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Petitioner, *in propria persona*

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

BRUCE THOMAS MURRAY, Petitioner, vs. **MEDICAL BOARD OF CALIFORNIA;** **KIMBERLY KIRCHMEYER,** in her capacity as executive director, Medical Board of California; and **KERRIE D. WEBB,** in her capacity as staff counsel, Medical Board of California Respondents	Case No.: BS158575 **REPLY TO RESPONDENTS' OPPOSITION TO MOTION FOR JUDGMENT ON WRIT** Cal. Code Civ. Proc. § 1085 Hearing date: January 17, 2017 Hearing time: 9:30 a.m. Department 82 Hon. Judge Mary H. Strobel

SUMMARY

Petitioner Bruce Thomas Murray hereby replies to Respondents' "Opposition to First Amended Petition for Writ of Mandate and Motion for Judgment on Writ."

ARGUMENT

I. STANDARD OF REVIEW – LOW DEFERENCE

The appropriate standard of review in this case is independent judgment – at the low end of the deference scale – based on the standard set forth in *Yamaha Corp. of Am. v. State Bd. of Equalization* (19 Cal. 4th 1, 8, (1998)) and its progeny.

"The ultimate interpretation of a statute is an exercise of the judicial power … conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body. [Citation.] Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth." *Id.,* 7-8.

In their opposition memorandum, Respondents' simply stack several boilerplate quotes from non-applicable cases, with no analysis as to why the standards in those cases should apply to this case. Resp'ts' P. & A. in Supp. of Opp'n to 1st Am. Pet. and Mot. for J. on Writ, 4:7-28. Based on the facts of this case, the standard in Respondents' cited cases does not apply.

Here, Petitioner is challenging the Medical Board's interpretations of law – specifically the California Evidence Code, section § 1040; and the California Public Records Act (Cal. Gov. Code § 6250 et seq.). When a government agency makes determinations of law, especially generally applicable law (i.e., not enabling legislation or agency-made quasi-legislation), the courts afford a low level of deference to the agency's interpretations of law. *Yamaha,* 19 Cal. 4th at 7.

Respondents have made no argument whatsoever for why they should receive a deferential standard of review – perhaps because there is no good argument in support of this

position. Therefore, this court may appropriately independently judge the Medical Board's interpretations of law, because the facts of this case justify low deference to the Respondents.

II. THE INFORMATION SOUGHT BY PETITIONER IS NOT SUBJECT TO A BLANKET EXEMPTION; RATHER, IT IS SUBJECT TO DISCLOSURE UNDER BOTH CPRA AND THE EVIDENCE CODE.

A. Respondents' provide no valid basis for a blanket exemption under Cal. Gov. Code § 6254, and thus the information that Petitioner seeks is disclosable.

The Public Records Act, section 6254, sets forth various categories of documents that government agencies ***may*** withhold (but not "must" withhold): "[T]his chapter **does not require** the disclosure of any of the following records … (f) Records of complaints to, or investigations conducted by, or … any investigatory or security files compiled by any other state or local agency for … licensing purposes." [Emphasis added.]

Here, Respondents' opposition brief quotes only the first sentence of subsection (f), while conveniently omitting both the first and last paragraphs of the statute, which clearly set forth a permissive nondisclosure regime, not a mandatory one. As the appellate court explained, "The exemptions from disclosure provided by section 6254 are permissive, not mandatory; they permit nondisclosure but do not prohibit disclosure. [Citation.] The permissive nature of section 6254's exemptions is clearly evidenced by its last paragraph which states: 'Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.'" *Register Div. of Freedom Newspapers v. Cnty. of Orange,* 158 Cal. App. 3d 893, 905-06 (1984).

But here, Respondents simply conclude that "materials gathered in the course of an investigation are exempt from disclosure" (Resp'ts' Opp'n at 5:23), when in fact such materials might – or might not – be exemptible, depending on the circumstances. Characteristically, Respondents provide no factual analysis of the circumstances. Instead, they make only conclusory assertions, based on fragmentary rule statements. Therefore, Respondents' claim of an "easy exemption" fails.

B. Reports filed for the death of a patient (and the underlying information contained in them) are not subject to an unqualified exemption under Cal. Gov. Code § 6254 or an absolute privilege under Cal. Evid. Code § 1040.

No rule requires the non-disclosure of information filed under Cal. Bus. & Prof. Code § 2240 (Report for Death of Patient) and 16 C.C.R. 1356.4 (Outpatient Surgery--Reporting of Death). No authority – executive, judicial or legislative – supports the classification of such documents as "complaints to the board" – and thus exempt from disclosure under Cal. Gov. Code § 6254(f).

From the outset, the Medical Board has claimed "[r]eports for the death of a patient **are treated** as complaints to the Board, and will not be disclosed," as the Medical Board's staff counsel Kerrie Webb wrote in her Feb. 20, 2015 letter to Petitioner. Am. Pet., Exh. 9. [Emphasis added.] Since then, the Medical Board has not advanced its basis for withholding information much further than that. Tellingly, whenever Respondents discuss exemptions, they use the passive voice:

- "Such a report ***is treated*** as a 'complaint' for an investigation by the Board. Resp'ts' Opp'n at 7:5-6. [Emphasis added.]
- "This is an investigatory document, and the Board's assertion that Outpatient Reports of Death ***are exempt*** from disclosure is correct." *Id.* at 7:11-12. [Emphasis added.]

Respondents cite no case law, no executive opinion and no legislation supporting the "correctness" of its position. The only supporting "authority" Respondents put forth is a declaration from a staff services manager, who states, "A report under section 2240, subdivision (a), ***is deemed*** a 'complaint' by the Board." Resp'ts' Opp'n, Exh. A, 2:17-18. [Emphasis added.] Again, the staff services manager speaks in the passive, and cites no legal authority. Apparently, the information Petitioner seeks is only "exempt" from disclosure simply because Respondents say it is, and for no other reason. Respondents' self-serving "treatments" of law should therefore be rejected.

B2. The underlying information that would otherwise be contained in Cal. Bus. & Prof. Code § 2240 and 16 C.C.R. 1356.4 is not subject to an unqualified exemption under Cal. Gov. Code § 6254 or an absolute privilege under Cal. Evid. Code § 1040.

Title 16 of the California Code of Regulations (16 CCR 1356.4) sets forth the elements of what must be included in a Report for the Death of a Patient (Cal. Bus. & Prof. Code § 2240), including, most critically, "the circumstances of the patient's death." Presumably, this portion of the report would include more than, "Patient was treated; situations arose, and patient's heart stopped."

In its opposition memorandum, Respondents deny the existence of the report(s) Petitioner requested. Resp'ts' Opp'n at 7:19. Respondents similarly denied the existence of such reports in its demurrer. Resp'ts' P. & A. in Supp. of Dem. to 1st Am. Pet. at 7:5. Respondents have never explained why it is that they would deny the disclosure of non-existent documents, as Respondent Webb did in her Feb. 20, 2015, letter to Petitioner. Am. Pet., Exh. 9. Mistakes were made, perhaps.

At this point, whether or not these particular reports exist is irrelevant; it is **the underlying information** that counts.[1] Respondents do not deny possession of the underlying information that would be contained in the reports requested by Petitioner, including but not limited to "the circumstances of the patient's death." 16 C.C.R. 1356.4(c). Indeed, if Respondents did conduct an investigation into Dr. James Matchison's treatment of Petitioner's mother, as they claim, then they certainly should have garnered information as to the circumstances of Audrey Murray's death.

Therefore, the underlying information that would otherwise be contained reports filed pursuant to Cal. Bus. & Prof. Code § 2240 and 16 C.C.R. 1356.4 should be released to Petitioner, in addition to all other information in its possession regarding Audrey B. Murray's medical condition, treatment and death. Such information is privileged to Petitioner, as the beneficiary of his mother, **not** the Respondents.

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[1] In the context of police investigations, Cal. Gov. Code § 6254(f)(1)-(3) makes this critical distinction between specific records and the underlying information contained within them. These sub-sections of § 6254(f) require law enforcement agencies to release certain information contained within otherwise exempt reports. See *Rackauckas v. Super. Ct.*, 104 Cal. App. 4th 169, 174 n.3, (2002): "Subdivision (f) does require disclosure of certain information derived from the arrest and other investigative records, but not the records themselves." Also see *Williams v. Super. Ct.*, 5 Cal. 4th 337, 348 (1993), which describes § 6254(f) as "designed to provide access to information contained in law enforcement investigatory records without, however, requiring disclosure of the records themselves."

C. Respondents repeatedly stonewalled Petitioner's requests for information, exhausting all administrative remedies and making this claim ripe for review.

In overruling Respondents' demurrer, this court considered Respondents' various arguments and defenses pertaining to ripeness, finality and exhaustion of administrative remedies. As the court concluded, "The FAP pleads facts showing that the first cause of action is ripe and petitioner exhausted administrative remedies." Decision on Dem. at 3.

Now, it appears, Respondents want to take a "second bite at the apple" on the issues of ripeness and exhaustion of administrative remedies. In a breathtaking stretch of reason, Respondents claim that because Petitioner specifically requested reports filed pursuant to Cal. Bus. & Prof. Code § 2240 and 16 C.C.R. 1356.4, "and nothing more," that somehow Petitioner never requested information regarding the cause and circumstances of his mother's death, as he is now. Resp'ts' Opp'n at 7:5. As an informal fallacy, this argument assumes form over substance – as if Petitioner requested only a form, and not the underlying information contained in the form, i.e., "the circumstances of the patient's death." 16 CCR 1356.4.

Stretching it even further, Respondents assert, "Petitioner cannot contend that the Board erroneously withheld this information from him after a CRA request because Petitioner did not seek this information. Respondents did not have an opportunity to evaluate and respond to such a request." *Id.* at 8:8-11. This statement flies in the face of almost every communication Petitioner had with Respondents, going back to his initial complaint to the Board:

> "I am writing to ask your assistance regarding the death of my mother, Audrey B. Murray, who died last June about 30 hours following an elective heart procedure. The doctor, James C. Matchison, either can't or won't tell me what caused her death … Dr. Matchison lost a patient – my mother – and if he does not know what caused her death, he really should if he is to continue operating on patients." Am. Pet. Exh. 1.

From day 1, Respondents knew exactly what type of information Petitioner was looking for; they had every opportunity to evaluate his requests for information; and they had every opportunity to respond. Instead, they stonewalled. Now they spin spurious arguments.

Respondents' "second bite" at the apple must fail. Petitioner has exhausted his administrative remedies, and his claim is ripe.

C2. Petitioner has properly requested non-exempt and non-privileged information, or information that is privileged to him, as the beneficiary of his mother.

Petitioner's prayer for relief in his Amended Petition begins by asking the court to compel the Medical Board to release "all information, reports and statements acquired by the Medical Board regarding Audrey B. Murray's medical condition, treatment and death." Am. Pet. at 15. The prayer then proceeds to filter out information that is "legitimately and lawfully privileged to someone other than Audrey B. Murray or her beneficiaries, or appropriately requires redaction or in camera inspection." *Id.*

In its opposition brief, Respondents claim that Petitioner is making an unqualified request for "the entire investigative file resulting from his complaint to the Board regarding the care and treatment of Mrs. Murray by Dr. Matchison." Resp'ts' Opp'n at 8:7-8. Petitioner made no such unqualified request. Respondents assume facts and statements not supported by the record, then strike them down in a "straw man" argument. Respondents' argument disregards both the structure and substance of the Amended Petition. Accordingly, the court should disregard Respondents' fallacious arguments.

III. THE INFORMATION SOUGHT BY PETITIONER IS SUBJECT TO THE BALANCING TEST FOR A QUALIFIED PRIVILEGE UNDER CAL. EVID. CODE § 1040(b)(2), BECAUSE RESPONDENTS ARE NOT ENTITLED TO AN ABSOLUTE PRIVILEGE.

(A) Ripeness and Exhaustion

See II(C) above.

(B) The information Petitioner seeks is not subject to any kind of blanket exemption under Cal. Gov. Code § 6254(f), and therefore it is proper to weigh this information under the qualified privilege of Cal. Evid. Code § 1040(b)(2).

California Government Code § 6254, subdivision (f), addresses information gathered by state agencies for licensing purposes. Various subsections of the statute then hone in on specific categories of information compiled by police agencies, specifying which information shall be released notwithstanding the exemption.

As the Court explained, "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." *Williams v. Super. Ct.*, 5 Cal. 4th 337, 346-47 (1993).

In its opposition brief, Respondents attempt to assign themselves an absolute exemption, and here they do so by inappropriately invoking the police-specific subdivisions of § 6254(f)(1)-(3). Resp'ts' Opp'n at 10:6-8. But if Respondents looked at these sub-sections more closely, they would see that even the police to not get an absolute exemption. Therefore, because the information Petitioner seeks is not absolutely exempt, it is subject to the balancing test of Cal. Evid. Code § 1040(b)(2).

C. The interests of justice weigh strongly in favor of releasing information sought by Petitioner because the issue concerns life and death, and Petitioner has no alternate means of obtaining any explanation for his mother's death.

The qualified privilege of Cal. Evid. Code § 1040(b)(2) sets out a balancing test, in which the court inquires whether "[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." *Id.* Moreover, "[i]n determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered." *Id.*

In weighing the public interest under § 1040(b)(2), when a death is involved, the court favors releasing information to citizens and individuals, rather than granting secrecy to public agencies and public officials. *Shepherd v. Super. Court*, 17 Cal. 3d 107, 130 (1976); *Michael P. v. Super. Court*, 92 Cal. App. 4th 1036, 1048 (2001); *Dominguez v. Super. Court of L.A. Cnty.*, 101 Cal. App. 3d 6 (1980).

The best Respondents can do to counter this clear pattern is to point out that the Petitioner in this action is not a plaintiff in an action for damages, unlike the parties in the cases he cites. Resp'ts' Opp'n at 12:13. But then, Respondents cite no case in which a death is involved, and then a survivor seeks information from a public agency, is denied, and then pursues a writ of mandate. It appears that there is no such case on record. Therefore, it is appropriate to employ

analogical reasoning to the most similar cases available, as Petitioner has done. Based on the pattern in the cases cited, the courts clearly favor disclosure over secrecy.

In weighing what it considers the public interest against disclosure, Respondents present a parade of horribles: Disclosure of the type of information Petitioner seeks would have a "chilling effect" on future investigations; doctors might refuse to cooperate; hospitals would be less likely to provide the Board with information; members of the public would be afraid to supply the Board with information "if their identities are public"; and patients, too, would shy away. Resp'ts' Opp'n at 12:22-28. Consequently, the Board would "not [be] able to fully assess the full scope of the care and treatment of patients, as well as the circumstances surrounding possible violations of the laws governing the practice of medicine." *Id.* What Respondents' syllogism really amounts to is the old bureaucratic saw, "If I have to do this for you, then I have to do it for everyone," i.e., they might actually have to lift a finger.

In assessing what it considers to be the Petitioner's interest in disclosure, Respondents fire off a "parade of dismissals": If Petitioner really wants to get serious about getting some information, go be a "litigant" (like the Plaintiffs in *Shepherd, Michael P, and Dominguez)*; go get "Mrs. Murray's medical records and obtain[] an opinion as to the cause of her death." *Id.* at 12:12-18. In other words, go away.

Respondents close out their argument against disclosure by considering the interests of doctors: "A licensee would also face embarrassment and damage to his reputation through disclosure of a complaint, materials gathered in investigation and the accompanying opinions and analysis of the complaint, even when no violations of the law has been found." *Id.*, at 13:11-13. What Respondents fail to explain: How is an investigation that determines that a doctor has performed according to the standard of care, has not breached his duty, has not caused harm – how could this possibly be "embarrassing" or "damaging to his reputation"? The reasoning doesn't follow.

It is worthy of note that the Medical Board routinely releases information related to complaints and investigations when disciplinary and enforcement action is taken, according to the requirements of Cal. Bus. & Prof. Code § 803.1(a) and § 2227(b). What about all of the possible chilling effects there? The potential of private patient information being disclosed? The embarrassment to doctors? Inducement, innuendo and colloquium? Apparently, the Medical

Board has a way of dealing with these potential problems. And it could certainly reasonably deal with Petitioner's request here.

D. The public interest is served by disclosing the records Petitioner seeks.

The results of the balancing test are the same under Cal. Gov. Code § 6255 as under Cal. Evid. Code § 1040: Respondents have not justified withholding the records Petitioner seeks, and the public interest is best served by disclosure.

IV. RESPONDENTS HAD A DUTY TO ASSIST PETITIONER AND TO IDENTIFY ANY SEGREGABLE PORTIONS OF THE RECORDS HE SOUGHT.

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

In their opposition brief, Respondents reason that because documents requested by Petitioner do not exist, Respondents had nothing to segregate. The trouble with this reasoning is, when Respondents considered Petitioner's request for these records, they rejected his request – as if the records existed. If at that time Respondents had made the slightest effort to assist Petitioner in any way, as § 6253 requires, perhaps they would have discovered the existence/non-existence of these particular documents, and then the parties could have proceeded to the next step in identifying the information sought by Petitioner.

Thus, in assessing Respondents' duties under § 6253 and § 6253.1, Respondents must be estopped from denying the existence of individual records in order to escape responsibility. Respondents have not denied possession of the information Petitioner seeks, regardless of the particular title of any document containing this information, and Respondents must provide this information accordingly.

V. THE CALIFORNIA CONSTITUTION ENSHRINES THE RIGHT OF ACCESS TO 'THE CONDUCT OF THE PEOPLE'S BUSINESS.'

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

Petitioner's case is supported by the state constitution, the common law and statute. The court may find in Petitioner's favor on all of these bases.

VI. PUBLIC POLICY FAVORS OPENNESS AND TRANSPARENCY

The California Constitution, the California Public Records Act, the Medical Practice Act and the California Evidence Code all set forth a policy of openness and transparency in government. Petitioner cites from all four sources in his Amended Petition. Respondents muster no separate public policy arguments here. Resp'ts' Opp'n at 15:4-9.

VII. COSTS AND FEES

If he prevails on his CPRA claims, Petitioner is entitled to costs and fees under Cal. Gov. Code § 6259(d). Petitioner additionally claims fees pursuant to Cal. Code Civ. Proc. § 1021.5 ("private attorney general") and/or the equitable private attorney fee doctrine.

CONCLUSION

For all of the reasons stated here, as well as in the Amended Petition and trial brief, Petitioner requests that the court find in his favor and issue a writ of mandate compelling Respondents to release the information that he seeks.

Dated: January 3, 2017

Respectfully Submitted,

Bruce Thomas Murray, Esq.

Petitioner, in pro per (619-501-8556)