

1 **BACKGROUND**¹

2 The National Practitioner Data Bank (“NPDB”) was established through Title IV of
3 Public Law 99-660, the Health Care Quality Improvement Act of 1986. (Doc. No. 18-1 at
4 9 (*see* 42 U.S.C. § 11133).) The focus of the NPDB is to improve the quality of health care
5 by identifying practitioners who are incompetent or engage in unprofessional conduct; thus
6 it acts as a flagging system to restrict the ability of such practitioners to move from state to
7 state without disclosure or discovery of the “physician’s previous damaging or incompetent
8 performance.” (Doc. No. 1 at 5; Doc. No. 18-1 at 9 (*see* 42 U.S.C. § 11101).)

9 Plaintiff is a registered nurse and certified registered nurse anesthetist licensed to
10 practice nursing in California. (Doc. No. 1 at 3; Doc. No. 18-1 at 11.) On January 29, 2013,
11 Mountain View Surgery Center submitted a report to the NPDB concerning Plaintiff. (Doc.
12 No. 18-1 at 11.) The report stated that on January 2, 2013, Plaintiff passed out while
13 monitoring one patient during a procedure and subsequently had to be stopped from trying
14 to administer sedation to a patient who had already been sedated. (*Id.*; Doc. No. 18-2 at
15 30.) Plaintiff contests this report as well as any other reports submitted by Mountain View.
16 (Doc. No. 1 at 8.)

17 Beginning in February of 2013, Plaintiff began requesting that Mountain View either
18 remove the report or at a minimum correct it. (Doc. No. 18-1 at 12.) On October 9, 2013,
19 the Department of Health & Human Services (“the Department”) noted several errors in
20 Mountain View’s NPDB report and as a result requested by letter that Mountain View
21 correct the report. (Doc. No. 18-2 at 29–32.) Despite these corrections, Plaintiff continued
22 to challenge the departmental review of the report and on August 26, 2014, Plaintiff
23 requested reconsideration of the Department’s decision. (Doc. No. 18-1 at 13; Doc. No.
24 18-2 at 53–59.) On December 2, 2014, the Department responded that there was “no basis
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26 ¹ As the facts of the instant matter have not changed since the Court’s January 16, 2018
27 order, the Court will utilize portions of the background section from that previous order.
28 (Doc. No. 23.)

1 harm “just so long as is necessary to hold a hearing, and no longer.” *Granny Goose Foods,*
2 *Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439 (1974).
3 A request for a TRO is evaluated by the same factors that generally apply to a preliminary
4 injunction. *See Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7
5 (9th Cir. 2001). However, a TRO is an “extraordinary remedy” and is “never awarded as
6 of right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citing *Munaf v.*
7 *Geren*, 553 U.S. 674, 689–90 (2008)). Instead, the moving party bears the burden of
8 demonstrating four factors: (1) “he is likely to succeed on the merits”; (2) “he is likely to
9 suffer irreparable harm in the absence of preliminary relief”; (3) “the balance of equities
10 tips in his favor”; and (4) “an injunction is in the public interest.” *Winter*, 555 U.S. at 20.

11 Although a plaintiff must satisfy all four of the requirements set forth in *Winter*, the
12 Ninth Circuit employs a sliding scale whereby “the elements of the preliminary injunction
13 test are balanced, so that a stronger showing of one element may offset a weaker showing
14 of another.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).
15 Accordingly, if the moving party can demonstrate the requisite likelihood of irreparable
16 harm and show that an injunction is in the public interest, a TRO may issue so long as there
17 are serious questions going to the merits and the balance of hardships tips sharply in the
18 moving party’s favor. *Id.*

19 DISCUSSION

20 Plaintiff alleges that since the Court’s previous order denying his first motion for a
21 TRO, there has been new compelling evidence provided to the Court. (Doc. No. 33 at 1.)
22 Specifically, Plaintiff illustrates that the instant motion is based upon (1) the indisputable
23 admission made by the Mountain View Attorney, John Whalin, that Mountain View was
24 not eligible to make a report concerning Plaintiff to the NPDB; (2) the indisputable
25 admission made by the Mountain View administrator, Mary Lamoureux, that the
26 organization did not have a formally adopted peer review process that provided Plaintiff
27 with rights to a hearing as required by HCQIA for eligibility in the NPDB; (3) the
28 indisputable Mountain View Bylaws that demonstrate that it did not have a “Formal Peer

1 Review Process” in place to make a report to the NPDB; and (4) Plaintiff’s motion for
2 summary judgment and corresponding exhibits. (Doc. No. 33 at 1–2.)

3 Unfortunately, under the standard proscribed by this circuit, Plaintiff has again failed
4 to demonstrate his likelihood to succeed on the merits. Plaintiff attempts to focus the
5 Court’s attention on the foregoing four allegations. However, as the Court reiterated during
6 the motion hearing on Defendant’s motion to dismiss, at this stage, Plaintiff must
7 demonstrate that his Privacy Act claim was filed within the statute of limitations. The Court
8 cannot reach the merits of Plaintiff’s complaint or motion for summary judgment until this
9 issue has been addressed and decided.

10 As has already been established in great detail, a suit seeking civil damages under
11 the Privacy Act must be filed:

12 within two years from the date on which the cause of action
13 arises, except that where an agency has materially and willfully
14 misrepresented any information required under this section to be
15 disclosed to an individual and the information so misrepresented
16 is material to establishment of the liability of the agency to the
17 individual under this section, the action may be brought at any
time within two years after discovery by the individual of the
misrepresentation.

18 5 U.S.C. § 552a(g)(5) (emphasis added).

19 Curiously, the Court’s previous order denying Plaintiff’s first request for a TRO
20 particularly delineated that the first factor—Plaintiff’s likelihood to succeed on the
21 merits—turned on whether there existed any allegations that demonstrated that Plaintiff’s
22 Privacy Act claim was filed within the two year statute of limitations or that it fits within
23 an exception. (Doc. No. 23 at 5.) Despite the Court’s clear breakdown of the salient issues
24 for Plaintiff’s benefit, the current motion solely focuses on the merits of Plaintiff’s claims.
25 Thus, Plaintiff has again leaped over the threshold issue of determining whether his Privacy
26 Act claim is time-barred and wishes the Court to join him in making a determination as to
27 how and why Defendant purportedly violated the Privacy Act. However, the Court cannot
28 do so. *See Gray v. Beard*, No. 12-CV-1911-H (RBB), 2013 WL 4782821, at *5 (S.D. Cal.

1 Sept. 6, 2013) (“The statute of limitations is a threshold issue that must be resolved before
2 the merits of individual claims.”). Consequently, as Plaintiff’s TRO is silent as to whether
3 his Privacy Act claim is barred or is timely, the Court finds that Plaintiff has not
4 demonstrated a likelihood to succeed on the merits.

5 As to the second factor, the Court agrees that the immediate and irreparable injury
6 to Plaintiff if this TRO is not granted is severe. This factor weighs even more heavily due
7 to the fact that Plaintiff has been offered a position with the San Diego Veterans
8 Administration hospital, whom according to Plaintiff, is required to and will search the
9 NPDB and discover the report at issue and then retract its offer to Plaintiff. (Doc. No. 33-
10 1 at 3; Doc. No. 33-2 at 1–2.) Thus, this factor weighs in favor of granting Plaintiff’s
11 request.

12 Next, the Court finds that the balance of the competing claims of injury tip in favor
13 of denying the motion for a TRO. *See Keep A Breast Foundation v. Seven Grp.*, No. 3:11-
14 cv-00570-BEN-WMC, 2011 WL 3341474, at *3 (S.D. Cal. May 20, 2011) (“In each case,
15 a court must balance the competing claims of injury and must consider the effect on each
16 party of the granting or withholding of the requested relief.”) (citation omitted). As noted,
17 Plaintiff alleges that he has already suffered five years of adverse effects through the
18 dissemination of the NPDB report. (Doc. No. 33-1 at 3.) The Court is sensitive to Plaintiff’s
19 claims. However, at this point, they are simply just allegations. The Court has made no
20 finding that the NPDB report is inaccurate or erroneous. Thus, an injunction precluding
21 Defendant from disseminating the report or removing the report would in fact defeat the
22 purpose of the NPDB in allowing hospitals and medical professionals the ability to track
23 and report incompetent or unprofessional employees. Thus, the third factor weighs in favor
24 of denying Plaintiff’s request. Finally, the Court does not find that the injunction would
25 advance the public interest in improving the quality of medical care. *See Golden Gate Rest.*
26 *Ass’n v. City and Cty. of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008) (“In
27 considering the public interest, [the Court] may consider the hardship to all individuals . .
28 . [and is] not limited to parties . . .”).


1 In sum, after reviewing the equities in this case, the Court concludes that Plaintiff
2 has not met his burden of persuasion in demonstrating the need for the “extraordinary and
3 drastic remedy” of a TRO. *Swanson v. Cleveland Nat’l Forest*, Case No. 06-CV-1560 W
4 (LSP), 2008 WL 11337488, at *2 (S.D. Cal. Sept. 2, 2008).

5 **CONCLUSION**

6 The bane of Plaintiff’s motion lies in the fact that he has not persuaded the Court
7 that his Privacy Act claim is likely to succeed on the merits. Further, most of the remaining
8 factors weigh in favor of denying Plaintiff’s request. Consequently, the Court **DENIES**
9 Plaintiff’s motion for a temporary restraining order **WITHOUT PREJUDICE**.

10
11 **IT IS SO ORDERED.**

12 Dated: February 21, 2018

13 
14 Hon. Anthony J. Battaglia
United States District Judge