants
4 investigation and are therefore privileged. Defendants acted properly and in compliance with the
5 law when they denied Plaintiff's request for such records.

6 For the above reasons, Defendants' demurrer to Plaintiff's Fourth Cause of Action should
7 be sustained without leave to amend.

8 **VIII. THE DEMURRER TO PLAINTIFF'S FIFTH CAUSE OF ACTION SHOULD BE SUSTAINED**
9 **BECAUSE DEFENDANTS PROPERLY INTERPRETED AND APPLIED THE LAW IN NOT**
10 **RELEASING THE RECORDS PLAINTIFF SOUGHT AS THEY ARE STATUTORILY**
11 **EXEMPT AND GOVERNMENTAL IMMUNITY UNDER SECTION 821.6 APPLIES**

12 In his fifth cause of action, Plaintiff contends that Defendants erroneously interpreted and
13 applied Evidence Code §1040 and Government Code § 6253, et seq. The Board, as the
14 physician's licensing agency, is authorized to investigate and take action against its licensees for
15 the purpose of public protection. (*See* Bus. & Prof. Code §§ 2001.1, 2004, 2220.5.)

16 Investigations completed by the Board are clearly for licensing purposes and are privileged and
17 exempt from disclosure as discussed above. Here, the clear language of the statute provides that
18 the agency records of complaints to, and investigations conducted by, state licensing agencies are
19 not subject to disclosure pursuant to Government Code section 6254, subdivision (f) and (k).
20 Because Plaintiff seeks records which are exempted by law from disclosure, he has failed to state
21 a claim for which relief may be granted.

22 Further, Government Code section 821.6 provides that "[a] public employee is not liable for
23 injury caused by his instituting or prosecuting any judicial or administrative proceeding within the
24 scope of his employment, even if he acts maliciously and without probable cause." If the
25 employee is immune from liability, then the public agency employer would also be immune
26 pursuant to Government Code section 815.2, subdivision (b).

27 "Investigations are considered to be part of judicial and administrative proceedings for
28 purposes of section 821.6 immunity." (*Richardson-Tunnell v. School Ins. Program for*
Employees (2007) 157 Cal.App.4th 1056, 1062.) In *Richardson-Tunnell*, the investigatory

1 surveillance activities which the plaintiff claimed as invasions of privacy were covered by this
2 immunity, regardless of whether such investigatory activities were “carried out negligently,
3 maliciously, or without probable cause.” (*Id.* at p. 1063.) The immunity applied, even though the
4 alleged privacy violations were based in part on article 1, section 1 of the California Constitution.
5 (*Id.* at p. 1066.)

6 “California courts construe section 821.6 broadly in furtherance of its purpose to protect
7 public employees in the performance of their prosecutorial duties from the threat of harassment
8 through civil suits.” (*Id.* at p. 1062; quoting *Gillan v. City of San Marino* (2007) 147 Cal.App.4th
9 1033, 1048.)

10 Plaintiff’s allegations against Defendants do not overcome the immunity provided in
11 Section 821.6. Here, Plaintiff alleges that Defendant Webb erroneously interpreted and applied
12 Government Code § 6255 and Evidence Code § 1040, and that the Board is unlawfully
13 withholding privileged information that belongs to him. Here, Defendants were acting in their
14 official capacities as agents or employees of a public agency during the investigation and
15 processing of Plaintiff’s complaint. Thus, Defendants are immune from any injury or damages
16 resulting from their official duties. Plaintiff further contends that Defendants investigation into
17 his complaint about the cause of the death of his mother should be disclosed to him. However,
18 Defendants’ duties are not to investigate the cause of a patient’s death, but to investigate if the
19 licensee’s care and treatment was a violation of the Medical Practice Act.⁷

20 Defendants’ demurrer to Plaintiff’s Fifth Cause of Action should be sustained without leave
21 to amend.

22 **IX. THE DEMURRER TO PLAINTIFF’S SIXTH CAUSE OF ACTION SHOULD BE SUSTAINED**
23 **BECAUSE PLAINTIFF REQUEST FOR INFORMATION IS EXEMPT FROM DISCLOSURE**
24 **AND IS PRIVILEGED AND IT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A**
CAUSE OF ACTION

25 In his sixth cause of action, Plaintiff alleges a violation of California Constitution, Article I,
26 section 3(b) for failure to provide access to the People’s business.

27
28 ⁷ See footnotes 2 and 3.

1 "A constitutional provision does not create a private right of action 'when it merely
2 indicates principles, without laying down rules by means of which those principles may be given
3 the force of law.'" (*Clausing v. San Francisco Unified School District* (1990) 221 Cal.App.3d
4 1224, 1237). Article I, Section 3 is not self-executing. As such, Plaintiff cannot state a cause of
5 action under Article I, Section 3 against Defendants. Further, as specified above, the information
6 he seeks is statutorily exempt from disclosure and is privileged. Because Plaintiff seeks records
7 and information which are exempted by law from disclosure, he has failed to state a claim for
8 which relief may be granted.

9 Thus, Defendants' demurrer to Plaintiff's Sixth Cause of Action should be sustained
10 without leave to amend.

11 **X. THE DEMURRER TO PLAINTIFF'S SEVENTH CAUSE OF ACTION SHOULD BE**
12 **SUSTAINED BECAUSE THE INFORMATION PLAINTIFF REQUESTS IS STATUTORILY**
13 **EXEMPT FROM DISCLOSURE AND IT FAILS TO STATE FACTS SUFFICIENT TO**
14 **CONSTITUTE A CAUSE OF ACTION**

15 Plaintiff's seventh cause of action alleges a violation of public policy. Plaintiff contends,
16 *inter alia*, that the Board's investigation of deaths of patients are of vital importance to consumers
17 and to the public health, and that by Defendants refusal to not even share the patient's own
18 privileged medical information their actions do not serve the public. (V.C. at 21, ¶ 116.) Plaintiff
19 further contends that Defendants failure to provide Plaintiff with "any substantive information
20 renders his entire effort bringing a complaint to the Board futile." (V.C. at 22-23, ¶ 121.)

21 Plaintiff appears to believe that Defendants' purpose is to supply him with an explanation
22 of the reason and cause of his mother's death. This is not Defendants' duty nor obligation.
23 Defendants rightfully performed their statutory duty when they investigated Plaintiff's complaint
24 and concluded, after a medical consultant's review of the information gathered during the
25 investigation, that there were no departures from the standard of care (*i.e.*, the care and treatment
26 rendered to Plaintiff's mother was not negligent or incompetent). If Plaintiff, as he claims, is
27 really authorized to obtain his mother's medical records then he should do so and obtain them
28 directly through the medical facility where she was treated. Plaintiff could then submit the
records to a physician to advise him of the cause of his mother's death. Plaintiff has chosen not

1 to do this and instead, demands that Defendants do it for him. This is not Defendants'
2 responsibility. Defendants' responsibility is to investigate complaints against its licensees to
3 determine if there are any violations of the Medical Practice Act. Defendants have already
4 performed their statutory duty and had the matter reviewed by another physician who found no
5 deviations from the standard of care. As a result, the investigation was closed.

6 Thus, Plaintiff has failed to plead facts sufficient to state a cause of action, pursuant to Code
7 of Civil Procedure section 430.10, subdivision (e), in that he is not entitled to relief. The records
8 Plaintiff seeks are privileged and exempt from disclosure as discussed herein. His claim that
9 Defendants violated public policy is devoid of an allegation relating to the violation of any law
10 for which relief may be granted.

11 For these reasons, Defendants' demurrer to Plaintiff's Seventh Cause of Action should be
12 sustained without leave to amend.

13 **CONCLUSION**

14 For the reasons discussed above, each and every claim or cause in the Complaint for
15 Damages, Injunctive Relief and Declaratory Relief is fatally flawed. Thus, Defendants
16 respectfully requests that the Court sustain this Demurrer, without leave to amend.

17 Dated: December 17, 2018.

18 Respectfully Submitted,

19 XAVIER BECERRA
20 Attorney General of California
21 ROBERT MCKIM BELL
22 Supervising Deputy Attorney General

23 COLLEEN M. MCGURRIN
24 Deputy Attorney General
25 *Attorneys for Defendants*
Medical Board of California, Kimberly
Kirchmeyer, and Kerrie D. Webb

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