

<p>DISTRICT COURT, COUNTY OF DENVER, COLORADO</p> <p>Court Address: 1437 Bannock Street Denver, CO 80202</p> <hr/> <p>Plaintiff : JANE DOE, M.D.</p> <p>v.</p> <p>Defendants : COLORADO MEDICAL BOARD and PAULA MARTINEZ, in her official capacity as Program Director.</p> <hr/> <p><i>Attorneys for Plaintiff:</i> Carmen N. Decker, #35864 Kaylyn Peister, #52658 hershey decker drake 10463 Park Meadows Drive, Suite 209 Lone Tree, Colorado 80124 Telephone: (303) 226-1669 Fax: (303) 226-1668 E-mail: carmen@hersheydecker.com; kaylyn@hersheydecker.com</p>	<p>DATE FILED: January 24, 2020 1:51 PM FILING ID: E713B6625B05A CASE NUMBER: 2020CV30318</p> <hr/> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number:</p> <p>Division:</p>
<p style="text-align: center;">VERIFIED COMPLAINT FOR FORTHWITH JUDICIAL REVIEW AND INJUNCTION</p>	

Plaintiff, Jane Doe, M.D., through counsel, Hershey Decker Drake, brings this complaint for injunctive relief to enjoin the Colorado Medical Board and the Program Director of the Colorado Medical Board (“Medical Board”) from disclosing statutorily privileged professional review committee records by publicly filing a Notice of Formal Charges against Plaintiff with the Office of Administrative Courts (“OAC”) as follows¹:

PARTIES, JURISDICTION, and VENUE

1. Plaintiff Doe, who is known to Defendant Medical Board, is an individual licensed to practice medicine in Colorado.
2. The Colorado Medical Board is an administrative agency within the executive branch of the Colorado State Government with limited jurisdiction as outlined in the Medical Practice Act, §12-240-101 *et seq.*, C.R.S., the Administrative Procedure Act, §§24-4-101 to 108, C.R.S. and applicable Colorado and Federal law.

¹ Due to the exigent nature of this pleading, Plaintiff intends to file a subsequent forthwith Motion and Brief in Support of Preliminary Injunction pursuant to C.R.C.P. 65.

3. At all times relevant, Paula Martinez was the Program Director for the Medical Board.
4. This Court has jurisdiction over this action under Colo. Const. Art. VI, §9(1) and C.R.C.P. 106(a)(4) and §24-4-106(8), C.R.S.
5. Pursuant to §24-4-106(8), C.R.S., where an agency action “clearly exceed[s] the constitutional or statutory jurisdiction or authority of the agency” and the party seeking to enjoin the proceedings “show[s] that the agency action will cause irreparable injury,” the matter is appropriately set before a district court. *Envirotest Sys. v. Colo. Dep't of Revenue*, 109 P.3d 142, 144 (Colo. 2005).
6. As set forth below, Plaintiff can show that: (1) the Medical Board intends to act in a manner that clearly exceeds its constitutional or statutory jurisdiction; and (2) Plaintiff will be irreparably injured by such action.
7. Further, Plaintiff has no administrative remedy as the Office of Administrative Courts (“OAC”) does not have jurisdiction over a matter until the Medical Board has initiated a proceeding by filing a Formal Complaint and Notice of Charges. The attorneys for the Medical Board have confirmed that when they intend to file the Formal Complaint against Dr. Doe it will be done publicly and not under seal or in pseudonym. This is the very action with regard to which Dr. Doe seeks injunctive relief in this action, and Dr. Doe cannot initiate an action with the OAC directly.
8. Plaintiff has no administrative remedy and/or she has exhausted her current administrative remedies. *See id.*
9. Venue in the County of Denver is proper pursuant to C.R.C.P. 98(c).

FACTUAL ALLEGATIONS

10. Plaintiff is a board-certified physician licensed in good standing to practice medicine in the State of Colorado.
11. Plaintiff is currently engaged in the active practice of medicine in the State of Colorado.
12. The Medical Board reviewed complaints regarding Plaintiff’s conduct as a licensed physician.
13. The Medical Board sent Plaintiff notice of the complaints and an opportunity to respond to the complaints (“30-day letters”) on July 19, 2018, July 31, 2018, and September 7, 2018 respectively. Plaintiff timely filed responses with the Medical Board with respect to each complaint.
14. The Medical Board’s investigation, the complaints, the responses and all documents related to the investigation have been confidential to date and not open to the public.
15. Subsequently, the Medical Board sent notice to Plaintiff that the Medical Board was referring the cases against Plaintiff to the Office of the Attorney General for the filing of a Formal Complaint seeking discipline against Plaintiff’s medical license.

16. The Medical Board now intends to file a Formal Complaint and Notice of Formal Charges (“Notice of Charges”) against Plaintiff with the OAC, the Court that is designated to hear these cases if the Medical Board chooses to refer the case to the OAC for the hearing process.
17. The Medical Board is not required to refer a case to the OAC and has the authority to conduct its own hearing regarding whether there has been a violation of the Medical Practice Act supporting discipline. §12-240-125(1)(c), C.R.S.
18. Attorneys for the Medical Board have advised that it is the Medical Board’s position that such Notice of Charges and subsequent filings with the OAC shall be filed publicly and that the Notice of Charges will be published on Plaintiff’s Colorado Department of Regulatory Agencies – Division of Professions and Occupations license verification page and open to public inspection.
19. Plaintiff has a protected privacy interest in preventing the public disclosure of the Notice of Charges and other filings with the OAC.
20. If such Notice of Charges and other filings are public, Plaintiff’s reputation and professional career will be irreparably harmed.
21. Not only will such public filings impact Plaintiff’s professional standing in the medical community, it will also place her liability insurance, privileges at multiple healthcare facilities, Board certification, and position on multiple insurance panels in jeopardy.
22. Counsel for the Medical Board has indicated the filing of the Formal Complaint is imminent, however counsel has agreed to postpone such public filing of the Notice of Charges against Plaintiff pending determination of this proceeding.
23. The Medical Board exceeds its limited statutory authority granted to it pursuant to the Medical Practice Act, §12-240-101 *et seq.* by publishing the Notice of Charges and other professional review materials, which are confidential records pursuant to the professional review committee privilege.
24. The Medical Board’s powers and duties are limited by the Medical Practice Act. § 12-240-106, C.R.S.
25. The Medical Practice Act provides that records of the Medical Board with respect to disciplinary action are exempt from any law requiring that they be public, stating:

Investigations, examinations, hearings, meetings, or any other proceedings of the board conducted pursuant to this section shall be exempt from any law requiring that proceedings of the board be conducted publicly or that the minutes or records of the board with respect to action of the board taken pursuant to this section be open to public inspection.

§12-240-125(9)(a), C.R.S. (emphasis added).

26. Pursuant to §12-240-125(9)(b), C.R.S., the Medical Board is a “professional review committee” for purposes of the records related to a complaint filed against a licensee pursuant to §12-240-125, C.R.S. *Colo. Med. Bd. v. Office of Admin. Courts*, 333 P.3d 70, 73, n. 3 (Colo. 2014) (General Assembly specifically amended statute to make clear that Board is a professional review committee).
27. A “professional review committee” is any committee authorized under the statute to review and evaluate the competence, professional conduct of, or the quality and appropriateness of patient care provided by, any person licensed under the Medical Practice Act. § 12-30-202(7), C.R.S.
28. As such, all of the Medical Board’s records related to a complaint filed against a licensee are confidential and protected from all forms of subpoena or discovery and are *inadmissible in civil litigation, including administrative proceedings*. §12-30-204 (11)(a), (16), C.R.S. (emphasis added).
29. The Medical Board itself has advocated this position. *Colo. Med. Bd.*, 333 P.3d at 71, n.3.
30. The Medical Practice Act specifies that privileged records “related to the complaint” include all records described in Section 12-30-202(8), C.R.S. §12-240-125 (9)(b), C.R.S.
31. §12-30-202(8), C.R.S. defines “records”, in part, as follows:
- [A]ny and all written, electronic, or oral communications by any person arising from any activities of a professional review committee, including a governing board, established by an authorized entity under this part 2 or by the agent or staff thereof, including any:
- ...
- (II) *Complaint, response, or correspondence related to the complaint or response;*
- ...
- (V) Recordings or transcripts of proceedings, minutes, *formal recommendations, decisions*, exhibits, and other similar items or documents *related to professional review activities and typically constituting the records of administrative proceedings*.
- (emphasis added).
32. A Notice of Charges qualifies as a privileged “record”; it is a complaint arising from the activities of a professional review committee and a document “related to professional review activities and typically constituting the records of administrative proceedings.” §12-240-125 (9)(b), C.R.S.
33. Upon information and belief, the allegations in the Notice of Charges will recite information the Medical Board Inquiry Panel has received and reviewed in the course of its confidential investigation as a professional review committee, including reference to confidential patient records and reports.
34. Unlike the findings of an administrative law judge or hearing panel, the Notice of Charges contain preliminary disputed factual allegations before Plaintiff has been afforded due process.

35. As a “record” of a professional review committee, the Notice of Charges is by statute confidential and inadmissible in civil litigation, including administrative proceedings. *See* §12-30-204, C.R.S.; §12-240-125, C.R.S.; *Colo. Med. Bd.*, 333 P.3d at 72.
36. It is the Board’s own position that its investigation and all related records are confidential and privileged professional review pursuant to §12-240-125, C.R.S. and §12-30-204, C.R.S. *Colo. Med. Bd.*, 333 P.3d at 72.
37. The publication of the Notice of Formal Charges or other filings with the OAC reciting alleged facts gleaned from the Medical Board Inquiry Panel’s investigation is fundamentally inconsistent with the Medical Board’s position regarding confidentiality and with Colorado law. *Id.*
38. There is no rule requiring the Notice of Charges be made public.
39. To the contrary, the OAC Rule of Procedure 16 provides:

All files shall be open to public inspection, *unless otherwise prohibited by law*, regulation or court...All hearings shall be open to the public *unless prohibited by law*, regulation or court order...

(emphasis added).
40. As set forth above, §12-240-125, C.R.S. mandates that records of professional review committees remain confidential, therefore public inspection of the Notice of Charges and other pleadings to be filed with the OAC in this instance is prohibited by law.
41. Publication of the Notice of Charges serves no useful purpose and is contrary to public policy and due process considerations that Plaintiff not be deprived of a property interest before a hearing on unproven allegations.
42. Publication of the Notice of Charges and the factual allegations made by the Medical Board is inflammatory and serves only to draw public attention to the confidential professional review activities of the Medical Board.
43. Furthermore, once the Notice of Charges is filed with the OAC and a proceeding has been initiated, it has become public and the harm Plaintiff seeks relief from will be committed and cannot effectively be undone.
44. Plaintiff therefore seeks an order requiring that the Notice of Charges, all other pleadings, and the entire professional review proceeding at the OAC be under seal.

FIRST CLAIM FOR RELIEF
Judicial Review of Agency Action Pursuant to C.R.S. §24-4-106(7) and (8)
Declaratory Judgment pursuant to C.R.C.P. 57 and Colorado Declaratory Judgment Act,
C.R.S. § 13-51-101 *et seq.* and Injunctive Relief pursuant to C.R.C.P. 65

45. The Plaintiff incorporates all previous paragraphs as if herein incorporated.

46. The State Administrative Procedure Act, specifically §24-4-106(7) and (8), C.R.S. authorizes this Court to enjoin the actions taken by the Medical Board if that action is clearly beyond their constitutional or statutory jurisdiction or authority.
47. The Medical Board's powers and duties are limited by the Medical Practice Act, § 12-240-101 *et seq.* § 12-240-106, C.R.S.
48. In investigating the complaints received against Plaintiff, the Medical Board did so pursuant to § 12-240-125, C.R.S.
49. Section 12-240-125(9)(b) of the Medical Practice Act establishes that “[f]or purposes of the records related to a complaint filed pursuant to this section against a licensee, the board is considered a professional review committee, the records related to the complaint include all records described in section 12-30-202 (8), and section 12-30-204 (12) applies to those records.”
50. The Medical Board, a state agency, acts beyond its statutory jurisdiction or authority by publicly disclosing a record of professional review committee, i.e., the Notice of Formal Charges, related to Plaintiff's medical license.
51. Disclosure of Plaintiff's privileged peer-review information will substantially and irreparably harm Plaintiff by violating her right to privacy constituting “certain and imminent harm for which a monetary award does not adequately compensate.” *Gitlitz v. Bellock*, 171 P.3d 1274, 1279 (Colo. App. 2007).

SECOND CLAIM FOR RELIEF

Declaratory Judgment pursuant to C.R.C.P. 57 and Colorado Declaratory Judgment Act, C.R.S. § 13-51-101 *et seq.*; Violation of Plaintiff's Fifth and Fourteenth Amendment Right to Due Process pursuant to 42 U.S.C. §1983

52. Plaintiff incorporates the preceding paragraphs as if fully stated herein.
53. A genuine controversy exists between Plaintiff and Defendants for which Plaintiff is entitled to relief under C.R.C.P 57 and C.R.S. § 13-51-101 *et seq.*
54. Plaintiff has a statutorily-protected right to privacy in professional review committee records related to her medical license. §12-240-125(9)(b).
55. Defendants' actions of publicly disclosing such records violates Plaintiff's right to privacy and property interests without due process, equal protection of the laws, and fundamental fairness guaranteed by Article II, Section 25 of the Constitution of Colorado, and the Fifth and Fourteenth Amendments to the United States Constitution.
56. Article II, Section 25 of the Colorado Constitution provides:

No person shall be deprived of life, liberty or property, without due process of law.

57. The Fifth Amendment to the US Constitution provides in part that:

No person shall be ... deprived of life, liberty, or property, without due process of law.

58. The Fourteenth Amendment to the US Constitution, Section 1 states in part that:

[...] No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

59. Defendants' actions in publishing professional review committee records will cause Plaintiff to be deprived of her privacy, liberty and property interest without due process.

60. These interests include Plaintiff's reputation, her ability to work and be credentialed at Hospitals and other facilities, her ability to remain on insurance panels, and her ability to retain Board certification.

61. Therefore, Plaintiff is entitled to declaratory and injunctive relief.

THIRD CLAIM FOR RELIEF
Judicial Review of Agency Action Pursuant to C.R.C.P. 106(4)
(Pled in the Alternative)

62. The Plaintiff incorporates all previous paragraphs as if herein incorporated.

63. C.R.C.P. 106(4) authorizes this court to determine whether any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law.

64. The Medical Board's powers and duties are limited by the Medical Practice Act, §12-240-101 *et seq.* § 12-240-106, C.R.S.

65. The Medical Board exercises quasi-judicial functions through the hearing of evidence, ascertaining of facts, and exercise of judgment and discretion. *Sapero v. State Board of Medical Examiners*, 11 P.2d 555, 558 (Colo. 1932).

66. Section 12-240-125(9)(b) of the Medical Practice Act establishes that “[f]or purposes of the records related to a complaint filed pursuant to this section against a licensee, the board is considered a professional review committee, the records related to the complaint include all records described in section 12-30-202 (8), and section 12-30-204 (12) applies to those records.”

67. The Medical Board, a state agency, exceeds its statutory jurisdiction by publicly disclosing a statutorily privileged record of professional review committee, i.e., the Notice of Formal Charges, related to Plaintiff's medical license.

68. Disclosure of Plaintiff's privileged professional review information simply because it chooses to refer a matter to the OAC for further proceedings will substantially and irreparably harm Plaintiff by violating her right to privacy and due process for which there is no plain, speedy and adequate remedy at law.

WHEREFORE, Plaintiff respectfully requests that this Court:

- Find and conclude that Plaintiff faces danger of a real, immediate, and irreparable injury, which may be prevented through injunctive relief
- Find and conclude that no plain, speedy, and adequate remedy is otherwise provided by law;
- Enjoin the Medical Board consistent with the declaration and directions above, including an order that any future proceedings filed against Plaintiff with the Office of Administrative Courts be done under seal and not publicly disclosed;
- Award Plaintiff her reasonable attorneys' fees and costs, pursuant to state and federal law, and
- Award such other relief as is just and proper.

Dated this 24th day of January 2020

hershey decker drake

/s/ Carmen Decker

Carmen N. Decker, #35864

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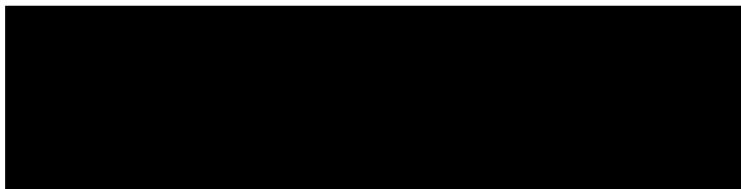
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I have reviewed this Complaint and declare under penalty of perjury that the facts alleged within this Complaint are true and correct.



CERTIFICATE OF SERVICE

I certify that on this 24th day of January 2020, a true and correct copy of the foregoing was filed with the Court and served via Colorado Courts E-filing upon the following:

Attorney for the Colorado Medical Board:

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