

1 KAMALA D. HARRIS  
Attorney General of California  
2 ROBERT MCKIM BELL  
Supervising Deputy Attorney General  
3 PEGGIE BRADFORD TARWATER  
Deputy Attorney General  
4 State Bar No. 169127  
California Department of Justice  
5 300 S. Spring Street, Suite 1702  
Los Angeles, California 90013  
6 Telephone: (213) 620-6068  
Fax: (213) 897-9395  
7 E-mail: Peggie.Tarwater@doj.ca.gov  
Attorneys for Respondents  
8 Medical Board of California  
Kimberly Kirchmeyer, Executive Director,  
9 Medical Board of California  
Kerrie D. Webb, Staff Counsel,  
10 Medical Board of California  
11

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 CITY AND COUNTY OF LOS ANGELES  
14

15 **BRUCE THOMAS MURRAY,**

16  
17 Petitioner,

18 v.

19 **MEDICAL BOARD OF CALIFORNIA, et**  
20 **al.,**

21 Respondents.  
22  
23

Case No. BS158575

**OPPOSITION TO FIRST AMENDED  
PETITION FOR WRIT OF MANDATE  
AND MOTION FOR JUDGMENT ON  
WRIT; MEMORANDUM OF POINTS  
AND AUTHORITIES**

Trial Date: January 17, 2016  
Time: 9:30 a.m.  
Dept: 82  
Judge: Hon. Mary H. Stroble  
Action Filed: October 5, 2015


24 Respondents Medical Board of California, Kimberly Kirchmeyer, Executive Director of the  
25 Medical Board of California, and Kerrie D. Webb, Staff Counsel, Medical Board of California  
26 (hereinafter the "Board" or "Respondents"), by and through counsel, Kamala D. Harris, Attorney  
27 General, by Peggie Bradford Tarwater, Deputy Attorney General, submit the following  
28

1 Opposition to First Amended Petition for Writ of Mandate (Amended Petition) and Motion for  
2 Judgment on Writ (Motion), filed by Petitioner Bruce Thomas Murray (Petitioner). Respondents  
3 submit that the Amended Petition should be denied.

4  
5 Dated: December 16, 2016.

Respectfully submitted,

6 KAMALA D. HARRIS  
Attorney General of California  
7 ROBERT MCKIM BELL  
Supervising Deputy Attorney General

8  
9   
10 PEGGIE BRADFORD TARWATER  
Deputy Attorney General

11 *Attorneys for Respondents*  
12 *Medical Board of California*  
13 *Kimberly Kirchmeyer, Executive Director,*  
14 *Medical Board of California*  
15 *Kerrie D. Webb, Staff Counsel,*  
16 *Medical Board of California*

## TABLE OF CONTENTS

	<u>Page</u>
Memorandum of Points and Authorities .....	1
Introduction .....	1
Procedural and Factual History .....	2
Argument .....	4
The Board Properly Denied Petitioner's CPRA Request for an Outpatient Report of Death Because the Report Is Exempt From Public Disclosure, It Was not Required to Be Filed, and It Is not in the Board's Possession; Moreover, this Court Should Reject Petitioner's Request that this Court Issue a Writ Of Mandate Compelling Production of Records Which Were not Sought by a CPRA Request.....	4
I. Standard of review .....	4
II. Records sought by Petitioner pursuant to the CPRA are exempt from disclosure pursuant to Government code, section 6254, subdivision (f); further, the records sought are not required and not in the Board's possession.....	5
A. Materials gathered in the course of an investigation are exempt from disclosure.....	5
B. Outpatient reports of death are part of the investigative file and are exempt from disclosure; further, the report Petitioner seeks was not required, and the Board is not in possession of the report .....	7
C. Petitioner's claim that he is entitled to copies of the entire investigative file should be denied because it is not ripe and it is not exhausted; should this court consider the claim, Petitioner is not entitled to the entire investigative file because it is exempt from disclosure .....	8
III. Records sought by Petitioner pursuant to the CPRA exempt from disclosure pursuant to Government Code section 6254, subdivision (k), Evidence Code section 1040, and Government Code section 6255.....	9
A. Petitioner's claim is not ripe for review, and Petitioner has failed to exhaust his administrative remedies.....	9
B. Whether records are exempt from disclosure pursuant to Government Code section 6254, subdivision (f), does not depend on a weighing under evidence code section 1040. ....	10
C. Records sought by Petitioner are exempt from disclosure pursuant to Government Code section 6254, subdivision (k), and Evidence Code section 1040, as they constitute official records.....	10
D. Records sought by Petitioner are exempt from disclosure pursuant to Government Code section 6255 .....	13
IV. Respondents are not required to segregate and release the records sought in Petitioner's CPRA request .....	14
V. California Constitution, Article I, section 3(b), does not mandate disclosure of the information sought by Petitioner in his CPRA request.....	14
VI. Non-disclosure of exempted records does not violate public policy .....	15

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**  
**(continued)**

	<b><u>Page</u></b>
VII. Petitioner is not entitled to costs and attorney's fees .....	15
Conclusion .....	15

## TABLE OF CONTENTS

	<u>Page</u>
<b>CASES</b>	
<i>Agosto v. Bd. of Trustees of the Grossmont-Cuyamaca Community Coll. Dist.</i> (2010) 189 Cal.App.4th 330 .....	4
<i>Brown v. Chiang</i> (2011) 198 Cal.App.4th 1203 .....	4
<i>Bryce v. Board of Medical Quality Assurance</i> (1986) 184 Cal.App.3d 1471 .....	12
<i>Cal. Assn. of Med. Prods. Suppliers v. Maxwell-Jolly</i> (2011) 199 Cal.App.4th 286 .....	4
<i>Cal. Water Impact Network v. Newhall County Water Dist. (2008)</i> 161 Cal.App.4th 1464 .....	8
<i>City of Hemet v. Superior Court of Riverside County (Enterprise Press Company)</i> (1995) 37 Cal.App.4th 1411 .....	6
<i>City of San Jose v. Superior Court</i> (1999) 74 Cal.App.4th 1008 .....	6, 11, 13
<i>County of Orange v. Superior Court of Orange County</i> (2000) 79 Cal.App.4th 759 .....	11
<i>County of San Diego v. State of California</i> (2008) 164 Cal.App.4th 580 .....	4
<i>County of Santa Clara v. Superior Court</i> (2009) 170 Cal.App.4th 1301 .....	12, 13
<i>Haynie v. Superior Court</i> (2011) 26 Cal.4th 1061 .....	6
<i>Inglewood Redevelopment Agency v. Aklilu</i> (2007) 153 Cal.App.4th 1095 .....	4
<i>Klajic v. Castaic Lake Water Agency</i> (2001) 90 Cal.App.4th 987 .....	4
<i>Rackauckas v. Superior Court</i> (2002) 104 Cal.App.4th 169 .....	9, 13

**TABLE OF CONTENTS**  
**(continued)**

	<b><u>Page</u></b>
<i>Santa Clara County Counsel Attorneys Assn. v. Woodside</i> (1994) 7 Cal.4th 525 .....	4
<i>Williams v. Superior Court</i> (1993) 5 Cal.4th 337 .....	8, 10
 <b>STATUTES</b>	
Business and Professions Code	
§ 800.....	11, 13
§ 801.....	7
§ 2001.....	6, 9, 11
§ 2004.....	6, 9, 11, 12
§ 2220.....	6, 9, 11
§ 2225.....	11
§ 2240.....	1, 2, 7
California Public Records Act .....	passim
Code of Civil Procedure § 1085.....	1, 4
Evidence Code	
§ 1040.....	1, 3, 9, 10, 11
Government Code	
§ 6250, <i>et seq.</i> .....	5
§ 6253.....	14
§ 6254.....	passim
§ 6255.....	9, 13
§ 6259.....	15
 <b>CONSTITUTIONAL PROVISIONS</b>	
California Constitution, Article I, § 3 .....	6, 14, 15
 <b>OTHER AUTHORITIES</b>	
California Code of Regulations, Title 16, § 1356.4 .....	1, 2, 7

# MEMORANDUM OF POINTS AND AUTHORITIES

## INTRODUCTION

Petitioner seeks issuance of a writ of mandate pursuant to Code of Civil Procedure section 1085, commanding the Board to release documents sought by Petitioner under a California Public Records Act request (CPRA). Petitioner filed with the Board a request for an Outpatient Report of Death required under circumstances involving outpatient treatment in accordance with Business and Professions Code section 2240<sup>1</sup> and California Code of Regulations, title 16, section 1356.4,<sup>2</sup> relating to the death of his mother, Audrey B. Murray, under the CPRA. (Amended Petition at p. 2, ¶ 2.) The Board denied Petitioner's request, asserting that the records were exempt from disclosure as investigatory files pursuant to Government Code section 6254, subdivision (f), and as official information, pursuant to Evidence Code section 1040. The Board properly determined that these exemptions applied to Petitioner's CPRA request. Additionally, the reports sought by Petitioner were not required to be prepared in connection with the treatment received by Mrs. Murray, and they do not exist in the Board's files. Without having previously requested any additional or different information pursuant to a CPRA request, Petitioner now contends that additional information should have been provided to him by the Board, including facts and analyses from the investigation and an explanation for Mrs. Murray's death. Any claim based on these new requests should not be considered because is not ripe for decision and is unexhausted. In any event, the information is exempt from disclosure.

<sup>1</sup> Business and Professions Code section 2240, subdivision (a), provides that a physician and surgeon who performs a medical procedure outside of a general acute care hospital that results in the death of a patient is required to report the death in writing within 15 days after the occurrence.

<sup>2</sup> California Code of Regulations title 16, section 1356.4 requires that a patient report of death under Business and Professions Code section 2240, subdivision (a), include the following: the patient's identifying information; the physician and surgeon's full name, license number and specialty certifications; the outpatient surgery center name and the name of the entities which 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.

## PROCEDURAL AND FACTUAL HISTORY

According to the Amended Petition, Petitioner's mother, Audrey D. Murray, died on June 5, 2013, at Torrance Memorial Medical Center. The Amended Petition alleges that on June 4, 2013, Mrs. Murray had undergone a cardiac catheterization procedure after which she had been transferred to the hospital's Progressive Care Unit for post-procedure recovery. She was released from the hospital on June 5, 2013, but returned the same day and passed away in the hospital's emergency department. (Am. Pet. at pp. 3-4, ¶¶ 1-7; see Exhs. 1-2e.) Petitioner filed a complaint with the Board on May 15, 2014, relating to the care and treatment rendered to Mrs. Murray by James Matchison, M.D. (Am. Pet., at p. 4, ¶ 9; Exh. 1.) The personal representative of Mrs. Murray provided the Board with authorizations for the release to the Board of medical records for Torrance Memorial Medical Center and for James Matchison, M.D., at Torrance Memorial Medical Center, for the purpose of investigation and possible administrative and/or criminal proceedings. (Am. Pet. at p. 4, ¶ 13; Exhs. 2c-2d.)

On October 10, 2014, December 15, 2014, and January 21, 2015, Petitioner requested from an Associate Enforcement Analyst a document entitled, "Outpatient Surgery Report of Death," pursuant to Business and Professions Code section 2240 and California Code of Regulations title 16, section 1356.4. On January 21, 2015, the analyst replied, "We do not provide copies of those reports." (Am. Pet. at p. 5; Exh. 4.)

Petitioner sent the Board a letter, dated February 10, 2015, requesting, pursuant to Government Code section 6253.1 (the CPRA), that the Board provide copies of the following documents relating to the death of the patient: Report for Death of a Patient, pursuant to Business and Professions Code section 2240; and Outpatient Surgery-Reporting of Death, pursuant to California Code of Regulations title 16, section 1356.4. (Am. Pet. at 5, ¶ 21, Exh. 8.)

The Board delivered to Petitioner a letter, dated February 20, 2015, which included the following explanation:

"Unfortunately, the Medical Board of California (Board) is unable to comply with your request. Records of complaints to, and investigations conducted by, state licensing agencies are not subject to disclosure pursuant to Government Code section 6254(f). In addition, records of complaints and investigations of state licensing

1 agencies are privileged under Evidence Code section 1040. Reports for death of a  
2 patient are treated as complaints to the Board, and will not be disclosed.

3 “Please feel free to contact me if you have any further questions.”

4 (Am. Pet. at 5, ¶ 22, Exh. 9.)

5 A letter, dated April 14, 2015, was delivered to Petitioner advising him as follows:

6 “The Medical Board of California has completed its review of your complaint  
7 against Dr. James Matchison.

8 “As a licensing agency, the Board has the authority to ensure that its licensees  
9 abide by the provisions of the California Business and Professions Code. Your  
10 complaint and all relevant medical records were reviewed by the Board’s Medical  
11 Consultant. It was the opinion of our consultant that the treatment rendered did not  
12 constitute a violation of the law as it relates to the practice of medicine. Therefore,  
13 the Board is unable to proceed with further action and has closed its case in this  
14 matter.

15 “Thank you for contacting the Medical Board of California.”

16 (Am. Pet. at p. 6; Exh. 10.)

17 On October 5, 2015, Petitioner filed a Petition for Writ of Mandate and Declaratory and  
18 Injunctive Relief. Respondents filed a Demurrer to the Petition on November 23, 2015. On  
19 January 2, 2016, Petitioner filed an Amended Petition for Writ of Mandate. In his Amended  
20 Petition, Petitioner alleges as follows: (1) the Board abused its discretion in denying Petitioner’s  
21 requests for information under Government Code section 6254; (2) the Board abused its  
22 discretion in the interpretation and application of Evidence Code section 1040; (3) the Board  
23 failed to properly respond to a request under the CPRA; (4) the Board failed to provide access to  
24 “The People’s Business”; and (5) the Board acted in violation of public policy in denying the  
25 CPRA request. (Am. Pet. at pp. 7-15.) On February 8, 2016, Respondents filed a demurrer to the  
26 Amended Petition. This Court overruled the demurrer and set this matter for hearing on January  
27 17, 2017.  
28

## ARGUMENT

THE BOARD PROPERLY DENIED PETITIONER'S CPRA REQUEST FOR AN OUTPATIENT REPORT OF DEATH BECAUSE THE REPORT IS EXEMPT FROM PUBLIC DISCLOSURE, IT WAS NOT REQUIRED TO BE FILED, AND IT IS NOT IN THE BOARD'S POSSESSION; MOREOVER, THIS COURT SHOULD REJECT PETITIONER'S REQUEST THAT THIS COURT ISSUE A WRIT OF MANDATE COMPELLING PRODUCTION OF RECORDS WHICH WERE NOT SOUGHT BY A CPRA REQUEST

### I. STANDARD OF REVIEW

A writ of traditional mandate is most often sought to compel the performance of a clear, present, and usually ministerial duty on the part of the respondent, often a public entity or officer. (See, e.g., *Brown v. Chiang* (2011) 198 Cal.App.4th 1203, 1213; *Santa Clara County Counsel Attorneys Assn. v. Woodside* (1994) 7 Cal.4th 525, 539.) A ministerial duty is one that the respondent is required to perform under a given set of facts, without the exercise of independent judgment or opinion. (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 593.)

The exercise of discretion in reaching a decision is also susceptible to mandate when an agency either refuses to exercise discretion, or abuses its discretion. (*Cal. Assn. of Med. Prods. Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 302; *Agosto v. Bd. of Trustees of the Grossmont-Cuyamaca Community Coll. Dist.* (2010) 189 Cal.App.4th 330, 335.)

A court "reviews an administrative action pursuant to Code of Civil Procedure section 1085 to determine whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair, or whether the agency failed to follow the procedure and give the notices the law requires." (*Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 995.) "In determining whether an agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld." (*Helena F. v. West Contra Costa Unified School Dist.* (1996) 49 Cal.App.4th 1793, 1799; see also *Inglewood Redevelopment Agency v. Aklilu* (2007) 153 Cal.App.4th 1095, 1114 [An agency's actions are subject to a deferential standard of review].)

1 **II. RECORDS SOUGHT BY PETITIONER PURSUANT TO THE CPRA ARE EXEMPT FROM**  
2 **DISCLOSURE PURSUANT TO GOVERNMENT CODE, SECTION 6254, SUBDIVISION (F);**  
3 **FURTHER, THE RECORDS SOUGHT ARE NOT REQUIRED AND NOT IN THE BOARD'S**  
4 **POSSESSION**

5 In his First Cause of Action, Petitioner alleges that the Board abused its discretion in  
6 denying his request for information under the CPRA. Petitioner's complaint is based upon an  
7 allegation that the Board improperly classified the report of outpatient death as a "complaint" and  
8 that this designation inappropriately places the reports under the ambit of the exemption described  
9 in Government Code section 6254, subdivision (f). (Am. Pet. at 7-9; Motion at 5-6.) Petitioner  
10 also contends in his Motion for Judgment on Writ that the Report he previously sought is  
11 irrelevant in any event, and what he really seeks is the information that would have been included  
12 in such a report had a report been required and had it been filed. Without having submitted a  
13 CPRA request for that information, Petitioner now requests that this Court issue a writ of mandate  
14 compelling the Board to produce the entire investigative file resulting from his complaint to the  
15 Board. (Motion at pp. 6-7; see Am. Pet., Exh. 1.) An outpatient report of death form, as that  
16 sought by Petitioner, is treated as a complaint that triggers an investigation into whether a  
17 licensee has violated the statutes and regulations governing health care providers. When this  
18 report is filed, it is exempt from a CPRA disclosure. In the instant matter, this report was not  
19 required and is not contained in the Board's records. Petitioner's request for an order compelling  
20 Respondents to produce an investigatory file that was not previously sought pursuant to a CPRA  
21 request is a claim that should not be considered by this court because it is not ripe for review and  
22 is not exhausted. In any event, the Board's investigative file falls squarely within the exemption  
23 of Government Code section 6254, subdivision (f).

24 **A. Materials Gathered in the Course of an Investigation Are Exempt from**  
25 **Disclosure**

26 The CPRA provides for the inspection of public records maintained by state and local  
27 agencies. (Gov. Code, § 6250, *et seq.*) However, the right to review public records is not  
28 absolute. While the CPRA embodies a strong policy in favor of disclosure of public records, it  
also recognizes that certain records should not – for reasons of privacy, safety, and efficient

1 government operations – be made public. (*Haynie v. Superior Court* (2011) 26 Cal.4th 1061,  
2 1064.)

3 The court in *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, provided a  
4 summary of the law governing exemptions to the general policy of disclosure:

5 “Disclosure of public records . . . involves two fundamental yet competing  
6 interests: (1) prevention of secrecy in government; and (2) protection of individual  
7 privacy. [Citation.] . . . [The CPRA] includes two exceptions to the general policy of  
8 disclosure of public records: (1) materials expressly exempt from disclosure pursuant  
9 to 6254; and (2) the ‘catchall exception’ of section 6255, which allows a government  
10 agency to withhold records if it can demonstrate, on the facts of a particular case, the  
11 public interest served by withholding the records clearly outweighs the public interest  
12 served by disclosure. [Citation.]” (*Id.* at p. 1017, fns. omitted.)

13 Exemptions from compelled disclosure under the CPRA are construed narrowly, and the  
14 burden is on the agency to show why records should not be disclosed. (*City of Hemet v. Superior*  
15 *Court of Riverside County (Enterprise Press Company)* (1995) 37 Cal.App.4th 1411, 1416-1417.)

16 The California Constitution was amended to include the people’s right of access to public  
17 records. However, this amendment did not repeal or otherwise alter the specific exemptions  
18 already in existence. (Cal. Const., art. I, § 3.)

19 Government Code section 6254, subdivision (f), exempts from disclosure records gathered  
20 during the course of an investigation as follows:

21 “Records of complaints to, or investigations conducted by, or records of  
22 intelligence information or security procedures of, the office of the Attorney General  
23 and the Department of Justice, the Office of Emergency Services and any state or  
24 local police agency, or any investigatory or security files compiled by any other state  
25 or local police agency, or any investigatory or security files compiled by any other  
26 state or local agency for correctional, law enforcement, or licensing purposes.”  
27 (Emphasis added.)

28 The Board, as the physician’s and surgeon’s licensing agency, is authorized to investigate  
and to take action against its licensees for the purpose of public protection. The Board is tasked  
with investigating complaints, whether the complaints are from consumers or received by other  
means, such as through mandatory reporting. And, the Board is responsible for commencing  
disciplinary actions when warranted. (*See* Bus. & Prof. Code §§ 2001.1, 2004, 2220, 2220.5.)  
Investigative files created in the course of investigations are, therefore, exempt from disclosure.

1           **B. Outpatient Reports of Death are Part of the Investigative File and are**  
2           **Exempt from Disclosure; Further, the Report Petitioner Seeks was not**  
3           **Required, and the Board is not in Possession of the Report**

4           Here, in his CPRA request, Petitioner specifically requested an outpatient report of death,  
5           pursuant to Business and Professions Code section 2240, and California Code of Regulations,  
6           title 16, section 1356.4 (Outpatient Report of Death) and nothing more. Such a report is treated  
7           as a “complaint” for an investigation by the Board. (Opp., Exh. A; Declaration of Ramona  
8           Carrasco (Dec.), at pp. 2-3.) Accordingly, the report falls within the purview of Government  
9           Code section 6254, subdivision (f). The Outpatient Report of Death contains particular patient  
10          details, physician details and details relating to care and treatment that allow the Board to  
11          determine whether the treating physician violated the laws governing the practice of medicine.  
12          This is an investigatory document, and the Board’s assertion that Outpatient Reports of Death are  
13          exempt from disclosure is correct. (See Am. Pet., Exh. 9.)

14          Petitioner contends that it “strains logic to call reports for the death of a patient ‘complaints  
15          to the Board,’” (Am. Pet. at p. 6.) However, mandatory reporting is the manner by which many  
16          classes of investigations are begun. (See Bus. & Prof. Code, §§ 801 (insurer’s reports of  
17          malpractice settlements or arbitration awards); 802.1 (report of charge of felony, or conviction of  
18          felony or misdemeanor); 802.5 (coroner’s report indicating death may be result of gross  
19          negligence or incompetence).) Moreover, in this particular instance, an Outpatient Report of  
20          Death cannot be produced because it was not required to be prepared, and it does not exist in the  
21          Board files. Outpatient Reports of Death are required when a patient undergoes surgery in an  
22          outpatient setting, not in an acute care hospital. Here, there is no allegation that Mrs. Murray  
23          underwent surgery at an outpatient surgery center. To the contrary, the Amended Petition  
24          establishes that the patient care occurred at Torrance Memorial Medical Center, not an outpatient  
25          setting. Record releases were provided for that facility, not for an outpatient facility. (Am. Pet. at  
26          p. 4, Exhs. 2c-2d.) Petitioner alleges that after surgery, Mrs. Murray was transferred to the  
27          hospital’s Progressive Care Unit for recovery, not that Mrs. Murray was transferred from an  
28          outpatient setting. (Am. Pet. at p. 3; Motion at p. 2.) An Outpatient Report of Death was not  
29          required. Not surprisingly, no Outpatient Report of Death relating to Mrs. Murray’s death

1 prepared by or on behalf of Dr. Matchison was located in the Board's records. (Opp., Exh. A.  
2 Dec. at p. Exh. A., p. 2, ¶¶ 3-4.)

3 **C. Petitioner's Claim that he is Entitled to Copies of the Entire Investigative**  
4 **File Should be Denied Because it is not Ripe and it is not Exhausted;**  
5 **Should this Court Consider the Claim, Petitioner is not Entitled to the**  
6 **Entire Investigative File Because it is Exempt from Disclosure**

7 Petitioner now contends that the Board should be ordered to provide him with the entire  
8 investigative file resulting from his complaint to the Board regarding the care and treatment of  
9 Mrs. Murray by Dr. Matchison. (Am. Pet. at 6.) Petitioner cannot contend that the Board  
10 erroneously withheld this information from him after a CPRA request because Petitioner did not  
11 seek this information. (Am. Pet., Exh. 8.) Respondents did not have an opportunity to evaluate  
12 and respond to such a request. Accordingly, Petitioner has failed to exhaust this claim, and it is  
13 not ripe for decision. (See *Cal. Water Impact Network v. Newhall County Water Dist.* (2008) 161  
14 Cal.App.4th 1464, 1489.) This Court found in its May 3, 2016, Decision on Demurrer, that  
15 Petitioner had exhausted his administrative remedies with respect to his CPRA request for the  
16 Outpatient Report of Death (Decision at p. 3); however, Petitioner's claim that he is entitled to the  
17 entire investigative file is very different from the CPRA request for a clearly specified report.  
18 (Am. Pet., Exh. 8.) Petitioner should not be permitted to expand his CPRA request on a petition  
19 for writ of mandate.

20 Should this Court consider Petitioner's argument, it cannot be disputed that he is seeking  
21 release of the Board's actual investigative file which is exempt from disclosure under  
22 Government Code section 6254, subdivision (f). Respondents acknowledge that subdivision (f) is  
23 not a blanket exemption for all information gathered in the course of an investigation. (See  
24 *Williams v. Superior Court* (1993) 5 Cal.4th 337, 348-350.) For example, subdivision (f) allows  
25 for disclosure of witness statements and party statements without disclosure of the actual  
26 documents unless the disclosure would entail certain risks, such as endangering the successful  
27 completion of the investigation. (*Id.* at pp. 348-349; Gov't Code, § 6254, subd. (f).) Here, as set  
28 forth more fully in Section B, *infra*, disclosure of witness and party statements would hinder the  
successful completion of an investigation. Additionally, under Government Code section 6254,

subdivision (f), "nothing in this division shall require the disclosure of that portion of those investigative files which reflect the analysis or conclusion of the investigating officer." (See also, *Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169, 174.) Petitioner is asking for exactly that. He is asking for the reasoning underlying the closure of the Board's investigation. (Motion at p. 6.) The Board is not required to provide this information to the public.

To the extent that Petitioner claims he is entitled to investigative materials because he is a litigant, this is not the case. (Am. Pet. at p. 8.) The parties a Board investigation and any subsequent disciplinary action are the Board and the licensee. (See Bus. & Prof. Code § 2220.5)

Because Petitioner seeks records which are exempt by law from disclosure, he has failed to state a claim for which relief may be granted.

**III. RECORDS SOUGHT BY PETITIONER PURSUANT TO THE CPRA EXEMPT FROM DISCLOSURE PURSUANT TO GOVERNMENT CODE SECTION 6254, SUBDIVISION (K), EVIDENCE CODE SECTION 1040, AND GOVERNMENT CODE SECTION 6255**

In his second cause of action, Petitioner contends that Respondents abused their discretion in the interpretation and application of Evidence Code section 1040. He contends that a balancing test under Evidence Code section 1040, subdivision (b)(2), must be employed to determine whether investigative records are exempt from disclosure pursuant to Government Code section 6254, subdivision (f). (Am. Pet. at 9-11; Motion at pp. 7-9.) He contends that because the investigation involved a death, the Board is required to release an explanation for that death. (Am. Pet. at pp. 9-11; Motion at pp. 8-9.) Petitioner's claim should be denied.

**A. Petitioner's Claim is not Ripe for Review, and Petitioner has Failed to Exhaust his Administrative Remedies**

Petitioner argues that after weighing the public interest with the need for preserving confidentiality, the balance requires that the Board provide an explanation for Mrs. Murray's death. (Motion at pp. 7-9.) To the extent Petitioner is requesting information not included in his CPRA request – Outpatient Report of Death – his claim should be denied, as set forth more fully in Argument II, Section C.

1           **B. Whether Records are Exempt from Disclosure Pursuant to Government**  
2           **Code Section 6254, Subdivision (f), Does not Depend on a Weighing Under**  
3           **Evidence Code Section 1040.**

4           Petitioner contends that Respondents erred in not applying the balancing test required by  
5           Evidence Code section 1040, relating to official records, in determining whether records were  
6           exempt from disclosure under Government Code section 6254, subdivision (f).<sup>3</sup> (Motion at pp. 9-  
7           11.) Subdivision (f) is applied according to its terms by compelling the disclosure only of that  
8           information from law enforcement investigatory records that the statute expressly requires to be  
9           disclosed.” (*Williams v. Superior Court, supra*, 5 Cal.4th at p. 354.) Evidence Code section 1040  
10          does not apply to this particular exemption. (*Id.*, at pp. 349-354.)

11           **C. Records Sought by Petitioner are Exempt from Disclosure Pursuant to**  
12           **Government Code Section 6254, Subdivision (k), and Evidence Code**  
13           **Section 1040, as they Constitute Official Records.**

14          A public entity may invoke the Official Information Privilege to protect from disclosure  
15          official information where competing interests favor nondisclosure. (Evid. Code, § 1040.)  
16          Application of the privilege requires that it be based on official information acquired by a public  
17          employee in the course of duty and not officially open or disclosed to the public prior to the time  
18          the privilege is claimed. (Evid. Code, § 1040, subd. (a).) Application of the privilege also  
19          involves weighing competing interests, and a court should preclude disclosure as against the  
20          public interest where there is a necessity for preserving the confidentiality of the information that

21          <sup>3</sup> Evidence Code section 1040 provides, in relevant part:

22          “(a) As used in this section, ‘official information’ means information acquired in  
23          confidence by a public employee in the course of his or her duty and not open, or officially  
24          disclosed, to the public prior to the time the claim of privilege is made.

25          “(b) A public entity has a privilege to refuse to disclose official information, and to prevent  
26          another from disclosing official information, if the privilege is claimed by a person authorized by  
27          the public entity to do so and:

28          “(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of  
29          this state; or

30          “(2) Disclosure of the information is against the public interest because there is a necessity  
31          for preserving the confidentiality of the information that outweighs the necessity for disclosure in  
32          the interest of justice; but no privilege may be claimed under this paragraph if any person  
33          authorized to do so has consented that the information be disclosed in the proceeding. In  
34          determining whether disclosure of the information is against the public interest, the interest of the  
35          public entity as a party in the outcome of the proceeding may not be considered.”

1 outweighs the necessity for disclosure. (Evid. Code, § 1040, subd. (b)(2); *County of Orange v.*  
2 *Superior Court of Orange County* (2000) 79 Cal.App.4th 759, 763.)

3       The information sought by Petitioner is “official information.” It is obtained by the Board  
4 in the scope of its duties to investigate complaints to determine whether there has been a violation  
5 of the law and to determine whether disciplinary or other action is warranted. (See Bus. & Prof.  
6 Code §§ 2001.1, 2004, 2220, 2220.5; Opp., Exh. A, Dec. at p. 2, ¶ 2.) The information is not  
7 public. The Outpatient Report of Death is transmitted directly to the Board. It contains private  
8 patient medical information that is not available to the public. Medical records received by  
9 authorization, as here, are obtained in confidence. The authorization for release in Board  
10 investigations indicates that the disclosure of records is required for official use, including  
11 investigation and possible administrative and/or criminal proceedings. (Am. Pet., Exh. 2c-2d.)  
12 Information obtained through the course of the investigation remains confidential unless and until  
13 disciplinary proceedings are initiated. (See Bus. & Prof. Code, § 2225, subd. (a).) Complaints,  
14 any explanatory statements by a physician, or offers of mitigating evidence are kept in confidence  
15 in a licensee’s central file. If no action is taken on a complaint or if the complaint is found to be  
16 without merit, the file is purged. (Bus. & Prof. Code § 800.)

17       In determining whether such official information must be disclosed, consideration is given  
18 to the public policy favoring disclosure. The CPRA was passed to “ensure public access to vital  
19 information about the government’s conduct of its business.” (*City of San Jose v. Superior Court*,  
20 *supra*, 74 Cal.App.4th at p. 1016 (citations omitted).) Petitioner seeks disclosure of information  
21 of the cause of Mrs. Murray’s death on the basis that disclosing that information to citizens and  
22 individuals is an important interest, and Petitioner has no other means of discovering the cause of  
23 death. (Motion at pp. 8-9.) Respondents certainly agree with Petitioner that “[d]eath is the worst  
24 possible outcome of surgery.” (Motion at 9.) However, obtaining the Board’s investigative  
25 materials to assist in ascertaining the cause Mrs. Murray’s death is outweighed by the Board’s  
26 need to maintain the confidentiality of investigations in order to fulfill its mandate of public  
27 protection. (Bus. & Prof. Code, § 2001.1.)

28       The public interest in obtaining the confidential investigatory materials sought here is

1 minimal. The Board's responsibilities are outlined in Business and Professions Code section  
2 2004, and include investigation for the purpose of disciplining or limiting a licensee's actions.  
3 Petitioner is seeking information gathered by the Board and opinions obtained based on that  
4 information as an explanation for Mrs. Murray's death. The Board is not charged with making  
5 cause-of-death determinations in its investigations for the purpose assisting individual citizens.  
6 Board investigations are for the purpose of determining whether an action, such as discipline or a  
7 practice restriction, is necessary to insure public safety. These determinations do not depend  
8 upon patient injury. (See *Bryce v. Board of Medical Quality Assurance* (1986) 184 Cal.App.3d  
9 1471, 1475-1476.) It is entirely possible that a physician can be found to be unsafe to practice  
10 medicine in the complete absence of patient harm. Petitioner argues that when a death is involved,  
11 release of information to citizens and individuals, rather than non-disclosure is favored. (Motion  
12 at p. 8.) But, the support for his argument comes from cases involving requests for information  
13 by litigants. (Motion at p. 8.) As stated in Argument II, Petitioner is not a litigant to this action.  
14 Petitioner does not have the same interest in obtaining information as a party litigant. And, here,  
15 there is no bar to Petitioner obtaining Mrs. Murray's medical records and obtaining an opinion as  
16 to her cause of death. Petitioner has access to Mrs. Murray's medical records. He has made  
17 representations in his Amended Petition about information that would naturally be contained  
18 within medical records, and he provided authorization for the release of medical records to the  
19 Board. (Am. Pet. at 3-4, Exhs. 1-2(e).) The need for disclosure is lessened where there is an  
20 availability of an alternative, less intrusive means of obtaining the information. (See *County of*  
21 *Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1324.)

22 The public interest in non-disclosure clearly outweighs the public interest in disclosure here.  
23 Disclosing investigatory information would, in fact, be detrimental to the Board's ability to  
24 provide public protection by thoroughly investigating licensee conduct, and it would have a  
25 chilling effect on future investigations. Licensees are not likely to provide explanatory  
26 information if such information becomes public. Without these explanations, the Board is not  
27 able to fully assess the full scope of the care and treatment of patients, as well as the  
28 circumstances surrounding possible violations of the laws governing the practice of medicine.

1 Members of the public, health care institutions, and other possible complainants are less likely to  
2 provide the Board with information if their identities are public. "The prospect of public  
3 exposure discourages complaints and inhibits effective enforcement." (*City of San Jose v.*  
4 *Superior Court, supra*, 74 Cal.App. 4th at p. 1020 (citations omitted).) Patients, too, are less  
5 likely to share confidential medical information for purposes of investigation with the risk that the  
6 information will be publicly shared. Further, requiring disclosure investigative materials would  
7 not result in a disclosure to only those members of the public or to individuals by whom the  
8 information is sought. The information would be available to the public at large. (*Id.*, at p. 1018.)  
9 Although Petitioner states that the information he seeks is privileged to him (Motion at p. 9), the  
10 effect would be a disclosure to the general public.

11 A licensee would also face embarrassment and damage to his reputation through disclosure  
12 of a complaint, materials gathered in investigation, and the accompanying opinions and analysis  
13 of the complaint, even when no violations of the law had been found that would lead to action on  
14 his license and when such information would be purged from his licensing file. (See Bus. & Prof.  
15 Code § 800, subd. (d); *Rackauckas v. Superior Court, supra*, 104 Cal.App.4th at p. 176.) Here,  
16 the determination was made that there was no violation of the law. (Am. Pet., Exh. 10.) Making  
17 public the entire investigation file would unnecessarily expose information gathered in that  
18 investigation. It would also expose information clearly exempt from the disclosure – the opinions  
19 and conclusions reached as a result of the investigation. (See Gov't. Code, § 6254, subd. (f);  
20 *Rackauckas v. Superior Court, supra*, at pp. 176-177.)

21 Under the circumstances present here, public policy and public protection warrants non-  
22 disclosure.

23 **D. Records Sought by Petitioner are Exempt from Disclosure Pursuant to**  
24 **Government Code Section 6255**

25 Government Code section 6255 "allows a government agency to withhold records if it can  
26 demonstrate that, on the facts of a particular case, the public interest served by withholding the  
27 records clearly outweighs the public interests served by disclosure." (*County of Santa Clara v.*  
28 *Superior Court, supra*, 170 Cal.App.4th at p. 1321.) As set forth in Section D, *infra*, the public

1 interest served in releasing investigatory materials in this case is far outweighed by the public  
2 interest is non-disclosure. Petitioner's Petition seeking disclosure of this information should be  
3 denied.

4 **IV. RESPONDENTS ARE NOT REQUIRED TO SEGREGATE AND RELEASE THE RECORDS**  
5 **SOUGHT IN PETITIONER'S CPRA REQUEST**

6 In his Third Cause of Action, Petitioner contends that Respondents failed to properly  
7 respond to his CPRA request because they did not parse the reports of death and produce those  
8 portions that may appropriately be disclosed. (Am. Pet. at 12-13; Motion at p. 9.) The only  
9 record Petitioner sought was an Outpatient Report of Death. As set forth fully in Argument II,  
10 that record was not required to be filed with the Board, and it does not exist in the Board's  
11 records. (Opp. Dec. at pp. 2-3.) For the reasons set forth in Arguments II and III, Petitioner's  
12 claims that additional investigatory materials should be disclosed are not ripe, and he has failed to  
13 exhaust his administrative remedies. Respondents did not have the opportunity to segregate  
14 materials that were not sought under a CPRA request, and this claim should be denied.

15 Petitioner contends Respondents failed to assist him in identifying records and information  
16 that are responsive to the request or the purpose of the request, pursuant to Government Code  
17 section 6253.1, subdivision (a)(1) (Am. Pet. at 12). No such obligation exists in circumstances,  
18 such as here, wherein the public agency has determined that the request should be denied based  
19 upon an exemption listed in Government Code section 6254. (Gov. Code § 6253.1, subd. (d).)

20 **V. CALIFORNIA CONSTITUTION, ARTICLE I, SECTION 3(B) DOES NOT MANDATE**  
21 **DISCLOSURE OF THE INFORMATION SOUGHT BY PETITIONER IN HIS CPRA**  
**REQUEST.**

22 In his Fourth Cause of Action, Petitioner alleges a violation of California Constitution,  
23 Article I, section 3(b), for failure to provide access to the People's business. Petitioner contends  
24 that reports of the death of patients, and the Board's investigation of such deaths, are of vital  
25 importance to the consumers and to the public health of the People of California. Thus, he claims,  
26 that non-privileged portions of the reports should be made available to the public, and information  
27 privileged to the deceased should be made available to beneficiaries. (Am. Pet. at 13.) The  
28 California Constitution was amended to include the people's right to access of public records.

1 However, this amendment did not repeal or otherwise alter the specific exemptions already in  
2 existence. (Cal. Const., art. I, § 3.) As set forth in Arguments II and III, the records sought by  
3 Petitioner are exempt from disclosure.

4 **VI. NON-DISCLOSURE OF EXEMPTED RECORDS DOES NOT VIOLATE PUBLIC POLICY**

5 Petitioner's Fifth Cause of Action alleges a violation of public policy. Petitioner contends  
6 that by writing its own non-statutory exemption to the CPRA, the Board has placed its own  
7 interests before the public interest. (Am. Pet. at 13-14.) As set forth in Arguments II and III, the  
8 records sought in Petitioner's CPRA request, to the extent they exist, were properly exempted  
9 from disclosure and for purposes of fulfilling the Board's mission of public protection.

10 **VII. PETITIONER IS NOT ENTITLED TO COSTS AND ATTORNEY'S FEES**

11 Government Code section 6259, subdivision (d), provides that the court shall award costs  
12 and attorney's fees should a Petitioner prevail in litigation involving a CPRA request. Petitioner  
13 is not entitled to costs and fees in his matter. As he indicates, the Outpatient Report of Death is  
14 not relevant to his CPRA request. (Motion at p. 6.) As set forth in Arguments II and III,  
15 Petitioner did not request additional the investigative material prior to filing the Petition.


16 **CONCLUSION**

17 The Board did not prejudicially abuse its discretion when it denied Petitioner's CPRA  
18 request, and the Petition for Writ of Mandate should be denied.

19 Dated: December 16, 2016.

Respectfully submitted,

20 KAMALA D. HARRIS  
21 Attorney General of California  
22 ROBERT MCKIM BELL  
23 Supervising Deputy Attorney General

24   
25 PEGGIE BRADFORD TARWATER  
26 Deputy Attorney General

27 *Attorneys for Respondents*  
28 *Medical Board of California*  
*Kimberly Kirchmeyer, Executive Director,*  
*Medical Board of California*  
*Kerrie D. Webb, Staff Counsel,*  
*Medical Board of California*

# **EXHIBIT A**

1 KAMALA D. HARRIS  
Attorney General of California  
2 ROBERT MCKIM BELL  
Supervising Deputy Attorney General  
3 PEGGIE BRADFORD TARWATER  
Deputy Attorney General  
4 State Bar No. 169127  
California Department of Justice  
5 300 South Spring Street, Suite 1702  
Los Angeles, California 90013  
6 Telephone: (213) 620-6068  
Fax: (213) 897-9395  
7 E-mail: Peggie.Tarwater@doj.ca.gov  
Attorneys for Respondents,  
8 Medical Board of California  
Kimberly Kirchmeyer, Executive Director,  
9 Medical Board of California  
10 Kerrie D. Webb, Staff Counsel,  
Medical Board of California

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF LOS ANGELES  
13

14 **BRUCE THOMAS MURRAY,**

Petitioner,

17 v.

18 **MEDICAL BOARD OF CALIFORNIA, et al.,**

20 Respondents.

Case No. BS158575

**DECLARATION OF RAMONA  
CARRASCO**

**[OPPOSITION TO MOTION FOR  
JUDGMENT ON WRIT FILED  
CONCURRENTLY]**

Trial Date: January 17, 2017

Time: 9:30 a.m.

Dept: 82

Hon. Mary H. Strobel

Action Filed: October 5, 2015

22 I, RAMONA CARRASCO, hereby declare:

24 1. I am a Staff Services Manager, employed by the Medical Board of California,  
25 Department of Consumer Affairs (Board). I was initially employed by the Board as a Staff  
26 Services Analyst (Analyst) in the Central Complaint Unit of the Board in March 2001. I have  
27 been employed as a Staff Services Manager since August 2010. My duties include supervising  
28

1 and directing the activities of Central Complaint Unit staff in the intake and review of complaints  
2 received by the Board to determine whether there has been a violation of the statutes and  
3 regulations governing healing arts licensees.

4       2. I am familiar with procedures for processing complaints received in the Central  
5 Complaint Unit. The term, "complaints", refers to consumer complaints, reports mandated by the  
6 Business and Professions Code, information received from government agencies, information  
7 received from insurance companies, and other sources of information that may convey a violation  
8 of the laws governing healing arts licensees. When a complaint is received by the Board, it is  
9 processed by a Management Services Technician in the Central Complaint Unit. Information  
10 from the complaint is entered into the Board's data base, and the complaint is assigned a control  
11 number. The complaint is then assigned to an Analyst for review to determine whether the  
12 complaint falls within the Board's jurisdiction and then for the gathering of additional  
13 information and investigation.

14       3. I am familiar with the reporting requirement described in Business and Professions  
15 Code section 2240, subdivision (a). A report, in writing on a form prescribed by the Board, is  
16 required to be submitted to the Board when a patient death results from a medical procedure  
17 outside of a general acute care hospital. A report under section 2240, subdivision (a), is deemed a  
18 "complaint" by the Board. When the report is received by the Board, it is logged into the Board's  
19 data base, along with any information provided on the form, it is assigned a control number by a  
20 Management Services Technician and then assigned to an Analyst for the gathering of additional  
21 information and investigation. The report form is provided on the Board's website. A true and  
22 correct copy of the form provided on the Board's website is attached hereto as Exhibit A.

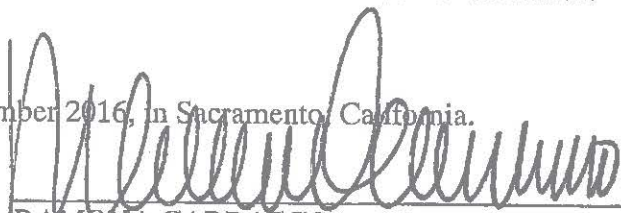
23       4. I have searched the Board's database and determined that there is no record of receipt  
24 of a report pursuant to Business and Professions Code section 2240, subdivision (a), relating to  
25 the death of patient Audrey B. Murray filed by or on behalf of James C. Murchison, M.D.

26       5. I am familiar with a complaint received by the Board relating to the care and  
27 treatment of patient Audrey B. Murray by James C. Murchison, Complaint Control Number 800  
28 2014 005263. I have reviewed all materials received by the Board relating to Complaint Control

1 Number 800 2014 005263. No reports of death, as set forth in Business and Professions Code  
2 section 2240, are contained within the materials.

3 I declare under penalty of perjury, under the laws of the State of California that the  
4 foregoing is true and correct.

5 Executed this 15 day of December 2016, in Sacramento, California.



6  
7 RAMONA CARRASCO  
8 Staff Services Manager,  
9 Medical Board of California-Enforcement Division  
10 Central Complaint Unit  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



## MEDICAL BOARD OF CALIFORNIA

### Central Complaint Unit



## OUTPATIENT SURGERY – PATIENT DEATH REPORTING FORM

State law (Section 2240 (a) of the California Business and Professions Code) requires that whenever a patient death results from a medical procedure outside of a general acute care hospital, either by the physician or by a person acting under the physician's orders or supervision, the physician must complete this form and send it to: Medical Board of California, 2005 Evergreen Street, Sacramento, CA 95815, Attn: Central Complaint Unit

### 1. Patient Name:

Last \_\_\_\_\_ First \_\_\_\_\_ Middle \_\_\_\_\_

Address: \_\_\_\_\_ Date of Birth: \_\_\_\_\_  
Number Street City State ZIP Code

Medical Record Number: \_\_\_\_\_ Physical Location of Medical Record: \_\_\_\_\_

### 2. Name of physician who performed surgery:

Last \_\_\_\_\_ First \_\_\_\_\_ Middle \_\_\_\_\_

2a. Physician's practice specialty and ABMS certification: \_\_\_\_\_

2b. Physician's license number: \_\_\_\_\_

### 3. Surgery Date: \_\_\_\_\_

3a. Patient Identifier (Social Security Number, Patient ID Number, etc.): \_\_\_\_\_

### 4. Name and address of outpatient setting where surgery/outpatient procedure was performed:

Name \_\_\_\_\_

Address: \_\_\_\_\_  
Number Street City State ZIP Code

### 5. Outpatient setting is licensed, certified, and/or accredited by:

- a. \_\_\_\_\_
- b. \_\_\_\_\_
- c. \_\_\_\_\_

### 6. Type(s) of outpatient procedures performed:

### 7. Circumstances of patient's death: (please attach additional sheets if necessary)

### 8. Name and location of hospital or emergency center where patient was transferred: (a separate Patient Transfer Form must also be completed)

9. Date of Report: \_\_\_\_\_ Physician Completing this Form: \_\_\_\_\_  
 (Please Print Legibly)

**Exhibit A**

**DECLARATION OF SERVICE BY OVERNIGHT COURIER**

Case Name: **BRUCE THOMAS MURRAY v. MEDICAL BOARD OF CALIFORNIA**

No.: **BS158575**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.


On December 19, 2016, I served the attached **OPPOSITION TO MOTION FOR JUDGMENT ON WRIT** by placing a true copy thereof enclosed in a sealed envelope with the **Golden State Overnight** addressed as follows:

Bruce Thomas Murray  
1931 E Street  
San Diego, CA 92102

Petitioner In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 19, 2016, at Los Angeles, California.

\_\_\_\_\_  
S. Barshefski  
Declarant

\_\_\_\_\_  
  
Signature