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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO**

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11 VOICE OF SAN DIEGO; KPBS PUBLIC) No. 37-2020-00026651-CU-WM-CTL
BROADCASTING; AND THE SAN DIEGO) Action Filed: July 29, 2020
12 UNION TRIBUNE,)
13) COUNTY OF SAN DIEGO'S
Petitioners,) SUPPLEMENTAL OPPOSITION BRIEF
14) [IMAGED FILE]
v.)
15) Dept: C-73
COUNTY OF SAN DIEGO, AND DOES)
1-10, inclusive,) Judge: Hon. Joel R. Wohlfeil
16)
Respondent.)
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20 Respondent County of San Diego (“County”) submits this supplemental opposition brief
21 pursuant to this Court’s October 26, 2020 Minute Order.

22 **I. INTRODUCTION**

23 In this lawsuit, Petitioners seek an Order requiring the County to disclose the name and
24 address of all locations where COVID-19 outbreaks have occurred.¹ Prior to the court hearing,
25 this Court issued a comprehensive, six page Tentative Ruling (“Tent. Ruling.”) denying the
26 petition. This Court held that the requested information was exempt from disclosure because (1)

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¹ Page 1 of the Tentative Ruling correctly notes the parties “entered into a written stipulation
28 affirming the only information sought in this lawsuit is the location information redacted from the
spreadsheet.”

1 pursuant to Government Code section 6254(k) the information is “confidential by the express
2 language of section [17 CCR] 2502(f)” (Tent. Ruling pp. 3-4); and (2) pursuant to Government
3 Code section 6255(a) the public interest served by not disclosing the information clearly
4 outweighs the public interest served by disclosure of the information (Tent. Ruling pp. 4-6.)

5 After the hearing on the petition, this Court issued its October 26 Minute Order
6 requesting further briefing on two code sections not discussed in Petitioners’ brief: Health and
7 Safety Code sections 120175.5 and 120130.² Section 120175.5 requires the County Health
8 Officer to share disease outbreak information with local cities subject to state and federal
9 privacy laws. Section 120130 requires the local health officer to establish a list of reportable
10 diseases and conditions to be published in the California Code of Regulations.

11 As discussed below, section 120175.5 confirms the statutorily private, confidential and
12 protected nature of the COVID-19 outbreak information. And Section 120130 does nothing to
13 change that fact. Therefore, the Tentative Ruling should be affirmed.

14 **II. SECTION 120175.5 CONFIRMS DISCLOSURE OF THE OUTBREAK**
15 **LOCATION INFORMATION IS PROHIBITED AND THUS EXEMPT UNDER §**
16 **6254(k) OF THE PUBLIC RECORDS ACT (AND SECTION 120130 DOES**
17 **NOTHING TO CHANGE THAT FACT).**

18 **A. HEALTH AND SAFETY CODE SECTION 120175.5 EXPRESSLY AFFIRMS**
19 **THE PRIVACY RIGHTS OF INDIVIDUALS WHO TEST POSITIVE FOR**
20 **COVID-19, THEREBY PROHIBITING THE COUNTY FROM DISCLOSING**
21 **OUTBREAK INFORMATION.**

22 In their Opening Brief (“OB”), Petitioners argued that by sharing COVID-19 outbreak
23 information with the City of El Cajon, the County waived its right to withhold location
24 information from the news media. (Petitioners’ Opening Brief 10:1-15.) However, the
25 County’s Opposition explained – and this Court agreed - that argument was incorrect because
26 Health and Safety Code section 120175.5 required the County to share the COVID-19 outbreak
27 information with local cities. (County’s Opposition (“Opp,”), 6:21-7:9; Tent. Ruling p. 3.) In
28 relevant part, section 120175.5 states:

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² Although Petitioners did not discuss section 120175.5 in either their Opening or Reply briefs, the County did discuss that section in its Opposition Brief at pages 6-7 and 12-13.

1 (a) During an outbreak of a communicable disease, or upon the imminent and
2 proximate threat of a communicable disease outbreak or epidemic that
3 threatens the public’s health, a local health officer shall do both of the
4 following:

5 (1) Promptly notify and update governmental entities within the local health
6 officer’s jurisdiction about communicable diseases listed in Section 2500 of
7 Title 17 of the California Code of Regulations that may affect them, if, in
8 the opinion of the local health officer, action or inaction on the part of the
9 governmental entity might affect outbreak response efforts.

10 (2) Make any relevant information available to governmental entities,
11 including, but not limited to, the locations of concentrations of cases, the
12 number of residents affected, and the measures that the governmental
13 entities should take to assist with outbreak response efforts.

14 Health & Saf. Code § 120175.5.

15 The County also pointed out in its Opposition that the outbreak disclosures required by
16 section 120175.5 are expressly subject to both state and federal privacy laws. (Opp. 7:7-9 and
17 7:27-28.) Subsection (c) states: “A local health officer that provides the notification and
18 information to a governmental entity pursuant to subdivision (a), and the governmental entity
19 that receives the notification and information, shall comply with all applicable state and federal
20 privacy laws.” (Health & Saf. Code § 120175.5(c) [emphasis added].) Petitioners did not
21 address this statutory protection in its Reply, and barely mentions it in their Supplemental Brief.

22 Section 120175.5 specifically references a California regulation – 17 CCR § 2500 -
23 containing one of those “state privacy laws.” Section 120175(a)(1) states: “During an outbreak
24 of a communicable disease . . . a local health officer shall . . . : (1) Promptly notify and update
25 governmental entities within the local health officer’s jurisdiction about communicable disease
26 listed in **Section 2500 of Title 17** of the California Code or Regulations” (120175.5((a)
27 and (a)(1) [emphasis added].) COVID-19, as a “novel coronavirus infection,” is one of the
28 communicable diseases listed in section 2500, at subsection (j).

Communicable disease information collected and reported pursuant to section 2500 “is
acquired in confidence and shall not be disclosed by the local health officer except as authorized
by these regulations” 17 CCR § 2500(f). Likewise, information reports about outbreaks of
the communicable diseases listed in section 2500 are prepared and send by the local health
official to the State. (17 CCR 2502(a) and (b); Dr. Wooten Decl. ¶ 3) Again, that information is

1 expressly confidential and cannot be disclosed: “Information reported pursuant to this section is
2 acquired in confidence and shall not be disclosed by the local health officer except as authorized
3 by these regulations” (17 CCR § 2502(f).)

4 As the Tentative Ruling recognized “the County present unrefuted evidence
5 demonstrating that the outbreak location information Petitioners seek was compiled for
6 inclusion in the one or more reports submitted to the State Department of Public Health pursuant
7 to regulatory section 2502.” As a result, this information is deemed to be confidential by the
8 express language of section 2502(f).” (Tent. Ruling p. 3-4.) Nothing in Health and Safety Code
9 section 120175.5 changes that ruling. Indeed, section 120175(c) expressly preserves the
10 confidentiality required by 17 CCR 2502(f).

11 **B. HEALTH AND SAFETY CODE SECTION 120175.5 REQUIRES COVID-19**
12 **OUTBREAK INFORMATION TO BE RELEASED ONLY TO “GOVERNMENT**
13 **AGENCIES” – NOT THE PUBLIC OR PRESS.**

14 Health and Safety Code section 120175.5 was enacted in 2019 by Assembly Bill 262
15 (Gloria). According to a brickbat hurled at the County in Petitioner’s Supplemental Brief, “the
16 California legislature responded to the COUNTY’S disastrous refusal to timely disclose
17 communicable disease [Hepatitis A] outbreak information by formulating Assembly Bill 262 . . .
18 .” (Petitioner’s Supp. Brief, 2:28-3:2.) What Petitioners fail to disclose is that the **County was**
19 **the sponsor** of AB 262 as the result of a unanimous vote by the County’s Board of Supervisors.
20 (Ex. 11; Ex. 12 p. 1.) As reported out of the Senate Rules Committee and the Senate Committee
21 on Health, the County sponsored the bill to “clarify and strengthen the authority of LHSs [local
22 health officers] as it relates to communicating relevant information and directing action of
23 jurisdictions under the purview of the LHO during a communicable disease outbreak.” (Ex. 12,
24 p. 8.) This clarification was necessary because, during the Hepatitis A outbreak, state and
25 federal law did not clearly allow the County to share the outbreak information with local cities.
26 As a result, a local health officer was unable to provide detailed outbreak information to a local
27 governmental entity without violating the confidentiality provisions at 17 CCR section 2502(f).

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1 The recent passage of section 120175.5 now puts the County on firm legal ground to share
2 outbreak information with the local cities without risk of violating the confidentiality provisions
3 of section 2502(f).

4 Petitioners continue to hurl brickbats in their Supplement Brief by stating: “apparently
5 having learned no lesson from the HepA debacle and ensuing investigations and legislative
6 actions, the COUNTY continues to withhold this location data from the public even though no
7 CPRA exemptions authorize nondisclosure.” (Petitioners’ Suppl. Brief 3:23-27.) This
8 statement is incorrect for two reasons.

9 First, this Court already held in its Tentative Ruling that the location information is
10 “exempted from disclosure under section 6254k of the CPRA” due to the “express language of
11 section 2502(f).” (Tent. Ruling pp. 3-4.) That tentative holding is correct for all of the reasons
12 stated in the Tentative Ruling and the County’s Opposition.

13 Second, Health and Safety Code section 120175.5 refers to providing information only to
14 “governmental agencies.” There is no language in that statute requiring, or even allowing, the
15 County to provide outbreak information to the public or press. Had the legislature intended to
16 require or allow *public* disclosure of outbreak locations, it could have easily done so.

17 **C. SECTION 120175.5 DOES NOT SOMEHOW ABROGATE THE**
18 **CONFIDENTIALITY REQUIREMENTS OF SECTION 17 CCR § 2502.**

19 Petitioners engage in a convoluted attack on the validity of 17 CCR § 2502 – the law
20 upon which this Court bases much of its Tentative Ruling. Petitioner’s first argument is that the
21 outbreak location information cannot be exempt under the PRA because section 120175.5
22 contains “no specific confidentiality provision . . . nor is any allusion made therein to 17 CCR §
23 2502(f) supporting the COUNTY’S claim that nondisclosure is required.” (Supp. Brief 4:13-
24 15.) This argument fails.

25 First, section 120175.5 absolutely does contain a specific confidentiality provision.
26 120175.5(c) states: “A local health officer that provides the notification and information to a
27 governmental entity pursuant to subdivision (a), and the governmental entity that receives the
28 notification and information, shall comply with all applicable state and federal privacy laws.”

1 While Petitioner may wish the subsection listed the entire panoply of state and federal privacy
2 laws that could be applicable, the legislature obviously believes such a comprehensive and
3 exhaustive list would not be feasible. For this same reason, the legislature undoubtedly chose
4 not to specifically call out 17 CCR section 2502(f) to the exclusion of all other potential state
5 and federal privacy laws. Nevertheless, section 120175.5(a) does expressly reference 17 CCR
6 section 2500 which, at section 2500(f), contains the nearly identical privacy language as section
7 2502(f). Furthermore, section 2502(a) and (b) requires reports to be sent to the State for
8 diseases reported pursuant to section 2500 which, as mentioned above, is explicitly referenced in
9 section 120175.5.

10 Petitioners also argue that section 120175.5 cannot encompass the explicit privacy
11 provision in 17 CCR § 2502 because section 120175.5 it is not mentioned in the statutory
12 authority for this regulation. (Supp. Brief, 4:21-25.) However, Petitioners apparently do not
13 appreciate the fact that 120175.5 took effect only ten months ago – after section 2502 was last
14 amended in 2016. Regardless, sections 120175.5 and 17 CCR section 2502 both explicitly
15 reference 17 CCR section 2500; and both of these regulations have the identical confidentiality
16 language at subsections (f). Furthermore, the clear language of 120175.5(c) encompasses “all
17 applicable state and federal privacy laws” regardless of whether those laws reference section
18 120175.5.

19 Petitioners next argue section 2502 lacks “authority” for its privacy provisions because
20 privacy was not explicitly stated in Health and Safety Code section 120130.³ Section 120130 is
21 but one of numerous sources of authority for that regulation. The complete list of authority and
22 references listed for 17 CCR § 2502 lists: “Sections 120130, 131050, 131051, 131052, 131080
23 and 131200, Health and Safety Code; and Section 555(b), Business and Professions Code.
24 Reference: Sections 7, 1603.1, 100325, 100330, 103925, 113150, 113155, 120125, 120130,
25 120140, 120145, 120175, 120190, 120245, 120250, 131050, 131051 and 131080, Health and
26 Safety Code; and Sections 551, 554 and 555, Business and Professions Code; **Section 1798.3,**
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28 ³ This argument advanced by Petitioners is the only time they rely on section 120130 about
which this Court’s Minute Order requested supplemental briefing.

1 **Civil Code**; Sections 11181 and 11182, Government Code; 42 C.F.R. Sections 2.11 and 2.12;
2 **Cal. Const., art. 1, section 1**; and **Section 1040, Evidence Code.**” Of those listed, several
3 statutes constitute more than sufficient authority to support the privacy rights set forth at
4 2502(f). Of particular note are the following (all emphasized in bold in the list above):

5 California Constitution Article 1, Section 1. The constitutional right to privacy.

6 California Civil Code section 1798.3 [Definitions] “ As used in this chapter: (a) The term
7 ‘personal information’ means any information that is maintained by an agency that identifies or
8 describes an individual, including, but not limited to, his or her name, social security number,
9 physical description, home address, home telephone number, education, financial matters, and
10 medical or employment history. It includes statements made by, or attributed to, the individual.”

11 Evidence Code 1040, [Official Information] Evidence Code section 1040 states:

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

15 (b) A public entity has a privilege to refuse to disclose official information, and to
16 prevent another from disclosing official information, if the privilege is claimed by a person
17 authorized by the public entity to do so and either of the following apply:

18 (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of
19 this state.

20 (2) Disclosure of the information is against the public interest because there is a necessity
21 for preserving the confidentiality of the information that outweighs the necessity for disclosure
22 in the interest of justice; but no privilege may be claimed under this paragraph if any person
23 authorized to do so has consented that the information be disclosed in the proceeding. In
24 determining whether disclosure of the information is against the public interest, the interest of
25 the public entity as a party in the outcome of the proceeding may not be considered.

26 Petitioners’ final argument deviates from this Court’s direction to address only sections
27 120175.5 and 120130. Petitioner argues Civil Code § 56.05(j), which defines “medical
28 information” as being certain types of information, is not implicated by disclosure of COVID-19

1 outbreak location information. However, Civil Code section 56.05(j) is completely irrelevant
2 here because it applies to a statutory scheme not at issue (Civil Code section 56 *et seq.*), and
3 only applies to medical information “in possession of or derived from a provider of health care,
4 health care service plan, pharmaceutical company or contractor.” In short, Civil Code section
5 56.05(j) has nothing to do with the local health officer’s disclosures of COVID-19 outbreak
6 information.

7 As explained in the Opposition, COVID-19 outbreak information can be disclosed under
8 section 2502(f)(3) only if the “information contained in an individual case report to any person
9 or entity if the disclosure may occur without linking the information disclosed to the individual
10 to whom it pertains.” (County’s Opp., 5:7-6:15.) Federal HIPAA regulations are the generally
11 accepted standard in public health and used by the County’s health officer to “de-link” personal
12 information as required by 2502(f)(3). (County’s Opp., 6:8-7; Dr. Wooten Decl., ¶ 5-6.) For
13 purposes of delinking the personal information from the COVID-19 outbreak reports, Dr.
14 Wooten redacted specific name and location data, an action this Court accepted. As noted in the
15 Tentative Ruling, “the disclosure of the location of a small outbreak at, for example, a small
16 business, may result in the ability to identify infected individuals who work at or patronize that
17 business.” (Tent. Ruling p. 5.)

18 **III. HEALTH AND SAFETY CODE SECTION 120175.5 AND 120130 DO NOT**
19 **INCREASE ANY PUBLIC INTEREST IN DISCLOSURE**

20 In its Tentative Ruling, this Court denied Petitioners’ petition on two grounds: that the
21 Covid-19 outbreak locations were exempt from disclosure under section 6254(k) of the
22 Government Code and under 6255 of the Government Code. Petitioners’ Supplemental Brief
23 discussed Health and Safety Code sections 120175.5 and 120130 as those sections apply to the
24 first ground only – i.e., exemption under Government Code section 6254(k). Significantly,
25 however, Petitioners’ Supplemental Brief does not address the second ground – Government
26 Code section 6255. In other words, the Supplemental Brief does not discuss Health and Safety
27 Code sections 120175.5 and 120130 in the context of the catchall test set forth at Government

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1 Code section 6255 – that “the public interest served by not disclosing the record clearly
2 outweighs the public interest served by disclosure of the record.”

3 By not discussing the catchall test, Petitioners are conceding the two Health and Safety
4 Code sections addressed in the supplemental briefs do not change this Court’s tentative ruling
5 that the outbreak location information is exempt under section 6255. As a result, the Court’s
6 Tentative Ruling denying the petition based on the section 6255 exemption should be summarily
7 affirmed.

8 **IV. CONCLUSION**

9 For the foregoing reasons, the Court’s Tentative Ruling should be affirmed and the
10 Petition denied.

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12 DATED: November 17, 2020 THOMAS E. MONTGOMERY, County Counsel

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