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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

DR. JOEL MOSKOWITZ, an individual, Petitioner and Plaintiff, **v.** **CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, a California State Agency,** Respondents and Defendants.	Case No. 34-2016-80002358 **DEPARTMENT OF PUBLIC HEALTH'S OPPOSITION TO PETITION FOR MANDAMUS** **[Code Civ. Proc. § 1085]** Date: February 24, 2017 Time: 11:00 a.m. Dept: 24 Judge: Shellyanne W.L. Chang Action Filed: June 9, 2016

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INTRODUCTION

The California Department of Public Health's (CDPH) mission of "optimizing the health and well-being" of people in California is predicated upon its scientists' ability to independently investigate health issues. Like the peer review process in academic settings, CDPH's scientists engage in candid discussions about their preliminary findings and recommendations as part of the deliberative policy-making process. A draft guidance memo may be shared with other scientists for comment and may be subject to multiple occasions of review, return, and revision before obtaining, if at all, the Director's determination that the memo should be disseminated to the public.

Here, it is undisputed that the subject cell phone guidance memo has not been approved for public dissemination and so remains a working draft within CDPH. In the years the subject cell phone guidance memo has been prepared, reviewed, and subject to revisions, a variety of other organizations have issued statements acknowledging the nascent science on the health effects of electromagnetic radiation from cell phone usage and indicating precautions a concerned consumer may take. The World Health Organization and the (federal) Center for Disease Control have both issued public statements, as stated in the instant petition. Petitioner Moskowitz, a U.C. Berkeley psychology professor, blogs on the subject. Two California cities, San Francisco and Berkeley, have enacted "warning" ordinances. Simply put, a California cell phone user may easily access advisory statements on cell phone usage from international, federal, and local authorities.

The nominal, if any, need for a CDPH statement on cell phone usage is outweighed by the chilling effect of premature disclosure of a working draft document. The release of the draft guidance memo will chill the candor of CDPH's internal discussions on pending investigations of health issues, thus putting at risk the health of the people of California. The publication of the draft guidance memo will result in an unfair exaggeration and/or or diminution of its findings and recommendations, harming the public's understanding of any discussed health risks and preventative measures. Moreover, compelled disclosure to force CDPH to "take a stand" on cell phone usage subverts the benign purpose of the Public Records Act. Because the balance of harm to the public from disclosure of CDPH's draft cell phone guidance document outweighs any

public interest served by disclosure of the draft, this Court should deny the sought writ of mandamus.

STATEMENT OF THE CASE

I. RELEVANT STATUTORY FRAMEWORK OF THE PUBLIC RECORDS ACT.

The California Public Records Act (CPRA) provides for the inspection of public records maintained by state and local agencies.[1] (Gov. Code, § 6250 et seq.) The CPRA is modeled upon the Federal Freedom of Information Act (FOIA); hence, "the judicial construction and legislative history" of the FOIA "illuminate the interpretation" of the CPRA. (*American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 447.) After the enactment of the CPRA, the California Constitution was amended to recognize the "right of access to information concerning the conduct of the people's business" and to provide that "the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, § 3, subd. (b)(1).) However, "[d]espite the strong legislative policy favoring access" to public records under the PRA, "the public's right to disclosure of public records is not absolute." (*American Civil Liberties Union of Northern Cal. v. Super. Ct.* (2011) 202 Cal.App.4th 55, 67, internal quotation marks omitted.)

Two exceptions to the general policy of disclosure are set forth in the Act: the "draft" exemption of section 6254 and the "catch-all" exemption of section 6255, as discussed more fully below. "Records' found to be non-exempt under section 6254 . . . can still be withheld under section 6255." (*Los Angeles Unified School District v. Super. Ct.* (2014) 228 Cal.App.4th 222, 254 [*LAUSD*].) Because disclosure is favored, the exemptions are narrowly construed. (Cal. Const., art. I, § 3, subd. (b)(2); *Bd. of Trustees of California State University v. Super. Ct.* (2005) 132 Cal.App.4th 889, 896.)

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[1] Government Code section 6252, subdivision (f) defines "[s]tate agency" under the PRA, and section 6253 requires "state or local agencies" to comply with the PRA and sets forth "agency duties." "Record" is defined broadly to include information stored in databases or other electronic formats. (See *Sierra Club v. Super. Ct.* (2013) 57 Cal.4th 157, 165.)

A. The Exemption for Drafts (Gov. Code, § 6254.)

Section 6254 expressly lists categories of material exempt from disclosure. Subdivision (a) exempts from disclosure "preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure." (Gov. Code, § 6254, subd. (a).) The agency has the burden of establishing this exemption. (*Citizens for a Better Environment v. Dept. and Food & Agric.* (1985) 171 Cal.App.3d 704, 711-712.)

B. The Catch-All Exemption (Gov. Code, § 6255, subd. (a).)

1. Section 6255 Provides a Justification for Withholding Records

Section 6255 establishes a catch-all exception that allows the government agency to withhold records by demonstrating "on the facts of the particular case the public interests served by not making the record public clearly outweighs the public interest served by disclosure of the record. (Gov. Code, § 6255, subd. (a).) The section 6255 catch-all exemption encompasses the pre-publication "deliberative process privilege" for policy makers' documents. (*Humane Society of the U.S. v. Super. Ct.* (2013) 214 Cal.App.4th 1233, 1263, fn. 27; *Times Mirror Co. v. Super Ct.* (1991) 53 Cal.3d 1325, 1342.) The PRA, thus, "recognizes that certain records should not, for reasons of privacy, safety, and efficient governmental operation, be made public." (*Haynie v. Super. Ct.* (2001) 26 Cal.4th 1061, 1064.)

2. The Burden of Proof for the Catch-All Exemption

The section 6255 catch-all exemption "contemplates a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality." (*Michaelis, Montanari & Johnson v. Super. Ct.* (2006) 38 Cal.4th 1045, 1071.) Where "the public interest in disclosure of the records is not outweighed by the public interest in nondisclosure, courts will direct the government to disclose the requested information." (*County of Santa Clara v. Super. Ct.*, 170 Cal.App.4th at p. 1321.) However, when the public interest in nondisclosure clearly outweighs the public interest in disclosure, the agency's refusal to release records will be upheld. (*Times Mirror Co., supra,* 53 Cal.3d at 1345; *Wilson v. Super.*

Ct. (1996) 51 Cal.App.4th 1136, 1141 [identities of applicants for appointment by governor not disclosable.)

3. The Public Interest

The balancing tests under both the draft exemption of section 6254 and the catch-all exemption of section 6255 require a determination of the public interest. "The motive of the particular requester in seeking public records is irrelevant to the determination of the public interest." (*LAUSD, supra,* 228 Cal.App.4th at p. 242; Gov. Code, § 6257.5.) Rather, the determination of public interest rest upon whether "disclosure serves a public purpose." (*County of Santa Clara v. Super. Ct.* (2009) 170 Cal.App.4th 1301, 1324.)

The public interest in disclosure is determined by "the extent to which disclosure of the requested item of information will shed light on the public agency's performance of its duty." (*Teamsters Local 856 v. Priceless, LLC* (2003) 112 Cal.App.4th 1500, 1519.) "Just because a member of the public has an interest in something does not necessarily make that interest one of public concern." (*LAUSD,* 228 Cal.App.4th at p. 240 [evaluation scores of individual teachers not subject to disclosure].) In assigning *weight* to the public interest in disclosure, courts must look not only to the nature of the information requested, but also how directly the disclosure of that information contributes to the public's understanding of government. (*Humane Society, supra,* 214 Cal.App.4th at p. 1268.) Moreover, for the public interest to carry weight, it must be more than "hypothetical" or "minimal." (*County of Santa Clara, supra,* 170 Cal.App.4th at pp. 1323-1324.) Where a requesting party has "an alternative, less intrusive, means of obtaining the information sought, the public interest in disclosure is minimal." (*LAUSD, supra,* 228 Cal.App.4th at p. 242.)

In determining the public interest in non-disclosure, the trial court may consider the impact of disclosure on the respondent as well as on the public as a whole. (*Humane Society, supra,* 214 Cal.App.4th at p. 1263.) Both expert testimony and common knowledge may inform the trial court's determination. (*Id.* at p. 1259.) Hence, a researcher's testimony that the sought disclosure will have a chilling effect on future research and communications among researchers is buttressed by the common understanding that "those who expect public dissemination of their remarks may

well temper candor with a concern for appearance." (*Ibid.*, citing *California First Amendment Coalition v. Super. Ct.* (1998) 67 Cal.App.4th 159, 174.) Plus, the researchers' own free speech interests under the First Amendment interests in non-disclosure may be considered. (*Id.* at p. 1264, fn. 28, discussing Dow *Chemical Co. v. Allen* (7th Cir .1982) 672 F.2d 1262 & *Cusamano v. Microsoft Corp.* (1st Dist. 1988) 162 F.3d 708.) Where public sector research is impaired by disclosure, the trial court may review any resulting harm to the public's interest in future quality and quantity of such research on issues of public importance. (*Id.* at p. 1263.)

Further, the federal FOIA decisions state the exemption of pre-publication documents from disclosure is "designed to guard against disclosure of documents that suggest "as agency position that which is as yet only personal position." (*Coastal States Gas Corp. v. Dept. of Energy* (D.C. Cir. 1980) 617 F.2d 854, 866.) Hence, the trial court may withhold documents to prevent public confusion about the agency's official stance. (*Russell v. Dept. of Air Force* (D.C. Cir. 1982) 682 F.2d 045, 1048-1049 [withholding documents to prevent public from "misconstruing" officer's views as agency views]; *Fisher v. United States Dept. of Justice* (D.D.C. 1991) 772 F.Supp. 7, 10-11, aff'd 968 F.2d 92 (D.C. Cir. 1992) [withholding documents "to prevent public confusion that might be caused by disclosure of reasons and rationales that were not ultimately the grounds for the agency's action"].)

C. The Trial Court's Determination Requires In-Camera Review

Under Government Code section 6259, the trial court "shall decide the cases after examining the record in camera, if permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties and any oral argument and additional evidence as the court may allow." (Gov. Code, § 6259, subd. (a).) The trial court must address objections to the evidence before addressing the merits. (*Humane Society, supra*, 214 Cal.App.4th at p. 1256.) If the trial court finds that the agency's decision to refuse to disclose was not justified under Government Code sections 6254 or 6255, the trial court orders the records disclosed. (Gov. Code, § 6259, subd. (b).) However, if the trial court determines otherwise, the trial court returns the records to the public official and issues an order supporting the decision not to disclose. (*Ibid.*)

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Drafts of the Cell Phone Guidance Document

Dr. Kreutzer and other CDPH staff prepared a draft cell phone guidance document in March 2010. (Exh. AA, Oliva Depo., 14:5-8 & 16:9-14.)[2] Two subsequent drafts were prepared in 2011, 2013 and/or 2014. (*Id.*, 19:2-19 & 23:15-18.) The 2010 draft was used to create the 2011 draft, and the 2011 draft was used for the 2013/2014 draft. (*Id.*, 23:19-22 & 34:4-9.)

The drafts were subject to review and editing within CDPH's chain of command to the Director's level, with the possibility of further review and approval by the California Health and Human Services agency. (Exh. AA, Oliva Depo., 19:20-21:8, 42:6-11, 43:24-44:20 & 45:7-11 [CDPH Dir. Chapman's decision not to release 2013-2014 draft based in part on existence of Center for Disease Control's guidance on cell phone usage].) The draft cell phone guidance document was not approved for public dissemination. (*Id.* at 22:25-23:1.) As of January 2014, the cell phone guidance document remained a draft, a "work in progress" subject to review within CDPH and not subject to release to the public. (*Id.* at 29:17- 20, 30:21-23, 45:15-46:15.)

B. Petitioner's Public Record Act Requests.

From January 27, 2014 to January 19, 2015, Moskowitz submitted three Public Record Act requests to CDPH concerning the cell phone guidance document. (Petn., ¶¶ 14, 20, 24 & Petn. Exhs. 1, 5, 9.) CDPH responded that the sought document was not yet approved and so was a "work in progress," exempt from disclosure under Government Code sections 6254, subdivision (a), and 6255. (Petn., ¶ 15, 18, 21, Exhs. 4, 6) In addition, CDPH stated in a February 5, 2015 letter, "In light of the updated guidance issued by the CDC in June 2014, CDPH has chosen not to issue a guidance document on radio frequency and cell phones." (Petn., ¶ 26, Exh. 11.)[3]

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[2] Because petitioner variously uses single letters (A-G) and numbers to refer to the exhibits attached to its petition and declarations, respondent refers to its exhibits with double letters, commencing with AA in its opposition brief.

[3] Petitioner alleges CDPH made belated responses to its Public Record Act requests. (Pet., ¶¶ 16, 17, 25, 28.) Such allegations are irrelevant. An agency's failure to timely object or produce does not waive its objections. (*Michaelis, Montanari & Johnson v. Super. Ct.* (2006) 38 Cal.4th 1065, 1072.)

On April 1, 2016, Dr. Moskowitz submitted a fourth PRA request to CDPH for copies of correspondence to other persons regarding cell phone guidance, and copies of correspondence from other persons regarding the health effects of cell phone usage.[4] (Petn., ¶ 27, Exh. 12.) On May 5, 2016, CDPH stated it had no records of such correspondence. (Petn., ¶ 30, Exh. 15.)

On May 27, 2016, Dr. Moskowitz filed this § 1085 action for mandamus relief against CDPH. CDPH filed an answer to the petition.

STANDARD OF REVIEW

"In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Los Angeles* (1990) 20 Cal.4th 805, 817 [citations therein]; *MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, 368.) Weight of the evidence is synonymous with preponderance of the evidence. (*Chamberlain v. Ventura County Civil Serv. Com.* (1977) 69 Cal.App.3d 362, 368-369.)

However, where legal conclusions are challenged, the reviewing court determines whether the agency's ruling was "so arbitrary and capricious as to amount to an abuse of discretion." (*Family Planning Associates Med. Group, Inc. v. Belshe* (1998) 62 Cal.App.4th 999, 1004 [citations therein].)

Because "an administrative ruling "comes before the court with a presumption of correctness and regularity," the burden of establishing invalidity is upon the petitioner. (*Family Planning, supra*, 62 Cal.App.4th at p. 1004.) The court should defer to the agency's interpretation "unless it is clearly erroneous or unauthorized." (*Physicians and Surgeons Laboratories, Inc. v. Dept. of Health Services* (1992) 6 Cal.App.4th 968, 986-987; *Californians*

[4] The same PRA request was submitted to the California Health and Human Services (CHHS) agency. (Petn., ¶¶ 31, 32.) Because CHHS is not named in this action, the allegations concerning its response to the PRA request are not relevant. (Petn., ¶ 10.) The allegations concerning a PRA request submitted by a journalist, Mr. Hakim, are also not relevant as this action is not brought by or on behalf of Mr. Hakim. (Petn., ¶¶ 36-38.)

for Political Reform Fdtn. v. Fair Political Practices Commission (1998) 61 Cal.App.4th 472, 484.)

LEGAL ARGUMENT

I. THE MEMO IS PROPERLY WITHHELD AS A DRAFT UNDER THE CPRA.

Petitioner concedes a key legal point: "[N]o court has addressed, in the context of the draft exemption, precisely when a document ceases to be "preliminary" under the section 6254 draft exemption. (Petn. Memo Ps & As, 11:18-19.) There is no need for the Court to make the technical determination sought by petitioner. The draft exemption should be applied in view of its purpose of protecting the agency's deliberative process.

In the decision of *Citizens for Better Environment v. Department of Food & Agriculture.* (1985) 171 Cal.App.3d 704 (*CBE*), the appellate court determined the CPRA's draft exemption meant the working files of the Department of Food and Agriculture's site visits, which culminated in a report card of a county's performance, were preliminary and not subject to disclosure. The *CBE* court reasoned the CPRA's draft exemption should be interpreted in accord with the similarly-phrased federal FOIA "memorandums exemption" which bars disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a [private party] in litigation with the agency." (*CBE, supra*, 171 Cal.App.3d at 712, citing 5 U.S.C. § 552(b)(5); Schaffer et al., *A Look At The California Records Act and Its Exemptions* (1973) 4 Golden Gate Rev. 203, 213.)

The *CBE* court recognized that the federal FOIA exemption "protects the deliberative materials produced in the process of making agency decisions, but not factual materials, and not agency law." By protecting deliberative materials, the federal deliberative process privilege serves three public policy interests: (1) protect candid discussions within an agency; (2) prevent public confusion from premature disclosure of agency opinions before the agency establishes final policy, and (3) protect the integrity of an agency's decision such that the public should not judge officials based on information they considered prior to issuing their final decisions. (*CBE, supra*, 171 Cal.App.3d at p. 773.) While the federal FOIA law initially relied upon a deliberative-factual distinction in applying this exemption, that technical distinction has yielded to "more

process-oriented considerations, i.e., the nature of the process is more significant than the nature of the materials." (Exh. BB, Lodged Out-of-State Decisions, *ATV Watch v. New Hampshire Dept. of Transp.* (2011) 161 N.H. 746, 759, citing *Judicial Watch, Inc. v. Clinton* (1995) 880 F.Supp. 1, 12.)

In accord, "other [state court] jurisdictions have held that the "preliminary draft" exemption in their state freedom of information acts was designed to "protect[ ] pre-decisional, deliberative communications that are part of an agency's decision-making process."" (Exh. BB, *ATV Watch, supra,* 161 N.H. at p. 758, citing *Harwood v. McDonough* (2003) 344 Ill.App.3d 242, 279 Ill.Dec. 56, 799 N.E.2d 859, 863, 864 (2003) (quotations omitted) (court looks to federal FOIA case law to interpret state FOIA); see also *Wilson v. Freedom of Information Commission* (1980) 181 Conn. 324, 435 A.2d 353, 359 [state's FOIA encompasses agency's records of preliminary, deliberative and predecisional process].) Hence, in accord with the federal FOIA and with other state jurisdictions, the decision of whether to compel disclosure of the cell phone guidance document should rest on the "predecisional posture of the document." (Exh. AA, *ATV, supra,* 161 N.H. at p. 759.)

Here it is undisputed that the cell phone guidance document is predecisional. The draft cell phone guidance document has not been approved for public dissemination. (Exh. B to Polsky Decl., Depo. Oliva, 45:18-46:9.) Rather, the document is essentially a working draft subject to revisions until approved for publication. (Decl. Starr, ¶¶ 21, 22; Exh. AA, Depo. Oliva, 22:25-23:1, 29:17- 20, 30:21-23, 45:15-46:15.) Contrary to petitioner's contention, it is not surprising that this draft is maintained – no final document has been approved to supersede the draft's ongoing function to enable deliberative work. (*Id.*, at 42:6-11, 43:24-44:20, 45:7-11, 46:1-15.)

Because the cell phone guidance document is predecisional, recognized public policy interests are served by exempting it from disclosure:

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> [T]to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's actions.

(*Coastal States Gas Corp. v. Dept. of Energy* (D.C. Cir.1980) 617 F.2d 854, 866.)

These public policy interests in exempting the draft document from disclosure outweigh Moskowitz' asserted public interest in disclosure of the draft document. Moskowitz contends the public interest is served by informing people within the State of California of the risks of cell phone usage. However, Moskowitz' own exhibits do not show that the asserted risks of cell phone usage are well-accepted by the scientific community. The Center for Disease Control (CDC) states, "More research is needed before we know if using cell phones causes health effects." (Exh. D to Decl. Moskowitz.) The Connecticut Department of Public Health states, "Current scientific research does not show a clear or consistent link between cell phone use and harmful health effects." (Exh. B to Decl. Moskowitz.) Indeed, merely possible harm, if any, from cell phone usage may not trigger any ethical duty to warn. Plus a portion of the public, namely the wireless industry and cell phone manufacturers, have litigated the Berkeley ordinance requiring retailers to provide consumers with warnings about cell phone usage, and likely have no interest in the dissemination of this cell phone guidance document. (See *CTIA-Wireless v. City of Berkeley* (2016) 158 F.Supp.3d 897.)

An alternative to disclosure is available should the public be interested in obtaining further information about cell phone usage: the very publications and websites indicated in petitioner's opening brief and exhibits, including and not limited to the federal CDC statement and the World Health Organization statement. Further, the public benefits when it can rely upon a neutral government entity, such as CDPH, to issue fully-vetted and approved public health statements to the people of the State of California. On balance, the public interest in non-disclosure of the cell phone guidance document outweighs any public interest in disclosure.

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II. THE BALANCING TEST UNDER § 6255 JUSTIFIES WITHHOLDING THIS RESEARCH DOCUMENT FROM DISCLOSURE.

"The CPRA does not have an express exemption" for scientific research by a government entity; hence, the application of the catch-all exemption set forth in section 6255 is at issue here. (*Humane Society*, *supra*, 214 Cal.App.4th at pp. 1254-1255.) Just as the *Humane Society* court found the catch-all exemption of section 6255 applied to ongoing academic research, so should this Court find the exemption applies to protect subject cell phone guidance draft, and its incorporated work-in-progress research, from disclosure.[5]

In the *Humane Society* case, the appellate court found the public interest in protecting the University of California's ongoing research regarding a proposed voter initiative outweighed the animal advocacy's interest in obtaining the research. The University of California established, through an expert declaration and common knowledge of the chilling effect of disclosure, that releasing the pre-publication research communications would "fundamentally impair the academic research process to the detriment of the public that benefits from the studies produced by that research." (*Humane Society*, *supra*, 214 Cal.App.4th at p. 1267.) In contrast, the advocacy group's interest in ensuring the accuracy of the University's methodology could be met without compelled disclosure.

Under the same balancing of public interest, the public interest in non-disclosure of CDPH's cell phone guidance document overcomes any public interest in disclosure. Dr. Mark Starr, CDPH Deputy Director of Environmental Health and Acting Director of Chronic Disease Prevention and Health Promotion, qualifies as an expert witness on the harmful impacts of the release of this cell phone guidance document. (Decl. Starr, ¶¶ 1-19.) His declaration attests that CDPH relies upon its official statements to provide the public with accurate information about health issues and to guide its future public policy decisions. (*Id.*, at ¶¶ 13, 26.) Yet, because the

[5] Because certain California state court decisions suggest the pre-publication deliberative draft indicated in federal decisions may also be encompassed within section 6255, respondent incorporates its discussion of the federal FOIA decisions on draft documents, supra II, in this discussion. (*Humane Society of the U.S. v. Super. Ct.* (2013) 214 Cal.App.4th 1233, 1263, fn. 27; *Times Mirror Co. v. Super Ct.* (1991) 53 Cal.3d 1325, 1342.)

public is easily confused as to whether a statement is "official" or not, the release of CDPH draft statement on cell phone usage will be viewed as its official stance, causing some members of the public to seek unnecessary medical attention. (*Id.*, at ¶¶ 19, 23-27.) The draft statement, and not CDPH's official stance, will likely be referenced in public forums and, given the ongoing litigation involving cell phone warnings, possibly in judicial forums. (*Id.* at ¶ 26.) To avoid the confounding effects of widely quoted draft (and unapproved) statement, CDPH will essentially be forced to issue an official statement, regardless of its desire to engage in further deliberations. (*Id.* at ¶ 30.) Such a compelled release does not serve the public interest in CDPH, a neutral entity, issuing a fully-vetted and approved public health statement that the people of the State of California can rely upon in the future. This Court should withhold the premature draft statement to prevent public confusion.

As recognized in the *Humane Society* decision, any disclosure of the CDPH draft cell phone document will harm the public's interest in scientific research by CDPH scientists. (Decl. Starr, ¶¶ 13, 28, 29.) CDPH prides itself on serving the public by researching public health issues on a neutral basis. (*Ibid.*) The candid debate and discussion of draft research documents is integral to CDPH's internal peer review process. (*Ibid.*) However disclosure of the subject cell phone document will deter and stifle such candor. (*Ibid.*) If staff scientists are learn that their critiques, comments, and other statements concerning each other's work may be disclosed to members of the public, or any internet user, they will likely be less candid in their statements. In addition, the integrity of the internal review and approval will be undercut. As a result, both the quantity and quality of CDPH's studies – from which the public benefits – will suffer.

In contrast, the public interest in disclosure is minimal, at best. Petitioner's assertion that the California public should be informed by CDPH is of no persuasive weight. Any member of the public may learn whether cell phones pose a risk to their health by consulting any number of public websites, such as the World Health Organization, the federal Center for Disease Control, the Federal Communications Commission, Connecticut Department of Public Health, journal articles, and the ordinances issued by San Francisco and Berkeley. (Decl. Moskowitz, ¶¶ 7-11 & Exhs. B-F; Decl. Polsky, Exhs. A, C-G.) In light of all these other publications, there is no need

for another cell phone guidance document, and certainly no need for CDPH to issue one on a premature and unofficial basis to people within the state.

Petitioner's attempt to quantitate public interest by surveys and blog hits falls flat. The isolated polling of a discrete and perhaps atypical population, such as residents of Berkeley (who presumably support their local ordinance directing cell phone warnings), does not establish statewide or even regional public interest in the issue of cell phone usage. (Decl. Polsky, Exhs. C & G.) Because petitioner's websites and presentations may inflame rather than measure public interest in the issue, the number of hits on petitioner's blog is also not probative of public interest.

Lastly, any public interest in learning whether CDPH has performed its public duty can be satisfied through other means. The subject two-page cellphone guidance document should not be the sole measure of CDPH's actions on public health issues. The CDPH has acted on other public health matters, such as issuing bulletins on blue-green algae and the risks of X-rays. (Decl. Starr, ¶ 11.) Therefore, there is no reason to release this document.

Petitioner has failed to establish that any public interest in disclosure of the cell phone guidance document overrides the public interest in non-disclosure. Therefore, this Court should deny petitioner's sought relief.

III. THERE IS NO SEGREGABLE MATTER

Petitioner assumes the two-page cell phone guidance document contains segregable materials. Here, the non-exempt and exempt materials are "inextricably intertwined with exempt materials;" hence, segregation may not be required. (*Pasadena Police Officers Assn. v. Super. Ct.* (2015) 240 Cal.App.4th 290, 294.)

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CONCLUSION

For these reasons, CDPH respectfully requests that the Court deny Moskowitz' motion and dismiss the petition for writ of mandamus.

Dated: January 18, 2017

Respectfully Submitted,

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DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **Dr. Joel Moskowitz v. California Department of Public Health**
No.: **34-2016-80002358**

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. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 18, 2017, I served the attached CDPH Opposition Brief, Dec. Starr, Dec. Tillman, Obj. to Moskowitz Dec, Obj. to Polsky Dec, Exhs. AA-CC by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

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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 January 18, 2017, at Sacramento, California.

Julie Hutcherson
Declarant

Signature

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