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6 Plaintiff, *in propria persona*

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  
OPPOSITION TO DEFENDANTS'  
MOTION TO STRIKE; MEMORANDUM  
OF POINTS AND AUTHORITIES**

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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23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **SUMMARY**

25 Plaintiff Bruce Thomas Murray brought his action against the Medical Board of California  
26 and its agents because they wrongfully refused his requests to provide him with personal and  
27 medical information regarding his deceased mother, Audrey Bevan Murray.  
28

1 Plaintiff's case is based primarily on the California Information Practices Act (CIPA), which  
2 mandates that public agencies release the personal information that they collect, upon request, to the  
3 individual to whom the information pertains, or his or her representative. Cal. Civ. Code §§  
4 1798.24-34.

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

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

13 Plaintiff has presented seven causes of action, and his prayer for relief assigns remedies in  
14 accordance with each applicable statute cited in his complaint. This memorandum will demonstrate  
15 the legal sufficiency of all of Plaintiff's claims and remedies.

## 16 ARGUMENT

### 17 **I. PLEADINGS DRAWN IN CONFORMITY WITH LAW**

18 Defendants declare that Plaintiff's "complaint states irrelevant or immaterial allegations" and  
19 "the complaint also fails to conform with the laws of this state." (Defs.' Mem. of P. & A. in Supp. of  
20 Mot. to Strike at 6:16-18.) That is the beginning and end of their analysis, i.e., no analysis.  
21 Therefore, Defendants' motion to strike fails on the first count.

### 22 **II. PLAINTIFF'S PRAYER FOR RELIEF PROPERLY REQUESTS EQUITABLE** 23 **AND LEGAL REMEDIES, AS WELL AS COSTS AND FEES, IN ACCORDANCE** 24 **WITH THE LAW APPLICABLE TO EACH CAUSE OF ACTION.**

#### 25 **A. Plaintiff is entitled to injunctive relief, damages and fees under the Information** 26 **Practices Act, as stated in his first two causes of action.**

27 The California Information Practices Act (CIPA) states: "Any agency that fails to comply  
28 with any provision of this chapter may be enjoined by any court of competent jurisdiction." Cal.

1 Civ. Code § 1798.47. “In any suit brought under the provisions of subdivision (b) or (c) of Section  
2 1798.45, the agency shall be liable to the individual in an amount equal to the sum of: (a) Actual  
3 damages sustained by the individual, including damages for mental suffering. (b) The costs of the  
4 action together with reasonable attorney’s fees as determined by the court.” Cal. Civ. Code §  
5 1798.48.

6 Despite the fact that Plaintiff’s complaint plainly states his first two causes of action under  
7 the Information Practices Act, Defendants’ insist that Plaintiff seeks public information under the  
8 California Public Records Act (CPRA). (Defs.’ Mem. at 6-7.) Under their alternate,<sup>1</sup> CPRA-based  
9 lawsuit, Defendants assert a blanket exemption under Cal. Gov. Code § 6254(f) (Records of  
10 investigations conducted by a state agency). *Id.* Defendants then conjure up a fictional version of §  
11 6254, in which all exemptions are total and absolute. In reality, all of the exemptions listed in §  
12 6254, are all permissive, not mandatory. i.e., “this chapter does not require the disclosure of any of  
13 the following records ...” *Id.*<sup>2</sup>

14 More importantly, CPRA does not supersede CIPA, as the Defendants would like. In fact,  
15 it’s the other way around: “This chapter shall be construed to supersede any other provision of state  
16 law, including Section 6253.5 of the Government Code, **or any exemption in Section 6254** or 6255  
17 of the Government Code, which authorizes any agency to withhold from an individual any record  
18 containing personal information which is otherwise accessible under the provisions of this chapter.”  
19 Cal. Civ. Code § 1798.70. [Emphasis added.] The appellate court expressly affirmed this  
20 construction of the two laws in *Bates v. Franchise Tax Bd.*, 124 Cal. App. 4th 367, 376 (2004).

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21 <sup>1</sup> Defendants’ argument follows a classic “straw man” pattern. “**Straw Man:** This is a fallacious  
22 argument in which one creates the illusion of having refuted a solid proposition by substituting a similar,  
23 weaker proposition for it and refuting the substitute instead.” Barbara A. Kalinowski, LOGIC AB INITIO: A  
24 FUNCTIONAL APPROACH TO IMPROVE LAW STUDENTS’ CRITICAL THINKING SKILLS, 22 Legal Writing: J.  
25 Legal Writing Inst. 109, 139 (2018). Here, Defendants’ create an alternate lawsuit, a false construct, in order  
26 to strike it down.

27 <sup>2</sup> In their demurrer memorandum (at 16:17), Defendants’ own featured case demonstrates that the  
28 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.

1 “This interpretation is consistent with the express purpose of the IPA, to govern the collection,  
2 maintenance, and use of *personal* information.” *Id.* at 377.

3 But Defendants attempt to construct the laws precisely the opposite: They make CPRA  
4 supersede CIPA, rather than the other way around. This construction has no grounding in law or  
5 logic.

6 In the non-fiction version of Plaintiff’s lawsuit, he seeks his deceased mother’s personal and  
7 medical information,<sup>3</sup> and he rightfully asserts his primary claims and remedies under the California  
8 Information Practices Act. The non-fiction version of CIPA is not swallowed up by the Public  
9 Records Act. And the non-fiction version of CIPA does not contain a long list of exemptions  
10 preventing the release of personal information to the person it belongs to. The law and facts of this  
11 case are inconvenient to Defendants, so they invent their own. The fallacy<sup>4</sup> is transparent.

12 If, as may be the case, some of Audrey Murray’s personal and medical information is  
13 contained in or among exempt documents, Plaintiff is still entitled to his mother’s personal  
14 information – and it must be extracted accordingly – just as multiple levels of hearsay are sifted out  
15 in the evidentiary context. (See Cal. Evid. Code §§ 1201, 1271; FRE § 805.) Both CIPA and CPRA  
16 contain provisions and procedures for redacting and segregating information. Cal. Civ. Code §  
17 1798.46; Cal. Gov. Code § 6259. But Defendants refuse to parse out and release **any** information in  
18 Audrey Murray’s file. Instead, they force Plaintiff to bring a civil action and have the court do this  
19 work instead. Defendants’ are not living up to their duties under the law; and their recalcitrance  
20 burdens everyone involved.

21 Plaintiff is entitled to relief under the Information Practices Act, and he has properly stated  
22 his claims and remedies. Therefore Defendants’ motion to strike his first two causes of action  
23 should be denied.

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28 <sup>3</sup> “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).

<sup>4</sup> Straw man: “A tenuous and exaggerated counterargument that an advocate puts forward for the sole  
purpose of disproving it.” BLACK’S LAW DICTIONARY, 8th Ed., (St. Paul, MN: Thomson West, 2004), 1461.

1           **B. Plaintiff is entitled to relief under CPRA in that Defendants failed to assist him in**  
2           **the identification of records, in violation of Cal. Gov. Code § 6253.1 (Third Cause of**  
3           **Action).**

4           In his third cause of action, Plaintiff alleges that Defendants failed to “assist [a] member of  
5 the public to identify records and information that are responsive to the request or to the purpose of  
6 the request.” Cal. Gov. Code § 6253.1. As remedies for violation of this chapter, “Any person may  
7 institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent  
8 jurisdiction.” Cal. Gov. Code § 6258.

9           In their motion to strike, Defendants reiterate their res judicata defense from their Demurrer.  
(See Defs.’ Mem. of P. & A. in Supp. of Dem. at 12-13.)

10          As Plaintiff shows in his Opposition to Defendants’ Demurrer, neither claim nor issue  
11 preclusion apply, because Plaintiff’s earlier writ action was dismissed on purely procedural bases –  
12 mootness and ripeness (failure to exhaust administrative remedies). (Defs.’ RFJN, Exh. 12 at 11-  
13 12.) Both claim and issue preclusion require a final adjudication on the merits. *Samara v. Matar*, 5  
14 Cal. 5th 322, 326–27 (2018). Here, the “on the merits” element was not satisfied.

15          “[T]here is no justiciable controversy,” Judge Mary H. Strobel wrote in her decision. *Murray*  
16 *v. Medical Board of Calif. et al.*, No. BS158575, Los Angeles Super. Ct. (2017). (See Defs.’ RFJN,  
17 Exh. 12 at 17.)

18          The on-the-merits element couldn’t be satisfied then, and it can’t be satisfied now. This is an  
19 objective fact and not an arguable point. In this regard, Defendants’ argument crosses the line from  
20 meritless to frivolous. Accordingly, their motion to strike should be denied.

21           **C. Plaintiff is entitled to equitable relief from Defendants’ wrongful assertion of an**  
22           **absolute privilege as their basis for withholding information that is rightfully privileged**  
23           **to Plaintiff (Fifth Cause of Action).**

24          In their denials of Plaintiff’s requests for information, Defendants’ base their refusal, in part  
25 on Cal. Evid. Code § 1040 (Privilege for official information), or alternately, Cal. Gov. Code § 6255  
26 (Withholding records from inspection; Justification; Public interest). (Verif. Compl. at 6, 8-10, ¶¶  
27 39, 55, 59, 63; RFJN, Exhs. 12, 19, 21, 24.) In their memorandum in support of their motion to  
28 strike, Defendants don’t state the rule for either of these laws. Correspondingly, their analysis goes

1 astray. Filling in the blanks, Cal. Evid. Code § 1040 sets out a two-tiered privilege regime – one  
2 absolute, the other qualified.

3 The absolute privilege of Cal. Evid. Code § 1040(b)(1) states, “A public entity has a  
4 privilege to refuse to disclose official information, and to prevent another from disclosing official  
5 information, if the privilege is claimed by a person authorized by the public entity to do so and ...  
6 Disclosure is forbidden by an act of the Congress of the United States or a statute of this state.”

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

13 Here, Defendants assert the absolute privilege without proper justification. Drawing from  
14 their fictional CPRA lawsuit, Defendants first claim an absolute exemption under Cal. Gov. Code §  
15 6254. From there, Defendants assert the absolute privilege of Cal. Evid. Code § 1040. Defendants  
16 conclude, “As such, disclosure of the information Plaintiff seeks is strictly prohibited.” (Defs.’ Mem  
17 at 9:2.) However, the plain language of § 6254 provides no “strict prohibition,” as Defendants  
18 assert. The exemption is permissive, not mandatory, i.e., “This chapter does not require the  
19 disclosure of any of the following records ...” *Id.* Defendants’ syllogism from the § 6254  
20 exemptions to the § 1040 absolute privilege does not follow.

21 More importantly, Plaintiff seeks information that is privileged to him, not the Medical  
22 Board. Plaintiff is entitled to this information under the Information Practices Act, entirely apart  
23 from the official privilege of § 1040. Defendants’ motion to strike should therefore be denied.

24 In this section of their memorandum, Defendants also erroneously assert governmental  
25 immunity. However, governmental immunity is irrelevant and inapplicable here, since Plaintiff  
26 seeks an injunction against the named agents of the Medical Board, not liability for damages.  
27 Defendants’ assertion of governmental immunity against Plaintiff’s claim for equitable relief  
28 appears to be yet another straw man. Therefore, Defendants’ motion to strike Plaintiff’s fifth cause  
of action should be denied.

1           **D. Plaintiff is entitled to equitable relief under the California Constitution (Sixth Cause**  
2           **of Action).**

3           Article I, Section 3(b) of the California Constitution, provides that “the people have the right  
4 of access to information concerning the conduct of the people’s business, and, therefore ... the  
5 writings of public officials and agencies shall be open to public scrutiny.”

6           The California Supreme Court has declared that equitable relief is appropriate for claims  
7 under the state constitution: “It also is clear that, like many other constitutional provisions, this  
8 section [article I, section 7] supports an action, brought by a private plaintiff against a proper  
9 defendant, for declaratory relief or for injunction.” *Katzberg v. Regents of Univ. of California*, 29  
10 Cal. 4th 300, 307 (2002). (Also see *Lane v. City of Redondo Beach*, 49 Cal. App. 3d 251, 255  
11 (1975): A cause of action under the California Constitution is a proper matter for declaratory relief  
12 when there is a justiciable live controversy.)

13           Returning again to their straw man line of argumentation,<sup>5</sup> Defendants misconstrue  
14 Plaintiff’s sixth cause of action as a constitutional tort, which it is not. Rather, Plaintiff seeks  
15 declaratory and injunctive relief with respect to his constitutional claim, as the Court has deemed  
16 appropriate: “As we observed more than a century ago, ‘every constitutional provision is self-  
17 executing to this extent, that everything done in violation of it is void.’ *Katzberg*, 29 Cal. 4th at 307  
18 (Quoting from *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 484 (1886)). Similarly here, it is  
19 appropriate for Plaintiff to request equitable relief under Article I, Section 3.

20           In addition to their straw man argument, Defendants cite a non-analogous case, *Clausing v.*  
21 *San Francisco Unified School Dist.*, 221 Cal.App.3d 1224 (1990); which unlike the present case,  
22 dealt with Article 1, Section 28 of the California Constitution (right of students and staff to safe,

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23 <sup>5</sup> The straw man argument is a favorite trope in legal sophistry:

- 24       • “EMC presents three straw man arguments in an attempt to convince us it has knocked down  
25 Wanger’s RESPA cause of action. The straw man, i.e., erroneous premise, is that the RESPA cause  
26 of action is solely a claim for wrongful foreclosure ... We reject these arguments.” *Wanger v. EMC*  
*Mortg. Corp.*, 103 Cal. App. 4th 1125, 1137 (2002)
- 27       • “The majority then engages in a detailed analysis of cases having no applicability here whatsoever, to  
28 slay this straw man of its own creation.” *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750,  
786 (1988) (White, J., dissenting).
- “The dissent also creates a straw man ... It states the trial court ‘informed the jurors they would be  
sanctioned if they did not adhere to the court’s instructions on the law.’ Of course, the trial court said  
no such thing. What the trial court did say was ...” *People v. Sanchez*, 58 Cal. App. 4th 1435, 1446  
(1997).

1 secure campuses), which the plaintiffs in that case had attempted to base a private right of action for  
2 damages. By contrast here, Plaintiff's sixth cause of action is based Article I, Section 3 of the  
3 California Constitution, and he seeks declaratory and injunctive relief under this provision, not  
4 damages. Plaintiff's prayer for relief should not be construed as beyond the scope of the court's  
5 traditional equitable power, as Defendants attempt to mischaracterize it. (Defs.' Mem at 9:18.)

6 Additionally, Plaintiff introduced his constitutional claim in order to guide his statutory  
7 causes of action; or, as the Court has termed it, when "statutory interpretation is augmented by a  
8 constitutional imperative." *City of San Jose v. Superior Court*, 2 Cal. 5th 608, 617 (2017). Here,  
9 Defendants repeatedly base their refusal to release information to the Plaintiff on "the public  
10 interest." (V.C. at 8-10, ¶¶ 55, 59, 63; RFJN, Exhs. 19, 21, 24.) Since Defendants purport to be  
11 conducting the people's business, in the public interest, all of Plaintiff's claims relate to the  
12 constitutional mandate of Cal. Const, Art. I § 3(b)(2). If any balancing of interests is to be applied,  
13 the constitutional priority as to what constitutes the public interest should be given due  
14 consideration. Accordingly, Defendants' motion to strike Plaintiff's sixth cause of action should be  
15 denied.

16 **E. Public policy is directly at issue in all of Plaintiff's causes of action, and Plaintiff is**  
17 **entitled to equitable relief.**

18 "Violations of public policy statutes ... have been declared justiciable in civil actions."  
19 *Montalvo v. Zamora*, 7 Cal. App. 3d 69, 76 (1970). "An action for declaratory relief is an  
20 appropriate proceeding for determining the applicability of such a statute ... [when] the complaint  
21 seeks a declaration of the rights of the parties under a statute declaring the public policy of this state,  
22 and an alleged violation thereof by the defendant." *Id.* (Also see *Lane*, 49 Cal. App. 3d at 255; and  
23 *City of San Jose v. Superior Court*, 2 Cal. 5th 608, 616-17 (2017).)

24 All of the statutes under which Plaintiff brings his causes of action contain public policy  
25 statements. For example, the Information Practices Act begins by declaring: "The Legislature  
26 declares that the right to privacy is a personal and **fundamental right** protected by Section 1 of  
27 Article I of the Constitution of California and by the United States Constitution and that all  
28 individuals have a right of privacy in information pertaining to them." Cal. Civ. Code § 1798.1.  
[Emphasis added.]



1 Plaintiff's complaint goes on to cite relevant public policy statements from the Business &  
2 Professions Code (Cal. Bus. & Prof. Code § 2001.1); the California Public Records Act (Cal. Gov.  
3 Code § 6250); and the California Constitution (Cal. Const, Art. I § 3(b)(2)). (V.C. at 21-23, ¶¶ 115-  
4 122.) Even the Evidence Code section invoked in Plaintiff's fifth cause of action contains a public  
5 policy-like statement: "In determining whether disclosure of the information is against the public  
6 interest, **the interest of the public entity as a party in the outcome of the proceeding may not be**  
7 **considered.**" Cal. Evid. Code § 1040(b)(2) [Emphasis added.]

8 In her Aug. 4, 2017 letter to Plaintiff, Defendant Webb states, "The Board has evaluated  
9 your request to determine if **public policy** weighs in favor of releasing the documents." (V.C. at 9, ¶  
10 59; RFJN, Exh. 21). And in her May 26, 2017 letter to Plaintiff, Webb states, "The public interest in  
11 non-disclosure clearly outweighs **the public interest** in disclosure here." (V.C. at 8, ¶ 55; RFJN,  
12 Exh. 19). [Emphasis added.]

13 Somehow, when the Defendants' gauge the public interest, it is always in accord with their  
14 own interest. It is for this reason that Plaintiff invokes public policy in his complaint, and he seeks  
15 the court's independent and impartial determination.

16 Public policy is directly at issue in this case, and Plaintiff properly pleads it. Therefore,  
17 Defendants' motion to strike Plaintiff's seventh cause of action should be denied.

## 18 CONCLUSION

19 Plaintiff properly seeks legal and equitable remedies, according to each of his seven causes  
20 of action. Accordingly, he asks this court to deny Defendants' motion to strike in its entirety.

21 Dated: February 11, 2019

22  
23 By:

24 Bruce T. Murray,

25  
26 Plaintiff *in propria persona*  
27  
28