No. S214679

IN THE SUPREME COURT OF CALIFORNIA

DEPARTMENT OF PUBLIC HEALTH,

Petitioner,

vs.

THE SUPERIOR COURT OF SACRAMENTO COUNTY,

Respondent.

CENTER FOR INVESTIGATIVE REPORTING.

Real Party In Interest

After a Published Decision of the Court of Appeal,
Third Appellate District, Case No. C072325
(Justice M. Kathleen Butz), Vacating a Judgment Entered by the
Superior Court for the County of Sacramento,
Case No. 34-2012-80001044 (Hon. Timothy M. Frawley).

OPENING BRIEF ON THE MERITS OF THE CENTER FOR INVESTIGATIVE REPORTING

Duffy Carolan (# 154988)
Jassy Vick Carolan LLP
400 Montgomery Street, Suite 200
San Francisco, CA 94104
Tel: (415) 539-3399
Fax: (415) 539-3394

Rochelle Wilcox (# 197790)
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6433
Tel: (415) 276-6500
Fax: (415) 276-6599

Attorneys for Real Party In Interest
THE CENTER FOR INVESTIGATIVE REPORTING

No. S214679

IN THE SUPREME COURT OF CALIFORNIA

DEPARTMENT OF PUBLIC HEALTH,

Petitioner,

vs.

THE SUPERIOR COURT OF SACRAMENTO COUNTY,

Respondent.

CENTER FOR INVESTIGATIVE REPORTING.

Real Party In Interest

After a Published Decision of the Court of Appeal,
Third Appellate District, Case No. C072325
(Justice M. Kathleen Butz), Vacating a Judgment Entered by the
Superior Court for the County of Sacramento,
Case No. 34-2012-80001044 (Hon. Timothy M. Frawley).

OPENING BRIEF ON THE MERITS OF THE CENTER FOR INVESTIGATIVE REPORTING

Duffy Carolan (# 154988)
Jassy Vick Carolan LLP
400 Montgomery Street, Suite 200
San Francisco, CA 94104
Tel: (415) 539-3399
Fax: (415) 539-3394

Rochelle Wilcox (# 197790)
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6433
Tel: (415) 276-6500
Fax: (415) 276-6599

Attorneys for Real Party In Interest
THE CENTER FOR INVESTIGATIVE REPORTING

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

I. ISSUES PRESENTED

(1) Can the public posting and access mandates of the Long-Term Care, Health, Safety and Security Act of 1973 governing citations issued to long-term health care facilities for serious violations of laws and regulations relating to patient care be reconciled with the earlier enacted general confidentiality provisions of the Lanterman-Petris-Short Act governing information obtained in the course of providing services to developmentally disabled individuals in a manner that gives effect to all of the provisions of both statutes?

(2) If the statutes cannot be reconciled without compromising the Legislature's intent in enacting either, which statutory scheme controls?

(3) Must the state redact information required under the Long-Term Care, Health, Safety and Security Act of 1973 to be contained in an on-line consumer information service system about substantiated complaints and citations assessed against long-term health care facilities to protect information obtained in the course of providing services to mentally and developmentally disabled individuals under the Lanterman-Petris-Short Act?

II. SUMMARY OF ARGUMENTS

This case involves the proper reconciliation of two statutory schemes designed to protect the state's most vulnerable populations – those residing in state licensed long-term health care facilities, and mentally and developmentally disabled individuals receiving services overseen by the state.

One of these statutes, the Long-Term Care, Health, Safety and Security Act of 1973 ("Long-Term Care Act" or "1973 Act"), specifically requires that the ultimate administrative record chronicling serious violations of law and regulations pertaining to patient care at state licensed long-term

health care facilities be publicly posted at the facility and made available to the public upon request; with only the names of patients and other individuals, except investigating personnel, redacted to protect patient privacy. Health & Safety Code §§ 1429(a)(1)(A); 1429(b); 1423(a)(2); 1439.

This statutory scheme was enacted to protect individuals residing in long-term care facilities by, in part, providing "information to the public about the citation record of facilities." Kizer v. County of San Mateo, 53 Cal. 3d 139, 143, 150 (1991). Its public posting and access provisions, along with other provisions pertaining to the issuance of citations and civil penalties, were "designed to implement the Legislature's declared public policy objective of 'assur[ing] that long-term health care facilities provide the highest level of care possible.'" Id. at 143; see also Health & Safety Code § 1422(a). It is a remedial statute, and as such must be "liberally construed on behalf of the class of persons it is designed to protect." California Association of Health Facilities v. Dep't of Health Services, 16 Cal. 4th 284, 294-95 (1997) (quoting Kizer, 53 Cal. 3d at 147-48).

Four of the eight categories of facilities expressly covered by the 1973 Act are specifically designated for the care of developmentally disabled individuals. See Health & Safety Code § 1418.

The other statutory scheme at issue here – the Lanterman-Petris-Short Act and a companion provision under the Lanterman Developmental Services Act (collectively the "Lanterman Act") – governs the evaluation, protection, care and treatment of persons who are mentally ill, developmentally disabled or impaired by chronic alcoholism. Welf. & Inst. Code §§ 5001, et seq.; id. §§ 4500, et seq. A provision of the Lanterman Act, enacted in 1972 – one year before the Long-Term Care Act – provides that "[a]ll information and records obtained in the course of providing services" under specified

divisions of the Act shall be confidential. Welf. & Inst. Code §§ 5328; 4514. This "general" rule of confidentiality is followed by specific exemptions to the general rule in the code, in successive sections of the code and elsewhere. E.g., Albertson v. Superior Court, 25 Cal. 4th 796, 805 (2001).

The intersection of these statutes arose in the context of a California Public Records Act ("CPRA") lawsuit brought by Real Party in Interest The Center for Investigative Reporting ("CIR"). It sought access to citations issued by the Department of Public Health ("DPH") for serious violations of law and regulations by state owned and operated long-term care facilities for the developmentally disabled, including patient deaths directly attributable to the state facilities. After DPH produced 55 citations redacted almost entirely, and refused to produce any citations before 2007, CIR brought the instant lawsuit.

The trial court found that the Long-Term Care Act's disclosure requirements could not be reconciled with the Lanterman Act's confidentiality provisions; under well-established rules of statutory construction, it ruled that the Long-Term Care Act prevailed, and ordered DPH to disclose to CIR the citations requested. 5 Petitioner's Exhibits ("PE") 1446-1448 (Order at 9-11).[1] The Court of Appeal vacated the judgment. In the guise of harmonizing these statutes, it held that certain information that is expressly required to be public under the Long-Term Care Act if relied on by DPH in issuing a citation must be redacted from citations involving mentally and developmentally disabled individuals receiving services under the Lanterman Act, when, and only when, those citations are

[1] Throughout this brief the record will be cited by reference to the volume then "PE" followed by the page number (without proceeding zeroes) and line number if applicable.

requested under the CPRA. Court of Appeal Opinion ("Opn.") at 21; see also id. at 6. Specific other information required to be considered in issuing a citation, which may implicate confidential information under the Lanterman Act, must be disclosed. Opn. at 20-21.

By parsing the statutes in this manner, the Court of Appeal effectively rewrote the 1973 Act by striking out language requiring that "all relevant facts" considered by the department in determining the amount of the civil penalty to be assessed under the Long-Term Care Act "shall be documented by the department on an attachment to the citation and available in the public record." Health & Safety Code § 1424(b) (emphasis added). "Relevant facts" to be considered by the department under the Act – and disclosed to the public – are defined to include the patient's or resident's mental condition, medical condition, and history of mental disability or disorder, the risk the violation presents to the patient's or resident's mental and physical condition; as well as the facility's good faith efforts to prevent the violation, and the licensee's history of regulatory compliance. Id., § 1424 (a)(1). Instead of following this statutory mandate, the Court of Appeal decided that for mentally and developmentally disabled individuals covered by the Lanterman Act, these provisions of the Long-Term Care Act will not be enforced "in PRA-request citations," although they remain in effect for all others residing in long-term health care facilities covered by the 1973 Act,[2] and in other contexts. Opn. at 21.

The Court of Appeal's decision does violence to both statutory schemes and, in the process, interjects substantial uncertainty into an

[2] Indeed, DPH publicly posts on its website citations issued to state licensed nursing homes falling under the 1973 Act with all of this same information disclosed. 2 PE 299:20-26; 432-534; see also http://www.cdph.ca.gov/certlic/facilities/Page/AACounties.aspx.

administrative process governing all long-term health care facilities throughout the state, as well as the regional centers and state departments that oversee them. If not reversed, the decision will result in the very type of "two-tiered system of enforcement" under the Long-Term Care Act that this Court refused to allow in Kizer, when it rejected an argument that the civil penalty provisions of the 1973 Act should only apply to private long-term care facilities, not facilities owned by government entities covered by the Tort Claims Act. 53 Cal. 3d at 148. The decision robs the most vulnerable of an already vulnerable population – mentally and developmentally disabled individuals who reside in long-term health care facilities – of important protections that the Legislature clearly intended to apply to them, while these same protections remain in effect for others covered by the 1973 Act.

Moreover, the Court of Appeal's decision sets up a compliance system – applicable throughout the state – that is simply not workable. By injecting the specter of civil liability for wrongful disclosure of confidential information under the Lanterman Act (see Welf. & Inst. Code § 5330) into the public posting and access mandates of the Long-Term Care Act, the decision puts long-term care facilities, and the state and counties charged with overseeing them, in a Catch-22. On the one hand, they must aggressively redact the citations or risk hefty civil penalties for guessing wrong. On the other hand, they face administrative penalties under the Long-Term Care Act if they do not fully disclose the citation information required by the Act. Health & Safety Code § 1429(c). This could not have been what the Legislature intended in enacting a comprehensive statutory scheme requiring the public posting of citations, while carefully protecting patient privacy.

The rules of statutory construction that control here compel the conclusion that the posting and public access mandates of the Long-Term Care Act were intended to apply uniformly to all populations residing in long-term health care facilities throughout the state, and that public disclosure of the ultimate administrative record chronicling serious violations of law at these facilities furthers the purposes of both statutory schemes – to protect vulnerable populations from actual harm.

For these reasons, and those more fully set forth below, CIR respectfully requests that the Court reverse the Court of Appeal's published decision and uphold the Legislature's declared purpose in enacting the Long-Term Care Act – deterring conduct that may endanger the well-being of patients by requiring public disclosure of citations involving all classes of persons covered by the Act. Kizer, 53 Cal. 3d at 150.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. The Center for Investigative Reporting and Its Reporting on Substantiated Cases of Abuse at State Run Developmental Centers.

CIR, founded in 1977, is the nation's oldest non-profit news organization. 1 PE 3:20-27. CIR Investigative Reporter Ryan Gabrielson, who made the CPRA request at issue here, is the lead reporter on CIR's investigation into, and subsequent publication of a series of news reports chronicling, cases of patient abuse, injury and death at the state's largest facilities for long-term care of developmentally disabled individuals, called "Developmental Centers." 2 PE 293:9-18. The series, titled "Broken Shield," initially was published in February of 2012 and is ongoing. Id.; 2 PE 304-372. While focusing on a number of specific abuse cases, it reported that according to the state's own records the Developmental Centers have

been the scene of 327 patient abuse cases from 2006 to 2011, with patients suffering an additional 762 injuries of "unknown origin." These injuries have included deep cuts on the patients' heads, fractured pelvises, broken jaws, busted ribs, shins and wrists, bruises and tears to male genitalia and burns on the skin the size and shape of a cigarette butt. 2 PE 293:20-28; 304-316 (Feb. 23, 2012 "Sloppy investigations leave abuse of disabled unsolved"). Despite these numbers, CIR could confirm few cases that were referred to prosecutors and fewer still resulting in criminal charges. 2 PE 293:21-18. DPH issued only 55 citations to Developmental Centers between 2007 and May of 2011. 1 PE 6:1-6; 30-165.

While the series has focused on the Office of Protective Services, whose function is to investigate allegations of crime at the Centers, CIR also has reported on citations issued by DPH against the Developmental Centers. One such news account involved a citation issued to Sonoma Developmental Center. An unredacted copy of the citation provided to CIR reflects that 11 of 27 patients in a single unit at Sonoma received significant thermal burn injuries consistent with being shot with a high-voltage probe or Taser gun. 5 PE 1388-1391; 1378:25-27. Though a whistleblower informed officials about the abuse in September of 2011, DPH did not issue a citation until June of 2012. 5 PE 1378:9-18. The redacted citation produced to CIR was devoid of all facts. 5 PE 1383-1386; see also 2 PE 300-301; 565-566 (reporting on murder of 16-year old girl at Fairview Developmental Center, DPH's belated issuance of citation, and the Center's near complete redaction of posted-citation).

B. Department of Public Health, Department of Developmental Services and the Developmental Centers.

DPH is a state agency responsible for licensing, regulating and inspecting health care facilities in California, including the Developmental Centers which are the subject of Mr. Gabrielson's CPRA request. 1 PE 224:16-19. Through its licensing and certification department, DPH is responsible for enforcing and administering the civil penalty/citation system for all long-term care facilities in violation of the laws and regulations of this state put into effect by the Legislature through the Long-Term Care Act of 1973. 1 PE 30-165 (citations).

The Department of Developmental Services ("DDS"), which is not a party to the underlying lawsuit, is the state agency responsible for providing services to people with developmental disabilities. When this lawsuit was filed, it operated five Developmental Centers, which housed about 1,700 of the state's most severely developmentally-disabled patients, many with cerebral palsy, severe autism and mental disabilities. 2 PE 294:8-12; 403. Each of the Centers at issue holds or held licenses to operate intermediate care/developmentally disabled facilities within the meaning of Section 1418 of the Health and Safety Code, and thus is or was subject to the citation and enforcement provisions of the Long-Term Care Act of 1973. 2 PE 294:17-295:6; 374-401; Health & Safety Code § 1418.

C. CIR's Public Records Act Request and DPH's Aggressive Redaction of Responsive Citations and Failure to Produce Any Citations Before 2007.

On May 6, 2011, Mr. Gabrielson made a written CPRA request to DPH seeking citations issued by DPH to the state's seven Developmental Centers from January 1, 2002 to the present. 1 PE 4:15-23; 19. On May 16, 2011, a representative of DPH responded to the request, stating that it is only

required to maintain citations for four years, and that any citations produced would be redacted pursuant to Welfare and Institutions Code Section 5328 to remove any confidential information obtained in the course of providing services to developmentally disabled persons. 1 PE 5:3-18; 22. On June 13, 2011, DPH produced 55 citations on a disk. 1 PE 6:1-6; 30-165 (copies of printed citations). No citations were produced for years 2002-2006. Each of the 55 citations was extensively redacted, removing all information except licensee information, oblique statutory references and some factually devoid statements about the violations or rights at issue on the initial page of the citation. Even the names of the department evaluators were redacted. Id.

DPH claimed that the near blanket redactions were necessary to comply with the confidentiality provisions of Welfare and Institutions Code Section 5328 and an express exemption to the confidentiality provisions for licensing personnel under Section 5328.15. 1 PE 7:24-27; 174-176.

D. Proceedings in the Trial Court and Court of Appeal.

On January 8, 2012, CIR filed a verified petition for writ of mandate under the CPRA and complaint for declaratory relief seeking an order compelling DPH to disclose in unredacted or minimally redacted form the previously produced "aggressively" redacted citations. 1 PE 1-177. On September 13, 2012, Respondent Court issued an 11-page order granting the petition and complaint for declaratory relief. 5 PE 1439-1450. Applying well accepted rules of statutory construction, Respondent Court found that where citations involve mental health records obtained in the course of providing services under the Lanterman Act, "DPH cannot make the citations publicly available [as required under the Long-Term Care Act] and simultaneously shield it from public disclosure." 5 PE 1446. Thus, "[w]here mental health records are involved, there is an irreconcilable conflict between

the Lanterman Act's confidentiality provisions and the Long-Term Care Act's accessibility provisions. The statutes cannot be harmonized by disclosing the citations denude of all the underlying factual information giving rise to the citation." Id.

Having found an irreconcilable conflict, Respondent Court went on to decide which statute prevails. In concluding that the Long-Term Care Act was the later enacted, specific act that controls the disclosure of citations, the court noted that "the ultimate purpose of both the confidentiality and the accessibility statutes is the same: to promote and protect the health and safety of mental health patients." Id. at 1447. "It follows, that publicly disclosing the basis of the citations is consistent with the ultimate purpose of the Lanterman Act to promote the health and safety of patients. The converse is not true. Withholding such information undermines the public's interest in protecting patients." Id.

Respondent Court also rejected DPH's alternative theory that disclosure was governed by the later enacted exceptions to the confidentiality provisions for licensing personnel contained in Sections 5328.15 and 4514(n) of the Welfare and Institutions Code. Id. at 1448. These provisions "were intended to authorize disclosure to licensing personnel conducting licensing duties, and not to supersede the public inspection provisions of the Long Term Care Act's citation system." Id.

On October 26, 2012, DPH filed a Petition for Extraordinary Writ of Mandate in the Court of Appeal. On November 21, 2012, the Court of Appeal issued an order granting the alternative writ. On September 18, 2013, after full briefing and oral argument, the Court of Appeal (Butz, J.) issued a peremptory writ of mandate directing Respondent Court to vacate its judgment and ruling and to enter a new one that directs DPH to produce to

CIR the requested citations in accordance with the standards set forth in the opinion and to grant declaratory relief in favor of CIR. Opn. at 25. The Court of Appeal held that the Long-Term Care Act and the Lanterman Act could be harmonized by allowing disclosure of certain information that is required to be considered by DPH in issuing a citation under the Long-Term Care Act, while prohibiting the disclosure of other information where disclosure implicates mentally and developmentally disabled individuals covered by the Lanterman Act's confidentiality provision. Opn. at 19-22; see also id. at 21 ("The patient's or resident's mental, physical, and medical conditions, history of mental disorder, as well as the risk the violation presents to the mental and physical condition, are not disclosable in PRA-requested citations, in light of the mental health-based confidentiality provisions of the Lanterman Act.").

An apt description of the majority's opinion is set forth in the dissent:

> Implicitly recognizing that sections 5328 and 4514 of the Lanterman Act conflict with section 1423, 1424, and 1439 of the Long-Term Care Act, the majority 'harmonizes' these provisions by holding that the Long-Term Care Act controls over the Lanterman Act on the issue of 'describ[ing] with particularity the nature of the violation' (Health & Safety Code, § 1423, subd. (a)(2)), but the Lanterman Act controls over the Long-Term Care Act on the issue of setting forth other 'relevant facts,' including the patient's or resident's 'medical' and 'mental' condition, his or her 'history of mental disability or disorder,' and 'the risk that the violation presents to [his or her] mental and physical condition.' (Health & Safety Code, § 1424, subds. (a), (b)(1)-(3).) Thus, under the guise of bringing harmony, the majority opinion does violence to two statutory enactments–carving out of the Lanterman Act an exception allowing public citations to include an unredacted description of the nature of the violation, and severing from the Long-Term Care Act the requirement that the public record contain the aforementioned 'relevant facts.'

Dis. Opn. at 1 (Hoch, J., dissenting).

The dissent concluded that the two acts conflict, that no reasonable interpretation of them gives force and effect to all of their provisions, and that the citation provisions of the Long-Term Care Act, which "deal specifically with citations and precisely mandate the contents of these citations," is the later enacted, more specific statute that takes "precedence over the Lanterman Act's general confidentiality provisions." Id. at 3, 6, 9.

On October 9, 2013, an order modifying the opinion and judgment was entered in response to a motion for rehearing by CIR addressing the recovery of fees on appeal. See Order Modifying Opinion.

On November 18, 2013, CIR timely petitioned this Court for review of the Court of Appeal's opinion, which was granted on January 29, 2014.

IV. LEGAL ANALYSIS

A. The CPRA and California Constitution Require Exemptions to the Public's Right of Access to be Narrowly Construed and Impose a Heavy Burden on Agencies Intent on Withholding Public Records.

The United States Supreme Court has declared that "[n]either our elected nor our appointed representatives may abridge the free flow of information simply to protect their own activities from public scrutiny." Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 19 (1986). Consistent with this principle, this Court has recognized that "[o]penness in government is essential to the functioning of a democracy." Sierra Club v. Superior Court, 57 Cal. 4th 157, 164 (2013) (quoting International Federation of Professional and Technical Engineers v. Superior Court ("International Federation"), 42 Cal. 4th 319, 328 (2007)). Quoting from its prior decisions, the Court explained, "[i]mplicit in the democratic process is the notion that government should be accountable for its actions. In order to verify

accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." Id. (citing International Federation, 42 Cal. 4th at 328-29) (quoting CBS Inc. v. Block, 42 Cal. 3d 646, 651-52 (1986)).

The CPRA and California Constitution guarantee citizens this crucial right of access. Gov't Code § 6252, et seq.; Cal. Const. Art. 1, § 3(b). Through the CPRA, the Legislature has mandated 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't Code § 6250. In addition, following the passage of Proposition 59 in 2004, Article 1, Section 3(b) of the California Constitution guarantees that "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore ... the writings of public officials and agencies shall be open to public scrutiny." Cal. Const. Art. 1, § 3(b).

Important to the Court's analysis here, the Constitution mandates that any statute "that furthers the people's right of access" – such as Health & Safety Code Sections 1429, 1439 and the CPRA – "shall be broadly construed," while any statute "that limits the right of access" – such as Welfare and Institutions Code Sections 5328 and 5328.15 – must be "narrowly construed." Id.; see also Sierra Club, 57 Cal. 4th at 175 ("To the extent the term 'computer mapping system' is ambiguous, the constitutional cannon requires us to interpret it in a way that maximizes the public's access to information 'unless the Legislature has expressly provided to the contrary.'") (quoting Office of the Inspector General v. Superior Court, 189 Cal. App. 4th 695, 709 (2010) (emphasis in original)).

Because the CPRA and state Constitution embody "a strong policy in favor of disclosure of public records," "any refusal to disclose public

information must be based on a specific exemption to that policy." Calif. State Univ., Fresno Ass'n v. Superior Court, 90 Cal. App. 4th 810, 831 (2001); see also International Federation, 42 Cal. 4th at 329. "The proponent of nondisclosure ... must demonstrate a clear overbalance on the side of confidentiality." Id.; International Federation, 42 Cal. 4th at 329.

B. The Legislature Specifically Mandated Public Access to Citations Issued Against Long-Term Health Care Facilities.

1. The Citation System for Imposing Civil Penalties Against Long-Term Care Facilities.

Through the Long-Term Care Act, the Legislature adopted a comprehensive inspection and citation system aimed at "assuring that long-term health care facilities provide the highest level of care possible." Health & Safety Code § 1422(a). It was the intent of the Legislature in enacting Chapter 2.4 (Sections 1417-1439.8) of Division 2 of the Health and Safety Code to establish: "(1) a citation system for the imposition of prompt and effective civil sanctions against long-term health care facilities in violation of the laws and regulations of this state relating to patient care; (2) an inspection and reporting system to insure that long-term health care facilities are in compliance with state statutes and regulations pertaining to patient care; and (3) a provisional licensing mechanism to insure that full-term licenses are issued only to those long-term health care facilities that meet state standards relating to patient care." Health & Safety Code § 1417.1; see also Kizer, 53 Cal. 3d at 143, 147 (recognizing that the primary purpose of the 1973 Act was to "secure obedience to statutes and regulations imposed to assure important public policy objectives.").

The Act was intended to be more efficient and less drastic than the then-present system for enforcing compliance with laws and regulations

through license suspension and revocation proceedings under Chapters 2 and 3 of Division 2 of the Health and Safety Code. 3 PE 725, 728. (Assembly Committee on Health Analysis of AB 1600); see also id. at 845-848 (Report of the Joint Committee on Aging, Sept. 14, 1973, published in the Assembly Journal). That law was criticized as "too rigid, lacking in intermediate sanctions, and ineffective in producing compliance with standards." Id. at 744 (Staff Analysis of AB 1600, as amended June 21, 1973). As noted by the Office of Attorney General in a study submitted to the Joint Committee on Aging, it also was a system shrouded in secrecy. Id. at 877-879.

As enacted, the law requires the Department of Health Services, whose authority is now vested in DPH, to conduct onsite inspections and investigations of any complaints unless determined that it is willfully intended to harass a licensee. Health & Safety Code § 1420(a)(1). If the complaint involves imminent danger of death or serious bodily harm, the inspection must be conducted within 24 hours. Id. Advance notice of the inspection is prohibited. Id., § 1421(c).

The Act explicitly sets forth the disclosure authorizations necessary to conduct the investigation. These include review of "all available evidence," including but not limited to observed conditions, statement of witnesses and facility records. Id., § 1420(a)(2)(A)-(C); see also id., § 1421(a) ("Any duly authorized officer, employee, or agent of the state department may enter and inspect any long-term health care facility, including but not limited to, interviewing residents and reviewing records, at any time to enforce any provision of this chapter.").

The department must notify the complainant and the licensee of its determination within 10 working days of the completion of the complaint investigation. If dissatisfied with the determination, the complainant may

pursue an informal conference and/or review with the Deputy Director of the Licensing and Certification Division of the state department. Id., §§ 1420(a)(3), 1420(c).

A citation, if any, must issue to the licensee within three working days of the informal conference or review, with a copy being served on the complainant. Id., § 1420(d). Where no informal conference or review is requested, the department is required to issue a notice to correct and intent to issue a citation within 24 hours of a determination that the facility violated any laws or regulations relating to the operation or maintenance of the facility. Id., § 1423(a). Before issuing a citation, an exit interview with the licensee must be held and any further information provided by the licensee considered. Id. If the department determines "that the violation warrants the issuance of a citation and an exit conference has been completed it shall either" recommend a federal enforcement remedy or issue a citation. Id., § 1423(a)(1), (2).

Citations are classified according to the seriousness of the offense. Class "AA" violations, the most serious, involve a determination that the violation was a "direct proximate cause of death of a patient" and require the imposition of a civil penalty not less than $5,000.00 or more than $25,000.00[3] Id., § 1424(c). Class "A" violations, subject to a penalty of not less than $1,000.00 but not more than $10,000.00, involve an "imminent danger" of death or serious harm to a patient or a "substantial probability" that death or serious physical harm would result from the violation. Id.,

[3] If a facility receives a second class "AA" citation within a 12-month period, the department must consider the suspension or revocation of the facility's license. If a third "AA" citation is issued in that period, the department must commence action to suspend or revoke the facility's license. Id., § 1424(c).

§ 1424(d). Class "B" violations are those with a "direct or immediate relationship to the health, safety, or security of long-term health care facilities' patients or residents, other than class "AA" or "A" violations." Id., § 1424(e). Class "B" violations are subject to a penalty of not less than $100.00 but not more than $1,000.00. Id.

A licensee may challenge a class "AA" or "A" citation or penalty by providing notice to the Department within 15 days of service of the citation and thereafter within 90 days filing a civil action in superior court. Id., § 1428(b). Class "B" citations may be appealed to an administrative law judge and thereafter are subject to judicial review or binding arbitration. Id., § 1428(c).

2. The Posting, Public Access and Public Records Mandates of the Citation System.

To fulfill the Act's goal of providing vital information to families and the public about serious violations of law found to have occurred at long-term health care facilities, the Act specifically requires access to citations through its public posting and access mandates. The two most serious violations, class "AA" and "A," must be prominently posted in the facility at "[a]n area accessible and visible to members of the public." Id., § 1429(a)(1)(A). The exact manner of the posting is also regulated. Id., § 1429(a)(2) (requiring that a cover sheet accompany the posting of the citation and that it contain the name of the facility in 28-point type and the class of citation in 20-point type). Class "B" violations, while not required to be posted at the facility, "shall be made promptly available by the licensee

for inspection or examination by any member of the public who so requests." Id., § 1429(b) (emphasis added).[4]

In issuing a citation and imposing civil penalties, the Act requires that DPH consider "all relevant facts," including the patient's medical and mental condition and history of mental disability. Id., §§ 1424(a); 1421(a). Importantly, "[r]elevant facts considered by the department in determining the amount of the civil penalty shall be documented by the department on an attachment to the citation and available in the public record." Id., § 1424(b) (emphasis added). The Act further requires that each citation "describe with particularity the nature of the violation, including a reference to the statutory provision, standard, rule, or regulation alleged to have been violated, the particular place or area of the facility in which it occurred, as well as the amount of any proposed assessment of a civil penalty." Id., § 1423(a)(2).

The facility may post a plan of correction, a statement disputing the citation or the appeal status of the citation, along with the citation. Id., § 1429(a)(3), (a)(4). Even when a citation is ultimately dismissed, the Act requires that the department take action "immediately to ensure that the public records reflect in a prominent manner that the citation was dismissed." Health & Safety Code § 1428(j) (emphasis added).

To ensure compliance with the Act's public posting and access mandates, the Legislature made it a class "B" violation, subject to a civil penalty of $1,000.00, for a licensee to violate any provision of Section 1429, which include the access mandates. Id., § 1429(c).

In addition to the public posting and access mandates specifically governing citations, the Act reiterates its intent that records generated in the

[4] The posting mandates are repeated in the California Code of Regulations without exception for developmentally disabled individuals under the Lanterman Act. See 22 C.C.R. § 76721.

course of conducting a complaint investigation under the citation system are public. Section 1439 provides, in relevant part, that "[a]ny writing received, owned, used, or retained by [DPH] in connection with the provisions of [the Long-Term Care Act] is a public record within the meaning of [the Public Records Act], and, as such, is open to public inspection pursuant to the provisions of Sections 6253, 6256, 6257, and 6258 of the Government Code." Health & Safety Code § 1439.

3. The Legislature Protected Patient Privacy by Requiring Names to be Redacted.

In requiring public disclosure of the citations, the Legislature expressly protected patient privacy. In particular, Section 1423 provides, "[t]he names of any patient jeopardized by the alleged violation shall not be specified in the citation in order to protect the privacy of the patient." Health & Safety Code § 1423(a)(2) (emphasis added). Moreover, while the licensee is authorized to receive a list of the names of patients allegedly jeopardized by violation, this list is not subject to disclosure as a public record. Id., § 1423(a)(2).

Similarly, Section 1439 provides that the "names of any persons contained in such records, except the names of the duly authorized officers, employees, or agents of the state department conducting an investigation or inspection in response to a complaint filed pursuant to this chapter, shall not be open to public inspection and copies of such records provided for public inspection shall have such names deleted." Id., § 1439 (emphasis added); see also 3 PE 606 (Leg. Counsel's Dig., April 25, 1973) (recognizing requirement that names be deleted from writings provided for public inspection).

Thus, in mandating public disclosure of the citations, the Legislature specifically accounted for patient and individual privacy interests through redaction of their names.

C. The Lanterman Act's Confidentiality Provision is a General Law with Numerous Statutory Exceptions.

The Lanterman Act sets forth the responsibilities of the State in providing services to those who are mentally ill, developmentally disabled or impaired by chronic alcoholism, and defines the rights and protections afforded individuals receiving those services. Welf. & Inst. Code §§ 5001, 4500. Sections 5328 and 4514 of the Welfare and Institutions Code govern the confidential nature of information obtained in the course of providing services under specified divisions of that Code. Id., §§ 5328, 4514. Replacing a similar provision, which was repealed, Section 5328 was first added to the Lanterman Act in 1972, a year before the legislature adopted the specific provisions governing citations under the Long-Term Care Act of 1973. Id., § 5328 (Hist. & Stat. Notes); cf. Health & Safety Code § 1417.[5]

Section 5328 provides, in relevant part:

> All information and records obtained in the course of providing services under Division 4 (commencing with Section 4000), Division 4.1 (commencing with Section 4400), Division 4.5 (commencing with Section 4500), Division 5 (commencing with Section 5000), Division 6 (commencing with Section 6000), or Division 7 (commencing with Section 7100), to either voluntary or involuntary recipients of services shall be confidential.

Id., § 5328 (emphasis added).[6]

---

[5] In 1982, the confidentiality laws as they pertain to the developmentally disabled were moved from Section 5328 under the Lanterman Act to newly enacted Section 4515 of the Lanterman Developmental Services Act as part of a technical amendment to the law. Welf. & Inst. Code §§ 4500, 4514. The substance of the law did not change. See 4 PE 886-887 (Leg. Counsel's Digest of Senate Bill 1736); 901 (enrolled bill report); 903 (Senate Committee on Health and Welfare, staff analysis).

[6] Section 4514 contains substantially similar language.

The Lanterman Act reflects legislative intent that any records disclosed will be subject to different confidentiality requirements, depending on the reason for disclosure. In many provisions, the Legislature expressly limits the use of the information, by requiring recipients to abide by terms expressly enunciated in the statute. For example, in Section 5328(e), the Legislature allows disclosure of confidential information for research only if the recipient signs an oath of confidentiality in language stated in the statute. In Section 5328(k), the Legislature allows disclosure in connection with particular criminal proceedings, while restricting use of the information by the court. And in Section 5328.15, the Legislature allows disclosure to licensing personnel, while specifically prohibiting further release of the information. Id. § 5328.15(a), (b).

Elsewhere in the statute, the Legislature has elected not to supplant other laws that may apply to information released by a facility. For example, Sections 5328(f), (g), (h), (j) and (r) authorize disclosure to courts, law enforcement agencies, the Legislature and the patient's attorney, without purporting to constrain their use of the information. Section 5328(u) authorizes release between persons on multidisciplinary teams involved with Adult Protective Services. It contains no language restricting use of the information once acquired; however, the statutes invoked in Section 5328(u) provide that "any personnel of the multidisciplinary team that receives information pursuant to this chapter, shall be under the same obligations and subject to the same confidentiality penalties as the person disclosing or providing that information." Welf. & Inst. Code § 15754(a).

The Legislature has amended the Lanterman Act to account for one provision of the Long-Term Care Act (Welf. & Inst. Code § 5326.9(e), citing Health & Safety Code §§ 1423-1425) – thus making clear that it intends the

statutory schemes to co-exist. However, it has never added language to suggest that it intends the Lanterman Act's confidentiality provisions to apply to information acquired by DPH pursuant to the Long-Term Care Act.

The legislative purpose for confidentiality in the Lanterman Act is to encourage persons with mental or severe alcohol problems or developmental disabilities to seek treatment on a voluntary basis. County of Riverside v. Superior Court, 42 Cal. App. 3d 478, 481 (1974). As the dissent pointed out below, however, "the Lanterman Act as a whole must be construed to, among other things, 'guarantee and protect public safety' and 'protect mentally disordered persons and developmentally disabled persons from criminal acts.'" Dis. Opn. at 4 (quoting Welf. & Inst. Code § 5001(c), (g)). The Act provides recipients of services "[a] right to be free from harm, including unnecessary or excessive physical restraint, isolation, medication, abuse, or neglect." Welf. & Inst. Code § 5325.1(c); see also id. § 4502(h). The Act also provides that no otherwise qualified person involuntarily detained or admitted voluntarily "shall be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity, which receives public funds." Id., § 5325.1; see also id. § 4502.

D. The Long-Term Care Act's Specific Requirement of Public Access to Citations Controls over the Lanterman Act's General Confidentiality Provision.

1. The Long-Term Care Act Expressly Extends Its Protection to Developmentally and Mentally Disabled Individuals.

DPH asks the Court to withdraw a fundamental remedial component of the Long-Term Care Act – its public disclosure provisions – from four of the eight types of health care facilities that are expressly protected by the Act. Health & Safety Code § 1418(a). But when engaged in statutory

construction, the court's aim is "to ascertain the intent of the enacting Legislative body so that [it] may adopt the construction that best effectuates the purpose of the law." Chavez v. City of Los Angles, 47 Cal. 4th 970, 986 (2010). The court first examines the words themselves "'because the statutory language is generally the most reliable indicator of legislative intent.' [Citation] When construing the interaction of two potentially conflicting statutes, [the court] strive[s] to effectuate the purpose of each by harmonizing them, if possible, in a way that allows both to be given effect." Id. However, where the statutes cannot be reconciled, later and more specific enactments prevail over earlier and more general ones. Id. (citing Dep't of Fair Employment & Housing v. Mayr, 192 Cal. App. 4th 719, 725 (2011)). When a special and a general statute are in conflict, the specific provision governs, whether it was passed before or after the general statue. Id. (citing Nunes Turfgrass v. Vaughn-Jacklin Seed Co., 200 Cal. App. 3d 1518, 1539 (1988), Consumers Union of U.S., Inc. v. California Milk Producers Advisory Bd., 82 Cal. App. 3d 433, 446 (1978)).

Because the issue of statutory construction here arises in the context of a CPRA case, the constitutional and statutory mandates requiring narrow construction of limitations on the right of public access also apply. See Cal. Const., Art. 1 § 3(b); see also Sierra Club, 57 Cal. 4th at 175.

Here, a careful analysis of the two statutes makes clear that the Lanterman Act does not purport to, and does not, extend to information after it is acquired by DPH pursuant to the mandate of the Long-Term Care Act. As such, the Long-Term Care Act's public posting and access mandates, along with its disclosure authorizations, are a limited exception to the Lanterman Act's confidentiality provision.

Initially, the plain language of the Long-Term Care Act and its statutory framework make clear that citations issued to facilities found in violation of the law are required to be made public. Health & Safety Code §§ 1429, 1423(a)(2), 1439. The words of the statute are unequivocal. Citations "shall be in writing and shall describe with particularity the nature of the violation ...." Id., § 1423(a)(2). "[A]ll relevant facts" considered by the department in issuing a citation must be reflected in the public record. Id., § 1424(b). "Relevant facts" are specifically defined under the Act as including the patient's mental and medical condition, history of mental disability or disorder, and the probability and severity of the risk that the violation presents to the patient's mental and physical condition. Id., § 1424(a)(1)-(5). The citations themselves must be posted at the facility in a place accessible to the public or, for class "B" violations, made available upon request by any member of the public. Id., §§ 1429(a)(1)(A), 1429(b). The Act specifically protects patient privacy by requiring that the names of patients and persons, other than investigating officers, be redacted from the citations and supporting public documents. Id., §§ 1423(a)(2), 1439.

Not only is the Act specific and detailed as to the disclosure of the ultimate citation issued against the facility, but it includes express authorizations for disclosure of underlying records that may otherwise be protected in order to conduct the investigation. Id., § 1420(a)(2)(A)-(C). And it provides for impromptu inspections and interviews with witnesses and patients. Id., § 1421(a).

Far from excluding from its reach patients receiving services under the Lanterman Act, the Long-Term Care Act was clearly intended to protect developmentally disabled individuals residing in long-term health care facilities. Four of the eight facilities covered under the Long-Term Care Act

are specifically designated for the care of the developmentally disabled. Id., § 1418. DPH's own regulations provide no exception to the posting and public access mandates for facilities that care for the developmentally disabled. See 22 C.C.R. § 76721.

Moreover, both the Legislature in enacting the law and this Court have recognized that the Act's posting and public access mandates are an integral component of the law. As the Legislative Council's Digest on the bill notes, the bill "[r]equires posting of such citations until the violation is corrected up to a maximum of 120 days." 3 PE 606 (Leg. Counsel's Dig., April 25, 1973); see also id. at 723 (Summary Digest) ("Requires posting of specified citations until the violation is corrected up to a maximum period of 120 days and requires licensee to promptly make available for inspection by any member of the public who so requests a copy of all final uncorrected violations."). Similarly, the Assembly Committee on Health's analysis of AB 1600 summarized the bill as follows, "AB 1600 establishes a citation system for identifying violations and imposing penalties on licensed facilities, public reporting on citations, and adjudication of citations." 3 PE 725; 742 (emphasis added).

As this Court has stated, the Act's posting requirements, along with other reporting provisions, were intended "to provide information to the public about the citation record of facilities." Kizer, 53 Cal. 3d at 143. The Act's measures "protect patients from actual harm, and encourage health care facilities to comply with the applicable regulations and thereby avoid imposition of the penalties." Id. "[B]ecause these patients are 'at the mercy of the facilities,' the inspection, citation, and penalty system established by the Legislature is necessary to assure that they receive quality care." Id. at 150 (citing Lackner v. St. Joseph Convalescent Hospital, Inc., 106 Cal. App.

3d 542, 556 (1980)). This is particularly true of those confined to the state's Developmental Centers, which house those ineligible to receive services elsewhere, and who are among the state's most severely developmentally-disabled individuals. 2 PE 294:8-12; 403.

Against this backdrop, it is inconceivable that the Legislature intended that the most vulnerable of populations residing in long-term care facilities – developmentally or mentally disabled individuals – would be excluded from the protections of the Long-Term Care Act. Nothing in the Lanterman Act or the Long-Term Care Act remotely suggests that the Legislature intended such an exclusion.

In Kizer, this Court rejected the very type of "two-tier system of enforcement" under the Long-Term Care Act that would result here if developmentally and mentally disabled individuals were carved out of the protections of the Act, as advocated by DPH. 53 Cal. 3d at 148. There, a county that operated a long-term care facility which had been issued a citation claimed that the Tort Claim Act (Gov't Code § 818) prevented the state from imposing statutory civil penalties against it under the 1973 Act. Id. at 139. In evaluating this contention, the Court extensively reviewed the provisions of the Act and the legislative intent underlying them. Id. at 142-144. The Court recognized that "the Act's provisions are designed to implement the Legislature's declared public policy objective of 'assur[ing] that long-term health care facilities provide the highest level of care possible.'" Id. at 143 (citing Health & Safety Code § 1422(a)). In rejecting the county's contention, the Court noted that "[g]ranting immunity to public entities from the penalties would be contrary to the intent of the Legislature to provide a citation system for the imposition of prompt and effective civil sanctions against long-term health care facilities in violation of the laws and

regulations of this state." Id. (citing Health & Safety Code § 1417.1). The Court characterized the county's argument that only private nursing homes should be subject to the statutory fines, not public entities, as "a two-tiered system of enforcement of the Healthy and Safety Code provisions." Id. at 149. It further stated, "[t]his procedure contradicts the very public policy that the Legislature sought to implement with the citation and penalty provisions of the Act." Id.

Reading into the Long-Term Care Act the confidentiality provisions of the Lanterman Act does exactly what this Court rejected in Kizer. It adopts different sets of rules for public access – one governing facilities licensed to care for developmentally disabled individuals (which comprise one-half of the facilities covered under the Long-Term Care Act, Health & Safety Code § 1418), and the other governing the rest of the facilities covered under the Act. But such a holding would be a far more serious contradiction of legislative intent than was at issue in Kizer. It would effectively strip an entire class of individuals – mentally and developmentally disabled individuals residing in long-term health care facilities – from the protections of the Act, although the Legislature clearly intended that they also be protected.

In sum, the words of the statute, the statutory framework as a whole, as well as the intent of the Legislature in enacting it and this Court's own interpretation of the Act all support the conclusion that developmentally and mentally disabled individuals residing in long-term health care facilities are included in the Long-Term Care Act's protections. This includes its public posting and access mandates, and the mandates providing access to underlying records and authorizing inspections to conduct citation investigations.

2. The Policies Underlying the Lanterman Act Make Clear that It Does Not Apply to Records Subject to the Long-Term Care Act.

The Lanterman Act's confidentiality provision is a general law with numerous exceptions. This Court recognized as much in Albertson v. Superior Court, 25 Cal. 4th 796, 800, 805 (2001), in stating that Section 5328 sets out a general rule of confidentiality followed by "21 specific exceptions to the general rule of confidentiality regarding information and records obtained in the course of providing services."

There, the Court also recognized that Section 5328's confidentiality law can be trumped by later enacted, specific legislation outside of the Lanterman Act. Id. at 805. In Albertson, the issue before the Court was whether the petitioning attorney in a commitment proceeding under the Sexually Violent Predators Act (Welf. & Inst. Code §§ 6000-6609.3) could obtain otherwise confidential information concerning a sexually violent predator to the extent contained in an updated mental evaluation. Id. at 804, 807. In concluding that the attorney could, the Court looked to the newly-enacted provisions of the act, which authorized updated or replacement evaluations of persons subject to commitment proceedings and disclosure of the evaluation to the petitioning attorney for use in the legal proceedings. Id. at 803. It noted that the statute provided for review of available treatment records and interviews of the person being evaluated. Id. at 805. Given this language, the Court stated that "the current provision clarifies within the SVPA an exception to section 5328's general rule of confidentiality of treatment records, and allows the district attorney access to treatment record information, insofar as that information is contained in an updated evaluation." Id.

In discussing a statue that is analogous to the Long-Term Care Act, the California Attorney General similarly has opined that the Child Abuse Reporting Laws (Penal Code §§ 11164-11174) are a specific exception to the general confidentiality provisions of Section 5328, to the extent the laws require disclosure of information obtained in the course of providing services. 65 Ops.Cal.Att.Gen. 345 (1982); 58 Ops.Cal.Att.Gen. 824 (1975). The AG noted in both opinions the remedial nature of the reporting statutes; it described the apparent conflict between Section 5328's confidentiality law and the mandatory reporting provisions as "merely superficial" given that the over-riding concern of both statutes is the patient's well-being. Id. at 349 (citing 58 Ops.Cal.Att.Gen. at 827).

The AG assumed that persons required to report under the act acquire information in the course of rendering services under the Lanterman Act, that this information is confidential under Section 5328, and that none of the exceptions under Section 5328 applied. Id. at 348. Nevertheless, the AG concluded that the reporting laws "would be seriously curtailed if the persons who observe or who have knowledge of child abuse cases remain silent." Id. at 353. Accordingly, the AG opined that "a special statute, like the reporting

law, overrides the general statute, section 5328." Id. at 355.[7] The AG's opinions are entitled to "great weight."[8]

Like the statute at issue in Albertson, the 1973 Act expressly authorizes a "review of all available evidence," including "interviewing residents and reviewing records," and requires unannounced inspections of health care facilities. Health & Safety Code § 1420(a)(2); 1421(a). It further requires that in determining the amount of the penalty a patient's "medical condition," "mental condition" and "history of mental disability," among other things, be considered. Id., § 1428(g). Thereafter, the Act mandates that citations issued to facilities found in violation of the law be posted or made accessible to the public. Id., § 1429. Thus, to the extent the citations include information protected under Section 5328, the Act poses as much a conflict with Section 5328 as do the SVPA provisions at issue in Albertson and the child abuse reporting statutes considered by the AG in its two opinions.

Yet, the Court must presume that in enacting legislation authorizing review of records, requiring consideration of a patient's medical,

---

[7] The AG has reached similar conclusions with respect to other laws it found to be exceptions to the general confidentiality provisions of Section 5328. See 53 Ops.Cal.Att.Gen 20, 23 (1970) (opining that earlier enacted Penal Code § 290, requiring a limited class of patients who have been adjudged sexual psychopaths or have committed specified crimes to register with law enforcement, is a special statute and thus an exemption from Section 5328's confidentiality law); 53 Ops.Cal.Att.Gen. 151 (1970) (opining that then-Welf. & Inst. Code § 4118, requiring the Department of Mental Health to cooperate with Bureaus of Immigration "in arranging for the deportation of all aliens who are confined in, admitted, or committed to any state hospital," to be an exception to Section 5328).

[8] Sacramento County Employees' Retirement System v. Superior Court, 195 Cal. App. 4th 440, 456 (2011) (quoting Orange County Employees Assn., Inc. v. County of Orange, 14 Cal. App. 4th 575, 578 (1993)). This "is particularly appropriate where ... no clear case authority exists, and the factual context of the opinions is closely parallel to that under review." Sonoma County Employees' Retirement Association v. Superior Court, 198 Cal. App. 4th 986, 995 (2011) (quoting Thorpe v. Long Beach Community College Dist., 83 Cal. App. 4th 655, 662-63 (2000)).

developmental and mental conditions, and mandating public access to citations chronicling serious violations of law, the Legislature was aware of the preexisting confidentiality provisions of Section 5328. Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles, 173 Cal. App. 4th 13, 21 (2009); Santa Clara Valley Transp. Authority v. Public Utilities Com. State of Cal., 124 Cal. App. 4th 346, 360 (2004). It nevertheless chose to account for patient privacy through the less restrictive means of de-identifying the records in a manner not uncommon elsewhere. E.g., Civ. Code § 56.06(g) (defining medical records as individually identifiable information in the possession of a health care provider); see also Rudnick v. Superior Court, 11 Cal. 3d 924, 933 n.13 (1974) (in the context of the physician-patient privilege the court stated, "if the disclosure reveals the ailments but not the patient's identity, then such disclosure would appear not to violate the privilege."). Although it easily could have done so given its presumed knowledge of a detailed statute enacted only a year earlier, the Legislature did not require broader redaction of any information "obtained in the course of providing services" under the Lanterman Act that might be contained in the citations.

The Legislature's policy choice of providing the substantive information while redacting names fits the purpose of both the Long-Term Care Act and the Lanterman Act – to promote and protect the health and safety of mental health patients. Dis. Opn. at 10; 5 PE 1447 (Order at 9). Patients protected by the Lanterman Act have an express right to be free from harm, including abuse and neglect. Welf. & Inst. Code §§ 5325.1(c), 4502(h). It would be entirely inconsistent for the Legislature to nonetheless sub silentio deny them statutory protections specifically enacted to prevent such harm. Indeed, to be denied the full benefits of the Long-Term Care Act arguably violates the Lanterman Act's proscription against being

discriminated against or denied benefits of any program or activity which receives public funds. Id., § 5325.1; see also id., § 4502.

Moreover, compliance with the express terms of the Long-Term Care Act by making the citations public, with names redacted, does not harm the underlying policy objectives of the Lanterman Act's confidentiality provision – to encourage individuals to seek treatment free of the stigma that otherwise might be associated with their disability. Even in the Lanterman Act context, courts have recognized that redacting names is an acceptable way to protect the privacy interests recognized in Section 5325.1 of the Welfare and Institutions Code. Sorenson v. Superior Court, 219 Cal. App. 4th 409, 444, n. 27 (2013) ("The privacy protections of section 5325.1, subdivision (b) are frequently invoked by appellate courts in redacting the names of the LPS conservatee.") (citing Conservatorship of Susan T., 8 Cal. 4th 1005, 1008, n.1 (1994) ("We have abbreviated Susan T's name to protect her privacy. (See Welf. & Inst. Code, § 5325.1, sub. (b)).). Because the citations do not publicly reveal patient names, and because they chronicle violations of law that just as readily could apply to any resident (see 1 PE 181-222 (unredacted citations)), there is little risk that disclosure will stigmatize any particular resident or patient.

Thus, the overall objectives of both statutes can be upheld by holding that the Long-Term Care Act is a limited exception to the confidentiality law set forth in Sections 5328 and 4514 of the Welfare and Institutions Code. Any other determination would "seriously curtail" the ability to conduct investigations under the Act and publicly report violations of law through the citation system.[9] See 65 Ops.Cal.Att.Gen. at 353. More importantly, to

[9] Other provisions, such as the mandate that citations be made publicly accessible through the posting requirements with names other than the investigating officers redacted, would be rendered meaningless or surplusage

carve out developmentally and mentally disabled individuals from the Long-Term Care Act's protections would rob this vulnerable population of express rights granted under 1973 Act, as well as the right to be free of abuse and neglect under the Lanterman Act.

3. DPH Has Misinterpreted a 2012 Amendment to the Lanterman Act, Which Merely Clarifies Another Agency's Right to Review Records.

Both the Court of Appeal and DPH below relied on Senate Bill 1377 (Corbett), which was passed by the Legislature and signed by the Governor on September 27, 2012, after entry of Respondent Court's Order.[10] Opn. at 17. SB 1377 addresses the rights of the protection and advocacy agency ("P&A") to obtain certain administrative records of DPH and the Department of Social Services, including unredacted citations, in the course of conducting abuse investigations. DPH argued below that the law would not have been necessary if access to unredacted citation reports were authorized through the Long-Term Care Act. See DPH's Pet. for Writ of Man. at 28. Reliance on this bill must be rejected for several reasons.

First, where the language of the statute is clear and unambiguous there is no need for construction. Lungren v. Deukmejian, 45 Cal. 3d 727, 735 (1988). The 1973 Act's public posting and access mandates for class "AA," "A" and "B" citations contains no ambiguity necessitating resort to extrinsic sources. Health & Safety Code § 1429(a), (b) ("Each citation shall be made

---

if DPH were allowed to gut the citations using Section 5328, a construction this Court must avoid. Elsner v. Uveges, 34 Cal. 4th 915, 931 (2004) ("We will avoid constructions that render parts of a statute surplusage."); Youngblood v. Board of Supervisors, 22 Cal. 3d 644, 656 (1978) (rejecting narrow construction urged by plaintiffs where it would render the enactment of a section a futile and useless act).

[10] See Welf. & Inst. Code §§ 5328.15(c), 4514(v), Stats. 2012, ch. 664 §§ 3, 1 respectively. For ease of reference, CIR will refer to these amendments by their bill number.

promptly available by the licensee for inspection or examination by any member of the public who so requests."); see also 22 C.C.R. § 76721. Thus, this Court need not go beyond the clear and express terms of the Long-Term Care Act to determine the Legislature's intent to make public final citations issued to long-term care facilities.

Second, even if there were some ambiguity with the Act's public posting mandates, which there is not, the Legislature's intent in enacting them should not be inferred from a later enacted law. "The declaration of a later Legislature is of little weight in determining the relevant intent of the Legislature that enacted the law...." Jones v. The Lodge at Torrey Pines Partnership, 42 Cal. 4th 1158, 1171 (2008) (quoting Lolley v. Campbell, 28 Cal. 4th 367, 379 (2002)).

Third, both the legislative history to SB 1377 and existing law governing P&A investigations on behalf of developmentally impaired individuals show that the bill was enacted to clarify P&A's existing rights of access to certain unredacted administrative records in carrying out abuse investigations. It was not enacted to grant a new right of access to unredacted citation reports that did not exist before. Under existing law, P&A already had the right of access to:

> Information and records prepared or received in the course of providing intake, assessment, evaluation, education, training, or other supportive services, including but not limited to, medical records ...

Welf. & Inst. Code § 4903(b)(1). Separately, Section 4903(b)(2) provides P&A a right of access to reports prepared by an agency charged with investigating incidents of abuse, neglect, injury or death. Welf. & Inst. Code § 4903(b)(2); see also id., §§ 4514.3, 5328.06; Civ. Code § 1798.24(b). This latter section would include citations issued by DPH, among other

administrative records generated by DPH in the process of conducting complaint investigations.

According to the author of SB 1377, despite this existing law, in 2009 DPH changed its policy of providing access to such reports for individuals with mental health or developmental disabilities and instead started providing heavily redacted reports. See CIR's Court of Appeal RJN, Ex. A at 4 (Senate Bill Analysis).[11] Under this new policy, DPH required P&A to submit "an individual written request to receive an unredacted record for the case." Id. Though there was no dispute as to P&A's right of access to the reports, and DPH would eventually provide them, this "extra layer of bureaucratic process" caused significant delays "jeopardiz[ing] the well-being of the individuals involved." Id. at 5. The author explained the need for the Bill:

> While it is arguable that existing law provisions already give the P&A agency the right to access these reports (Welf. & Inst. Code Secs. 4902(a)(1), 4903(a)-(b)), to the extent that the P&A agency's access to full reports is obstructed by redacting information and only providing the full, unredacted version upon specific written request, the addition of these types of unredacted records to the existing list of records in Section 4903 would arguably add necessary clarity and expedite the process in the interest of these persons with disabilities who are affected by delays in access to records.

Id. (emphasis added); see also DPH's Court of Appeal RJN 1535-1549 (Leg. Council's Digest) ("This bill would provide that the authority to access these records includes access to an unredacted facility evaluation report form, unredacted complaint investigation report form, unredacted citation report ....") (emphasis added). Thus, far from supporting DPH's argument below,

[11] The Court of Appeal granted CIR's request for judicial notice. Opn. at 24, n.13.

the legislative history of SB 1377 shows that it was enacted to clarify existing access rights because DPH was arbitrarily thwarting those rights.

E. Welfare & Institutions Code Section 5328.15, Governing Licensing Investigations, Demonstrates that the Legislature Knows How To And Does Mandate Ongoing Lanterman Act Confidentiality When It Intends That Result.

DPH argued below that an exception to Section 5328's confidentiality provision, Welfare and Institutions Code Section 5328.15, supports its refusal to comply with the plain language of the Long-Term Care Act. But that statute supports CIR, not DPH. Section 5328.15 applies to the investigatory and regulatory functions of the Department of Health Services (or DPH) as they pertain to licensing, suspension and revocation proceedings under Chapters 2 and 3 of Division 2 of the Health and Safety Code; it does not apply to the Long-Term Care Act of 1973, which is contained in Chapter 2.4 of Division 2 of the Code. The statute makes this distinction clear. It authorizes disclosure of "information and records obtained in the course of providing services":

> To authorized licensing personnel who are employed by, or who are authorized representatives of, the State Department of Health Services ...as necessary to the performance of their duties to inspect, license, and investigate health facilities and community care facilities, and to ensure that the standards of care and services provided in these facilities are adequate and appropriate and to ascertain compliance with the rules and regulations to which the facility is subject. **The confidential information shall remain confidential except for purposes of inspection, licensing, or investigation pursuant to Chapter 2 (commencing with Section 1250) and Chapter 3 (commencing with Section 1500) of Division 2 of the Health and Safety Code, or a criminal, civil, or administrative proceeding in relation thereto.** The confidential information may be used by the State Department of Health Services or the State Department of Social Services in a criminal, civil, or administrative proceeding. The confidential information shall

> be available only to the judge or hearing officer and to the parties to the case. Names which are confidential shall be listed in attachments separate to the general pleadings. The confidential information shall be sealed after the conclusion of the criminal, civil or administrative hearings, and shall not subsequently be released except in accordance with this subdivision. If the confidential information does not result in a criminal, civil, or administrative proceeding, it shall be sealed after the State Department of Health Services or the State Department of Social Services decides that no further action will be taken in the matter of suspected licensing violations....

Welf. & Inst. Code § 5328.15 (bold, underline added); see also id., § 4514(n). The referenced chapters, Chapters 2 and 3 of Division 2 of the Health and Safety Code, pertain to the licensing, revocation and suspension of licenses of certain health facilities (Chapter 2, §§ 1250-1339.59) and community care facilities (Chapter 3, §§ 1550-1567.50), together with their attendant formal administrative hearing procedures. Health & Safety Code §§ 1295, 1551, 1550.5, 1556. The referenced investigatory functions in these chapters do not pertain to the separately-chaptered provisions governing complaint investigations and the imposition of civil penalties for the violations of laws and regulations under the Long-Term Care Act – Chapter 2.4 of Division 2 (§§ 1417-1439.8).[12] See 5 PE 1448 (Order at 10).

Not only does the Legislature refrain from referring to Chapter 2.4 in Section 5328.15, but the Legislature specifically cabins Section 5328.15 by referring to "criminal, civil or administrative proceedings." Citations are issued without any administrative hearing or court proceedings, subject only to an after-the-fact appeal. Health & Safety Code § 1428(c); see also

[12] The legislative history of Section 5328.15 further supports the conclusion that Section 5328.15 pertains to licensing investigations, not the inspection and citation system put in place under the Long-Term Care Act. 4 PE 1175 (1980 Summary Digest) ("This bill would require disclosure of such confidential information to authorized licensing personnel ... as necessary to perform licensing inspection and investigation duties relating to health.").

Lackner, 106 Cal. App. 3d at 547-48 (explaining enforcement process under 1973 Act and upholding citation issued against long-term care facility). As the legislative history of the 1973 Act makes clear, this was intentional. The Act was intended to be a less drastic, more efficient mechanism than existing law governing licensing revocation proceedings. 3 PE 728.

Moreover, it makes eminent sense that Section 5328.15 (and its companion under 4514(n)) would not reference the 1973 Act contained in Chapter 2.4, because all of the authorizations necessary to conduct complaint investigations under the Long-Term Care Act's citation system already were in place. See, e.g., Health & Safety Code §§ 1420(a)(1) (authorizing impromptu onsite inspections); 1420(a)(2)(A)-(C) (authorizing review of "all available evidence," including facility records); 1421(a) (authorizing inspection of records and interviews of patients); 1424(a) (requiring consideration of the patient's "medical condition," "mental condition" and "history of mental disability"); 1428(f) (same).

In Section 5328.15, the Legislature chose to include provisions extending the confidentiality of the records that DPH acquires under that Section, and limiting the use of those records by DPH and in any subsequent court proceedings. But as discussed above, it made a different choice in the Long-Term Care Act, where it chose not to include comparable confidentiality provisions, and instead to protect patient privacy by requiring names to be redacted. This Court should not infer language the Legislature chose not to include. Apple Inc. v. Superior Court, 56 Cal. 4th 128, 148 (2013). To adopt DPH's position would require a complete rewriting of the statute. The Court would have to add new confidentiality language to the Long-Term Care Act, or engraft an entirely new statutory scheme into Section 5328.15. This Court should reject DPH's invitation to rewrite these

two carefully-crafted statutory schemes. McAllister v. California Coastal Comm'n, 169 Cal. App. 4th 912, 947 (2008) (rejecting proposed interpretation that would add new term to statute because "a cardinal rule of statutory construction prohibits us from adding provisions to statutes that were not included by the Legislature").

Given the many incongruities between the Long-Term Care Act and Section 5328.15, DPH's interpretation – that Section 5328.15 implicitly amends the Long-Term Care Act although nothing in the statute suggests such a legislative intent – would be nothing short of an unspoken repudiation of existing law. For example, Section 5328.15's requirement that confidential information be sealed after a "criminal, civil, or administrative proceeding" cannot be reconciled with Section 1429(b)'s requirement that final class "B" citations "shall be made promptly available by the licensee for inspection or examination by any member of the public who so requests." Compare Welf. & Inst. Code § 5328.15 with Health & Safety Code § 1429(b). Nor can Section 5328.15's confidentiality and sealing provisions be reconciled with the department's obligation to correct "the public record in a prominent manner" when a citation is ultimately dismissed. Health & Safety Code § 1428(j). Any suggestion that Section 5328.15 was intended to repudiate existing law under the Long-Term Care Act of 1973 must be flatly rejected. Apartment Ass'n of Los Angeles County, 173 Cal. App. 4th at 22 ("Generally, we will presume that the enactment of a statute does not impliedly repeal existing statutes.").

The absence of any reference to Chapter 2.4 in Section 5328.15 is instead explained by the clear intent of the Legislature in enacting the Long-Term Care Act in the first place – to adopt a system to encourage compliance with laws and regulations short of the onerous and drastic remedy of

revoking a facility's license, by ensuring accountability through public oversight. This purpose furthers the ultimate aim of protecting "one of the most vulnerable segments of our population, 'nursing care patients ... who are already disabled by age and infirmity,' and hence in need of the safeguards provided by state enforcement of patient care standards." California Ass'n of Health Facilities, 16 Cal. 4th at 295 (quoting Kizer, 53 Cal. 3d at 150).

In sum, Section 5328.15 supports CIR by establishing that when the Legislature intends the Lanterman Act's confidentiality provisions to apply to a recipient of records under the Act, it clearly says so. It did not expressly or implicitly repeal the Long-Term Care Act's public disclosure requirements. DPH's reliance on this provision is sorely misplaced.

F. The Administrative Record Compiled as Part of a Complaint Investigation Is Not Information "Obtained in the Course of Providing Services" under the Lanterman Act.

DPH's interpretation of Section 5328 also must be rejected because it ignores the plain language of the statute. Section 5328's confidentiality provision is limited to information "obtained in the course of providing services"; it does not purport to apply to information obtained by DPH in the course of conducting a complaint investigation, or to the ultimate administrative record chronicling the facility's violation of law – which already protect patient privacy through redaction of the patient's name.

A recent decision from the Sixth District, Sorenson v. Superior Court, 219 Cal. App. 4th 409, 444 (2013), is instructive. There, the court held that Lanterman Act conservatorship proceedings on grave disability are presumptively closed to the public, but concluded that Section 5328's confidentiality provision does not apply to a court transcript of the

proceedings because the transcript was not "obtained in the course of providing services." The court explained that "[t]he court transcripts from LPS conservatorship trials cannot reasonably be construed as constituting 'records obtained in the course of providing services.'" Id. (citing 53 Ops.Cal.Att.Gen. 25 (1970) (opining that information released pursuant to Section 5328(f) remains confidential only to the extent that the Legislature has specifically provided)).

Other courts have similarly rejected the overly broad interpretation of Section 5328 that DPH urges here. In Devereaux v. Latham & Watkins, 32 Cal. App. 4th 1571, 1587 (1995) (overruled on other grounds, Moran v. Murtaugh Miller Meyer & Nelson, LLP, 40 Cal. 4th 780 (2007)), for example, the court characterized a complaint for wrongful disclosure of information under Section 5330 as devoid of merit, explaining that absent a showing that the records disclosed "were generated in the course of receiving treatment ..., disclosure is not governed by section 5328." (Emphasis added.) Because the records at issue were criminal court records and the only two disclosures were otherwise authorized, the court upheld the dismissal of plaintiff's injunction action. Id. at 1585-86.

This Court similarly has construed Section 5328 in an exacting manner in its seminal decision governing a duty to warn, Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 431 (1976). There, the Court rejected the contention that a psychotherapist's letter to police describing his patient's mental condition and seeking a 72-hour commitment under Section 5150 of the Lanterman Act triggered the confidentiality provisions of Section 5328 and precluded the therapist from warning the victim. Id. at 442-43. "[A] therapist's duty to withhold confidential information is expressly limited to 'information and records obtained in the course of providing services under'"

the specific divisions of the Welfare and Institutions Code. Id. at 443. Because there were no facts alleged showing that the psychotherapy fell within any of the divisions, and because the therapy pre-dated the attempt to commit the patient, Section 5328 did not govern that information. Id. at 443; see also Mavroudis v. Superior Court, 102 Cal. App. 3d 594, 601 (1980) (citing Tarasoff and noting that the "general provision [of Section 5328] extends only to those records specifically described in the statute").[13]

The Lanterman Act itself distinguishes between records "obtained in the course of providing services" and administrative records generated in the course of conducting an abuse investigation in authorizing release of both categories of records to the P&A. See Welf. & Inst. Code §§ 4903(b)(1), (b)(2). Thus, both the plain language of Section 5328 and the Lanterman Act's own use of its terms show that it was not intended to attach to citations issued in the course of conducting a citation investigation under the Long-Term Care Act. Any ambiguity in Section 5328 must be construed in favor of public access. Sierra Club, 57 Cal. 4th at 175.

G. The Court of Appeal's Decision is Fundamentally Flawed and Should be Reversed.

1. The Decision Does Not Comport with the General Rules of Statutory Construction.

While the Court of Appeal noted the general rules of statutory construction in its opinion, it failed to apply them; it also paid no heed to the constitutional mandate for narrow construction of statutes that limit the public's right of access to public records. Rewriting both the Long-Term

[13] The Court of Appeal's decision similarly fails to discern between medical history information obtained prior to commitment and that obtained during the course of providing services under the specific divisions of the Lanterman Act.

Care Act and the Lanterman Act, the Court held that the Long-Term Care Act's provision requiring that the citations "describe with particularity the nature of the violation" (Health & Safety Code § 1423(a)(2)) trumps the Lanterman Act's confidentiality provision, but the Lanterman Act controls over the Long-Term Care Act's requirement that "all relevant facts" be made part of the public record. Opn. at 19-22.

By construing the statutes in this manner, the Court of Appeal "does violence to two statutory enactments—carving out of the Lanterman Act an exception allowing public citations to include an unredacted description of the nature of the violation, and severing from the Long-Term Care Act the requirement that the public record contain the aforementioned 'relevant facts.'" Dis. Opn. at 1.

The Court of Appeal also erred in concluding that exceptions to the Lanterman Act's confidentiality provisions must be set forth under Sections 5328 and 4515, or in successive sections to these statutes. Opn. at 15 (citing Gilbert v. Superior Court, 193 Cal. App. 3d 161, 169 (1987)). This construction of the Lanterman Act's confidentiality provision contradicts this Court's decision in Albertson, 25 Cal. 4th at 803, where an exception to the confidentiality provision was found to exist under the SVPA (Welf. & Inst. §§ 6000-6609.3), and opinions of the Attorney General similarly recognizing exceptions outside of the Lanterman Act's provisions. See 65 Ops.Cal.Att.Gen. 345 (1982) (child abuse reporting laws under Penal Code §§ 11164-11174 are exceptions to Section 5328), 58 Ops.Cal.Att.Gen. 824 (1975) (same). Thus, while Sections 5328 and 4515 of the Lanterman Act provide that "[i]nformation and records shall be disclosed only in any of the following cases," followed by several exceptions to the confidentiality rule, Albertson and several opinions by the AG make clear that exceptions to this

general rule may be found in other statutes.

By severing developmentally and mentally disabled individuals receiving services under the Lanterman Act from the protections of the Long-Term Care Act, the Court of Appeal's holding sets up the very type of "two-tier system of enforcement" under the Long-Term Care Act that this Court rejected in Kizer. 53 Cal. 3d at 148. Reversal of the decision is necessary to protect this statewide class of individuals and to ensure that the Long-Term Care Act is uniformly enforced against licensed long-term health care facilities.[14]

2. The Decision Creates an Unworkable Governmental Administrative Morass.

By holding that certain information required to be contained in the citations must be disclosed, while other information must be withheld "in PRA-requested citations," the Court of Appeal's decision sets up a statewide compliance system that is nonsensical and unworkable – which inevitably will create problems as agencies and facilities struggle to understand and comply with the Court's mandate in the multitude of situations in which the Opinion will be applied. Opn. at 6, 21.

First, confining the non-disclosure obligations to PRA-requested citations, as opposed to those required to be posted in the facility at "[a]n area accessible and visible to members of the public" (Health & Safety Code § 1429(a)(1)(A)), or those required to be made available under provisions of the Long-Term Care Act for inspection by "any member of the public who so requests" (id., § 1429(b)), makes no sense. Facilities would have no basis to distinguish between a request made under Section 1429(b), for example, and

[14] Though the decision does not say so, it presumably also would apply to chronic alcoholics receiving services under the Lanterman Act who reside in licensed long-term health care facilities covered under the 1973 Act.

a request under the Public Records Act. Under the CPRA, requests do not need to be in writing; indeed, they need only "reasonably describe an identifiable record." Gov't Code § 6253(b); Los Angeles Times v. Alameda Corridor Transp. Authority, 88 Cal. App. 4th 1381 (2001). The government's obligation to comply with a request for access to public records may be triggered merely by a citizen's over-the-counter request to see a document in the hands of the government. Thus, there is no basis for facilities to distinguish between PRA-requested citations that it must redact, and others it is obligated to make public under the 1973 Act.

Nor does it make sense to have the statutory vehicle under which access is sought determine the facility's disclosure obligations. Because the citations must be posted in an area visible to any member of the public, once a citation is posted pursuant to Section 1429(a)(2), it is public. Thus, the confidentiality that DPH claims is required by the Lanterman Act – through the obligation to redact PRA-requested citations – is completely lost. Also, providing less information to a citizen seeking access to a record under Article 1, Section 3(b) of the California Constitution and the CPRA than is given to a citizen seeking access to the same record under the 1973 Act, makes no sense, and certainly finds no support in the language of the statute.

Second, the Court of Appeal's decision injects uncertainty into a facility's disclosure obligation by substituting a clear statutory requirement that citations be publicly posted with names redacted (other than investigating personnel) for one requiring that various categories of information be redacted. What information will actually be redacted from the citations based on these categories necessarily will be decided on a case-by-case basis and left to the discretion of the disclosing entity – which may be inclined to redact as heavily as possible. This is all the more concerning

given that the categories of information to be redacted are readily susceptible to broad interpretation. For example, could Sonoma Developmental Center redact the fact that 11 of 27 patients in a single unit received significant thermal burn injuries consistent with being shot with a Taser gun, under a claim that this information pertains to the "physical" condition of a patient. 5 PE 1388-1391; 1378:25-27. Similarly, could DPH redact information necessary for the public to understand its classification of a violation by broadly reading the requirement that it redact "the risk the violation presents to that mental and physical condition." Opn. at 21. The entire classification system turns on the degree of harm presented to the patient by the violation. Health & Safety Code § 1424. If the decision is upheld and read in this manner, the public will be unable to oversee whether DPH is properly classifying violations, which trigger significant obligations on the part of the licensee depending on the severity and frequency of the violations, including potential revocation of its license.

Third, by holding that some information in the citations is protected under the Lanterman Act's confidentiality provision, the decision introduces the specter of civil liability for wrongful disclosure of confidential information, where that disclosure is required by the Long-Term Care Act. Welf. & Inst. Code § 5330(b) ("Any person may bring an action against an individual who has negligently released confidential information or records concerning him or her in violation of this chapter..."). By injecting the potential for civil liability into the public posting and access mandates of the Long-Term Care Act, the decision ensures that long-term care facilities, and the state and counties charged with overseeing them, will aggressively redact the citations or risk hefty civil penalties for guessing wrong. Surely, this was not what the Legislature intended when it enacted a comprehensive statutory

scheme requiring, among other things, the public reporting of citations to encourage facility compliance with laws and regulations relating to patient care.

3. The Court of Appeal Erred in Extending its Decision to the Consumer Information Services System Established in 1984 Under the Long-Term Care Act.

Seemingly as an after-thought, in a footnote at the end of its decision, the Court of Appeal declared that the Long-Term Care Act's consumer information services system also must conform to its decision. Opn. at 24, n.12. The Legislature adopted this statute in 1984, to require the implementation of a system "to provide updated and accurate information to the general public and consumers regarding long-term care facilities in their communities." Health & Safety Code § 1422.5(a). It requires disclosure of a facility's history of citations and complaints for the last two survey cycles, information regarding substantiated complaints, information about citations, including the status of each, and the facility's plan of correction. Id., § 1422.5(a)(2)-(4).

The Court of Appeal's decision requires DPH to conform this statutorily-mandated information system to its decision. Presumably, this means that the same categories of information that must be redacted from the citations must also be removed from the consumer services information system, and withheld from the public in the future. What this means in practice is uncertain. This issue was never raised by the parties below and the record is silent on the matter.

Nevertheless, nothing in the statutory language governing the consumer information services system supports the court's intended carve out. And, for the same reasons as discussed above pertaining to the Long-

Term Care Act's disclosure mandates, neither the public nor developmentally and mentally disabled residents of long-term care facilities should be deprived of the full benefits of the consumer information system.

This footnote highlights the fundamental problem with the Court of Appeal's decision. By introducing Lanterman Act protections into the consumer information services system without providing guidance regarding the scope of information to be protected – and given DPH's recent history of broadly interpreting the Lanterman Act's confidentiality provision – DPH undoubtedly will err on the side of withholding information, particularly given that it may face civil liability for wrongful disclosure of confidential information under the Lanterman Act. Welf. & Inst. Code § 5330. And yet, no statutory language supports the Court's decision. It simply could not have been the Legislature's intent in enacting Section 1422.5 to saddle DPH with the prospect of civil sanctions for carrying out a mandatory duty under the law.

In short, the Court of Appeal's decision to overhaul the consumer information services system, when that statute was never raised by either party, should be rejected.

V. CONCLUSION

To preserve important protections afforded extremely vulnerable populations under present law, and to ensure uniformity of enforcement of these laws, the Court of Appeal's decision should be reversed. The purposes of both the Long-Term Care Act and the Lanterman Act are best advanced by enforcing the plain terms of the later-enacted, specific act governing the exact administrative record at issue here – citations chronicling serious violations of law at state run or overseen facilities throughout this state. Only in this

way is the overall objective of both statutes advanced – protecting vulnerable populations from actual harm.

Dated: February 28, 2014

JASSY VICK CAROLAN LLP
Duffy Carolan

DAVIS WRIGHT TREMAINE LLP
Rochelle L. Wilcox

By: 
Duffy Carolan

Attorneys for Real Party In Interest The Center for Investigative Reporting

COMPLIANCE CERTIFICATE

I certify that pursuant to Rules of Court 8.204(c) and 8.486(a)(6), the attached Opening Brief on the Merits of The Center for Investigative Reporting is proportionately spaced, has a typeface of 13 points, and contains 13,987 words, excluding the caption page, table of contents, table of authorities, issues presented, signature blocks and this certificate.

Dated: February 28, 2014.

By: _____
Duffy Carolan

Proof of Service

I, Janis Wooley, declare as follows:

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of Davis Wright Tremaine LLP, and my business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111-6533.

I caused to be served the following document:

OPENING BRIEF ON THE MERITS OF THE CENTER FOR INVESTIGATIVE REPORTING

I caused the above document to be served on the interested parties at the address listed below by the following means:

☒ **I enclosed a true and correct copy of said document in an envelope and placed it for collection and mailing with the United States Post Office on February 28, 2014, following the office's ordinary business practice.**

California Court of Appeal
Third Appellate District
914 Capital Mall, 4th Floor
Sacramento, CA 95814

The Honorable Timothy M. Frawley
Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814

Kamala D. Harris
Attorney General of
CaliforniaNiromi W. Pfeiffer
Supervising Deputy Attorney General
Kathleen Kenealy
Chief Assistant Attorney General
Susan Duncan Lee
Acting Solicitor General
Julie Weng-Gutierrez
Senior Assistant Attorney General
C/O GRANT LIEN
Deputy Attorney General
1300 "I" Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Email: Niromi.Pfeiffer@doj.ca.gov
Grant.Lien@doj.ca.gov
(VIA US MAIL c/o Grant Lien)
Attorneys for Cal. Dep't of Public Health

Arne Werchick
135 Chelsea Circle
Palm Desert, CA 92260
Telephone: 415-779-2763
Fax: 415-866-301-8635
Attorneys for Amici Curiae CANHR

CANHR
650 Harrison Street, 2nd Floor
San Francisco, CA 94107
Telephone: 800-474-1116
Email: canhrmail@canr.org

I am readily familiar with the practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner4 this same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this February 28, 2014, at San Francisco, California.

Janis Wooley