

Bruce Thomas Murray,

Judge Mary Strobel  
Hearing: May 3, 2016

#3

v.

*Medical Board of California, et al.*

BS158575

Tentative Decision on Demurrer:  
Overruled

Respondents Medical Board of California; Kimberly Kirchmeyer, Executive Director of the Medical Board of California; and Kerrie D. Webb, Staff Counsel of the Medical Board of California ("Respondents") demur to the first amended petition of Petitioner Bruce Thomas Murray ("Petitioner") on the grounds that Petitioner's claims are not ripe, the petition is uncertain, and the petition fails to state a cause of action.

### **Statement of the Case**

According to the first amended petition, Petitioner is the son and beneficiary of Audrey Bevan Murray, who died on June 5, 2013. (First Amended Petition (FAP) "The Parties" ¶ 1.) Petitioner alleges that at approximately 8 a.m., June 4, 2013, Dr. James C. Matchison performed a cardiac catheterization procedure on Audrey Murray. (Id. "Facts" ¶ 1.) Due to complications, the procedure was aborted. (Id. ¶ 2.) At approximately 10 a.m., June 4, 2013, Audrey Murray was admitted to Torrance Memorial Medical Center for post-procedure recovery. (Id. ¶ 3.) She was discharged at 11:30 on June 5, 2013, but was transported back to Torrance Memorial that same day at 3:30 pm for emergency treatment and died shortly thereafter. (Id. ¶¶ 6-7.)

On May 15, 2014, Petitioner filed a complaint with the Medical Board, seeking and explanation and cause for his mother's death. (FAP ¶ 9, Exh. 1.) Petitioner complained that Dr. Matchison "either can't or won't tell me what caused her death." (Ibidi.)

On October 10, 2014, Petitioner sent an email to Linda Serrano of the Medical Board requesting a copy of Dr. Matchison's "Report for Death of Patient" / "Outpatient Surgery – Reporting of Death" for Audrey. (FAP Exh. 4.) Petitioner reiterated that request on December 15, 2014. (Id. Exh. 5.) On January 21, 2015, Serrano stated in an email "we do not provide copies of those reports." (Id. Exh. 7.)

On February 10, 2015, Petitioner sent to the Medical Board a letter requesting, pursuant to Government Code section 6253.1, the following documents: the Report of Death of Patient pursuant to Business and Professions Code section 2240; and (2) the Outpatient Surgery-Reporting of Death pursuant to California Code of Regulations title 16, section 1356.4. (FAP Exh. 8.)

On February 20, 2015, the attorney Kerrie Webb of the Medical Board responded to Petitioner's document request, stating:

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

Please feel free to contact me if you have any further questions. (FAP Exh. 9.)

### **Procedural History**

On October 5, 2015, Petitioner filed a petition for writ of mandate.

On November 23, 2015, Respondents filed a demurrer to the petition.

On January 7, 2016, before a ruling on the demurrer, Petitioner filed a first amended petition.

On February 8, 2016, Respondents filed a demurrer to the first amended petition. Respondents filed a declaration showing meet and confer pursuant to Code of Civil Procedure section 430.41.

On April 19, 2016, Petitioner filed an opposition to the demurrer.

No reply has been received. The reply was due by Tuesday, April 26, 2016.

### **Summary of Applicable Law**

A demurrer tests the sufficiency of a pleading, and the grounds for a demurrer must appear on the face of the pleading or from judicially noticeable matters. (Code Civil Procedure section 430.30(a); *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) A demurrer may be sustained without leave to amend when there is no reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Pursuant to the CPRA (Gov. Code § 6250, et seq.), individual citizens have a right to access government records. In enacting the CPRA, the California Legislature declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code, § 6250; see also *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 63.) To facilitate the public's access to this information, the CPRA mandates, in part, that:

[E]ach state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available . . .” (Gov. Code § 6253(b).)

## Analysis

### First Cause of Action – Denial of Request under Gov. Code § 6254

#### Ripeness and Exhaustion of Administrative Remedies

Respondents argue that Petitioner’s first cause of action is not ripe because Respondent Webb told Petitioner, in her February 20, 2015, “Please feel free to contact me if you have further questions.” (FAP Exh. 9.) Respondents argue that Petitioner should have taken this invitation to meet and confer. (Dem. 5.) These arguments lack merit.

“A decision attains the requisite administrative finality when the agency has exhausted its jurisdiction and possesses ‘no further power to reconsider or rehear the claim.’ [Citation.] Finality may be defined either expressly in the statutes governing the administrative process or it may be determined from the framework in the statutory scheme. [Citation.] Until a public agency makes a ‘final’ decision, the matter is not ripe for judicial review.” (*Cal. Water Impact Network v. Newhall County Water Dist.* (2008) 1464, 1485

Exhaustion of administrative remedies is “a jurisdictional prerequisite to judicial review.” (*Cal. Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4<sup>th</sup> 1464, 1489.) “The doctrine of exhaustion of administrative remedies is a closely related concept to finality. The policy reasons behind the two doctrines are similar. The exhaustion doctrine precludes review of an intermediate or interlocutory action of an administrative agency. [Citation.] A party must proceed through the full administrative process ‘to a final decision on the merits.’” (*Ibid.*)

Here, Exhibit 9 to the FAP shows that the Medical Board denied Petitioner’s CPRA request and the decision was final. Although Webb invited Petitioner to contact her with questions, there was no reason for Petitioner to believe that the Medical Board would reconsider its denial of the CPRA request. Respondents do not claim that the CPRA statutory scheme required Petitioner to take further action. Accordingly, the FAP pleads facts showing that the first cause of action is ripe and Petitioner exhausted administrative remedies. The demurrer to the first cause of action pursuant to Code of Civil Procedure section 430.10(a) is overruled.

#### Uncertainty

Demurrers for uncertainty are strictly construed, because discovery can be used for clarification, and apply where defendants cannot reasonably determine what issues or claims are stated. (*Khoury v. Maly’s of Cal., Inc.* (1993) 14 Cal.App.4<sup>th</sup> 612, 616.) A

failure to specify what aspects of a complaint are uncertain generally results in a demurrer being overruled as to such grounds. (*Fenton v. Groveland Community Services Dist.* (1982) 135 Cal.App.3d 797, 809.) Respondents argue that certain allegations in the petition are “unintelligible,” but they have also responded to the merits in their demurrer and they fail to specify how any allegations are uncertain. (Dem. 5.) The court finds that Respondents can reasonably determine what issues or claims are stated. The demurrer for uncertainty is overruled.

#### Failure to State a Claim

Respondents argue that the documents requested by Petitioner relate to an investigation of the Medical Board and are privileged pursuant to Government Code section 6254(f) and (k) and Evidence Code section 1040. (Dem. 5-6.)

While the CPRA provides express exemptions to its disclosure requirements, these exemptions must be narrowly construed and the agency bears the burden of showing that a specific exemption applies. (*Sacramento County Employees' Retirement System v. Superior Court* (2013) 195 Cal.App.4th 440, 453.)

Relevant here, Government Code section 6254(f) generally exempts “records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of ... any state or local police agency, ... or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes.” (Gov. Code § 6254(f) [emphasis added].)

Petitioner requested a report of Audrey Murray's death pursuant to Business and Professions Code section 2240. Subdivision (a) provides: “A physician and surgeon who performs a medical procedure outside of a general acute care hospital, as defined in subdivision (a) of Section 1250 of the Health and Safety Code, that results in the death of any patient on whom that medical treatment was performed by the physician and surgeon, or by a person acting under the physician and surgeon's orders or supervision, shall report, in writing on a form prescribed by the board, that occurrence to the board within 15 days after the occurrence.”

In her February 20, 2015 letter, Webb asserted that “reports for death of a patient are treated as complaints to the Board.” (FAP Exh. 9.) Respondents do not show that all reports prepared pursuant to Business and Professions Code section 2240 result in a licensing investigation. According to the petition, the Medical Board investigated Audrey Murray's death because of the complaint filed by Petitioner, not on its own initiative. (FAP Exh. 10.) Therefore, the reason for nondisclosure asserted in Respondents' February 20, 2015 letter seems questionable. At the least, it is a factual question as to whether the withheld documents are considered “complaints to the Board.”<sup>1</sup>

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<sup>1</sup> Also, section 6254(f) exempts “records of complaints to .... the office of the Attorney General and the Department of Justice, the Office of Emergency Services and any state

In the demurrer, Respondents seem to argue that the report at issue is privileged because it is contained in an "investigatory file ... compiled [for] licensing purposes." (§ 6254(f).) Based on the allegations of the petition, it seems possible that Dr. Matchison prepared a Report of Death of Patient pursuant to Business and Professions Code section 2240, and that the Medical Board may have obtained a copy. It also seems possible that the report was thereafter placed in an investigatory file related to Dr. Matchison. Nevertheless, Respondents bear the burden of showing that a specific exemption applies. (*Sacramento County Employees' Retirement System v. Superior Court* (2013) 195 Cal.App.4th 440, 453.) Nothing on the face of the petition shows dispositively that the requested records are held within a privileged investigatory file.<sup>2</sup>

Respondents also argue that the requested documents are exempt pursuant to Evidence Code section 1040, which is incorporated in Government Code section 6254(k). Respondents apparently contend that the documents were acquired in confidence by a public employee in the course of her duties. It is not clear that the reports pursuant to Business and Professions Code section 2240 would be submitted to the Board in confidence. Respondents do not explain why they believe the documents would be exempt under Evidence Code section 1040(b), and therefore have waived the argument for purposes of this demurrer. The court is unable to conclude from the allegations of the petition that these exemptions apply.

Despite asserting that the documents at issue are exempt from disclosure, Respondents also argue that Petitioner seeks non-existent records. (Dem. 7.) Respondents argue that there is no allegation that the patient death occurred in an outpatient setting, thus falling within the scope of Business and Professions Code section 2240. However, Petitioner alleges facts that suggest Dr. Matchison initially performed a cardiac catheterization procedure on Audrey Murray in an outpatient setting, shortly before her death. (FAP ¶ 1.) Business and Professions Code section 2240 requires a report for an outpatient surgery that "results in the death" of the patient. It does not state that the death must occur in the outpatient setting to be reportable. As Respondents do not cite any authorities to the contrary, the court cannot conclude on this demurrer that Audrey Murray's death was not reportable under section 2240.

Respondents also assert as a factual matter that the Board "is not in possession of the records sought." (Dem. 7.) The court cannot, and does not, consider this extraneous evidence in ruling on a demurrer. (*Hahn v. Mirza* (2007) 147 Cal.App.4th 740, 747; *Allred v. Bekins Wide World Van Services* (1975) 45 Cal.App.3d 984, 993.)

The general demurrer to the first cause of action is overruled.

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or local police agency." Respondents do not explain why they believe the Medical Board falls within those categories of public agencies.

<sup>2</sup> Respondents argue that to the extent the records are not contained in an investigatory file, they may be obtained by Petitioner with proper medical releases. (Dem. 7, fn. 4.) Even if true, this does not show Respondents would have no duty to comply with a CPRA request.

### Second Cause of Action – Application of Evid. Code § 1040

The demurrer to the second cause of action is based on the same arguments discussed above. For the reasons stated above, the demurrer to the second cause of action is overruled in its entirety.

### Third Cause of Action – Failure to Properly Respond under the CPRA

The demurrer to the third cause of action is based on the same arguments discussed above. For the reasons stated above, the court rejects those arguments.

Respondents also argue that to the extent the claim is based on Government Code section 6253.1(a)(1), a public agency does not have an obligation to assist in identifying responsive information if it has determined the documents are exempt. However, Petitioner alleges that Respondents improperly classified the documents as exempt. (FAP p. 12.) It can be inferred from the FAP, therefore, that Respondents did not satisfy its duty to “Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request.” (§ 6253.1(a)(1).)

The demurrer to the third cause of action is overruled in its entirety.

### Fourth and Fifth Causes of Action – Violations of Constitution and Public Policy

The demurrer to the fourth and fifth causes of action is based on the same arguments discussed above. (See Dem. 9-10.) Respondents did not assert any additional arguments with respect to these causes of action, and therefore waived additional objection to these causes of action for purposes of this demurrer. For the reasons stated above, the demurrer to the fourth and fifth causes of action is overruled in its entirety.

### Conclusion

The demurrer is overruled in its entirety.