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).

REPLY BRIEF ON THE MERITS OF THE CENTER FOR INVESTIGATIVE REPORTING

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I. INTRODUCTION

Mentally and developmentally impaired individuals residing in long-term health care facilities licensed by the State deserve the full protections of the Long-Term Care, Health, Safety and Security Act of 1973 (the "Long-Term Care Act"). The Act was adopted to counteract the inefficiencies in the licensing suspension and revocation process, which the Office of the Attorney General described as a system shrouded in secrecy. 3 PE 877-879.

To shed light on this system – and protect this vulnerable population – the Legislature specifically required that all relevant facts considered by the department in issuing a citation be "available in the public record," including the resident's "medical condition," "mental condition and his or her history of mental disability or disorder," and the "probability and severity of the risk that the violation presents to the patient's or resident's mental and physical condition." Health & Safety Code § 1424(a), (b). DPH's claimed "harmonization" with the Lanterman Act is nothing of the sort. Instead, it is an implicit repeal of these key remedial provisions. The record evidence is clear that redacting medical, mental and related information from the citations will render many of them – if not most – meaningless because the abuse or neglect for which the facility is cited often is intricately related to patient care and medical condition. E.g., DPH's Request to File Records Under Seal, 1 PE 181-184; 202-204; 211-212. Thus, DPH is simply wrong in its claim that its interpretation of the Long-Term Care Act preserves the Legislature's intent in mandating that citations with all relevant facts be publicly available. Answering Brief on the Merits ("AB") 9-10.

Moreover, this purported harmonization is not necessary because the confidentiality provisions of the Lanterman Act are not even triggered by compliance with the Long-Term Care Act's public posting and access

mandates. The Act expressly authorizes DPH to access information obtained in the course of providing services so that DPH can conduct a citation investigation, without restricting the subsequent use of that information to fulfill the public posting and access mandates. DPH's theory that the Lanterman Act's protections extend beyond authorized disclosures to protect all subsequently-created writings that may reflect the disclosed information finds no support in the statute. Extending the Lanterman Act's protections in this manner would have consequences that extend well beyond this case, and is flatly contrary to the narrow construction of California Public Records Act ("CPRA") exceptions required by Article I, Section 3(b) of the California Constitution.

Nor can DPH's theory of construction be justified by unsupported claims that the population affected is small and readily identifiable. The State's largest facilities oversee the care of 1,700 developmentally or mentally impaired individuals, alone. And the total population residing in long-term care facilities is not confined to these institutions. DPH's claim that the population is readily identifiable due to their idiosyncratic behaviors was rejected by Respondent Court, and the record fully supports that court's factual finding. 5 PE 1445, n. 3.

In short, this Court should uphold the Long-Term Care Act for all people intended to be protected by its provisions, and refuse to create a two-tiered system of protection previously rejected in Kizer v. County of San Mateo, 53 Cal. 3d 139 (1991).

II. NONE OF DPH'S ARGUMENTS SUPPORT ITS REQUEST THAT THE COURT JUDICIALLY REPEAL KEY REMEDIAL PROVISIONS OF THE LONG-TERM CARE ACT.

A. Disclosure of Citations, Redacted to Remove Residents' Names, Advances the Policy Objectives of Both the Lanterman Act and the Long-Term Care Act.

1. The Long-Term Care Act does not restrict DPH's use of information it obtains in conducting an investigation.

Throughout these proceedings, DPH never has contested its right to access information "obtained in the course of providing services" under the Lanterman Act in order to conduct an investigation under the citation system. See, e.g., Health & Safety Code §§ 1420(a)(1); 1420(a)(2)(A)-(C); 1421(a); 1424(a); 1428(f). These authorizations exist even though "disclosure to limited numbers of government representatives, may have a chilling effect on patients'" efforts to undergo treatment, as DPH states. AB 12. Thus, DPH recognizes that the disclosure authorizations under the Long-Term Care Act are a limited exception to the Lanterman Act's protections for confidential information. It nevertheless argues that writings generated in the course of conducting an investigation must be redacted to uphold the protections under the Lanterman Act to the extent they reflect information obtained in the course of providing services.

The Legislature, however, has not restricted DPH's use or disclosure of information it receives in conducting complaint investigations under the citation system. The absence of such restrictions is important because the Legislature repeatedly has shown that it knows how to restrict subsequent use of information protected by the Lanterman Act when that is its intent. See, e.g., Welf. & Inst. Code §§ 5328(k); 5328.15(a), (b); 15754(a). Indeed, the very law DPH invokes in an attempt to dismiss CIR's argument shows that in

authorizing disclosure of reports prepared by the Department of Social Services ("DSS") or DPH in conducting licensing or citation investigations, the Legislature also restricted disclosures that could implicate interests protected under the Lanterman Act. SB 1377, which added Sections 5328.15(c), 4514(v) and 4903(h), expressly authorizes disclosure of reports prepared by DSS and DPH to the protection and advocacy agency ("P&A"), while exempting these reports from the Lanterman Act's confidentiality provisions "to the extent that the information is incorporated within any of" the specific reports listed.

No such restriction exists for the public disclosure of citations under the Long-Term Care Act. Instead, the Legislature chose to protect individual privacy interests by requiring names to be redacted. Because the Legislature authorized the disclosure of protected information to conduct the citation investigation without restricting the use or disclosure of that information as reflected in documents created by DPH, Lanterman Act interests are not even implicated here. The authorized disclosures to DPH, without restriction, created a limited exception to the Lanterman Act's protections.

2. The Lanterman Act's protections do not extend to all subsequently created writings that might reflect information obtained in the course of providing services.

DPH summarily dismisses CIR's argument that the Lanterman Act protects only information obtained in the course of providing services under the various divisions of the Lanterman Act, not every subsequently created record that may reflect such information. Opening Brief ("OB") 40-42; see AB 25-26, n.8. DPH barely mentions the most recent authority on this point – Sorenson v. Superior Court, 219 Cal. App. 4th 409, 444 (2013), which recognized that a court transcript of conservatorship proceedings under the

Lanterman Act, although reflecting information obtained in the course of providing services, is not itself subject to the Lanterman Act's protections – or this Court's decision in Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425 (1976), which confined Section 5328's confidentiality provision to its plain terms. Instead, it argues that SB 1377 necessarily mandates that citations are confidential, apparently no matter who is authorized to receive them. AB 26.

As more fully explained below, this new law authorizing disclosure to the P&A of various DSS and DPH records that incorporate information obtained in the course of providing services, and requiring that P&A maintain confidentiality over such information, does not advance DPH's argument. Section D, infra. If anything, it is further proof that the Legislature saw a distinction between information obtained in the course of providing services and subsequently prepared records that may reflect such information, and adopted a narrow provision to protect the latter category of information in limited circumstances. That the Legislature knew the distinction also is evidenced elsewhere in the Lanterman Act where, in separate subdivisions, it authorized disclosure to P&A of records "obtained in the course of providing services" under the Lanterman Act and administrative records generated in the course of conducting an abuse investigation. Welf. & Inst. Code § 4901(b)(1), (b)(2). DPH never addresses this law.

Expanding the restrictions on information obtained in the course of providing services under the Lanterman Act to all records reflecting any underlying information – even when the Legislature has not chosen to restrict subsequent disclosures – could have enormous unintended consequences well beyond this case. This Court should proceed cautiously and, consistent with

Article I, Section 3(b)(2) of the California Constitution, adopt an approach that is the least restrictive on the right of access.

B. The Long-Term Care Act Is Not "Harmonized" with the Lanterman Act by Carving Out Protections Expressly Intended to Apply to the Vulnerable Citizens Residing in Long-Term Care Facilities.

In the guise of harmonizing potentially conflicting statutes, DPH argues that it should be authorized to redact what it contends is "essential Lanterman-protected information..." from the citations (information reflecting mental, physical and medical condition and the risk posed from the violation to that condition), but disclose information about the nature of the violation, regardless of whether it also triggers Lanterman-protected information. AB 13, 22.[1] Thus, it claims that any apparent conflict in the statutes can be resolved by creating implied exceptions to each. AB 14. But DPH admits that its theory of harmonization is no different than selecting which statute "supersedes" the other on each particular point of conflict. AB 19, n.7. In essence, DPH wants this Court to rewrite both statutes by imposing its view of what is "essential" under each.[2] DPH should not be

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[1] DPH also advocates for disclosure of information that would inform the public as to "how that violation harmed or posed a risk of harm to the facility's residents." AB 11. DPH concedes this information is "central" to the Long-Term Care Act's goal of informing the public. Id. This conflicting position highlights the hair-splitting determinations DPH's position, if adopted, would require – at risk of incurring substantial civil liability under the Lanterman Act should DPH guess wrong. Welf. & Inst. Code § 5330.

[2] This Court previously rejected DPH's position that information about a resident's medical condition and history of disorder or disability necessarily is "core" to the Lanterman Act. Tarasoff, 17 Cal. 3d at 443. There, the Court held that medical history in a psychotherapist's letter to police seeking a 72-hour commitment was not protected under Welfare and Institutions Code Section 5328 because no facts showed that the information was "obtained in the course of providing services" under the Lanterman Act.

allowed to pick-and-choose which parts of the statute it will follow. For numerous reasons, the Court should refrain from engaging in such policy determinations.

First, withholding relevant facts relied on by DPH in issuing the citation – including the resident's mental and medical condition, history of mental disability or disorder, and the probability and severity of the risk that the violations present to that resident's mental and physical condition – would directly violate Health and Safety Code Sections 1423(a)(2) and 1424(a)(1)-(5) and (b), as well as the public posting and access mandates of Section 1429. In arguing that nothing in the Long-Term Care Act prohibits the redaction of this information, DPH ignores these key provisions that would be repealed by implication if this Court accepted DPH's argument. AB 15-16.

Second, carving out key information from the citations would countermand the Legislature's intent in enacting the posting and access mandates of the Long-Term Care Act – "to provide information to the public about the citation record of facilities" in order to "protect patients from actual harm, and encourage health care facilities to comply with the applicable regulations and thereby avoid imposition of the penalties." Kizer, 53 Cal. 3d at 143, 148.

Third, DPH is simply wrong in arguing that harmonizing the statutes as it advocates is consistent with Health and Safety Code Section 1439. That Section designates the writings of the state department in connection with the

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Id. at 443. Here, too, DPH's arguments fail because it offered no evidence that information in the citations CIR seeks was obtained in the course of providing services under the Lanterman Act. 2 PE 934-935; 937-938 (declarations submitted by DPH; neither mentions the citations at issue in this litigation).

provisions of the Long-Term Care Act as public records open to inspection under the CPRA, while requiring that the names of individuals, other than investigating officers, be deleted. Health & Safety Code § 1439. It would be pointless for the Legislature to have included this provision in the Long-Term Care Act if it was no more than a reference to the CPRA and its exemptions, as argued by DPH. AB 13. Under the CPRA all documents received, owned, used or retained by the agency already are public records. Gov't Code § 6253. No law was required to make that clear.

Instead, Section 1439 is an unequivocal expression of legislative intent that DPH records generated in the course of conducting a complaint investigation under the Long-Term Care Act are public records open to inspection by any member of the public. Moreover, as a remedial statute, the Long-Term Care Act is to 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, 295 (1997). And to the extent that Section 1439 is ambiguous, California's Constitution requires the Court to interpret it in a way "that maximizes the public's access to information 'unless the Legislature has expressly provided to the contrary.'" Sierra Club v. Superior Court, 57 Cal. 4th 157, 175 (2013), citing Cal. Const. Art. I, § 3(b).

That DPH understands its disclosure obligations under the Long-Term Care Act is apparent from its public posting on its website of class "A" and "AA" citations issued to other long-term care facilities, in minimally redacted form as sought by CIR. 2 PE 299:20-26; 432-534; see also 22 C.C.R. § 76721 (regulations governing posting of citations provide no exception for facilities that care for the developmentally disabled). Indeed, until CIR requested the citations in this case, DPH regularly disclosed citations

involving mentally and developmentally disabled individuals with minimal redactions to various non-governmental entities and organizations that were not authorized as designated consumer advocates or otherwise required to maintain their confidentiality. 2 PE 297:6-17; 1 PE 178-222.

Fourth, stripping protections expressly included under the Long-Term Care Act from arguably the most vulnerable among the populations residing in long-term care facilities – developmentally and mentally impaired residents – creates the same type of two-tiered system of enforcement that this Court already rejected in Kizer. 53 Cal. 3d at 148. Indeed, depriving an entire population of the protections of the Long-Term Care Act arguably is a far more serious degradation of legislative intent than immunizing a county from the civil penalty components of the Long-Term Care Act, as was at issue in Kizer.

DPH tries to minimize the impact of the Court of Appeal's decision and its own theory of statutory construction by representing that the population at issue is small. AB 1, 23. At the time of CIR's request, nearly 1,700 individuals were residing at the State's largest Developmental Centers, which are charged with the care of the State's most severely disabled individuals. 2 PE 294:8-12; 403. But individuals receiving services under the Lanterman Act are not all committed to state-run Centers. Indeed, the vast majority of developmentally impaired individuals are served through private, non-profit regional centers with whom the Department of Developmental Services ("DDS") contracts to provide services. 2 PE 294:12-16. To the extent that these facilities are licensed as intermediate care or skilled nursing facilities, they are equally subject to the Long-Term Care Act. Neither party offered evidence on the overall population of mentally and developmentally impaired individuals residing in all long-term care

facilities covered under the Act. But DPH's claim that the population is small as justification for overriding their interests is not supported.[3]

Fifth, parsing the statutes as DPH advocates would result in an ambiguous and ultimately unworkable redaction requirement. By substituting a clear statutory mandate that citations be disclosed with names redacted, for one requiring redaction of vague categories of information, the Court of Appeal erroneously assumed that the citations could be readily compartmentalized.[4] A review of just some of the citations in the record illustrates the difficulty in segregating information about how the violation occurred from the residents' medical condition, behaviors, or the risks posed by the violation to the resident. See, e.g., 1 PE 181-184 (describing resident with history of self-injurious behavior, staff members account of attempts to get resident to stop banging wrists on bed rail during hospital stay, and resulting measures deemed abuse); 1 PE 202-204 (describing male resident with history of intermittent explosive disorder and former assaults on co-residents, who was placed in residence in close proximity to females without

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[3] Nor is it clear whether residents of long-term care facilities receiving services under the Lanterman Act all reside in facilities designated for the care of the developmentally disabled. Given the objective of assimilation, this is unlikely, which raises further complications as to how facilities will implement the Court of Appeal's order. Apparently, DPH has elected to confine its redaction efforts to the State's largest facilities, the majority of which have hundreds of beds. See Petitioner's Motion to Take Additional Evidence, Declaration of Jerry Curteman ("Curteman Decl."), ¶ 2. DPH's declaration thus raises serious concerns as to how it has applied the Court of Appeal's decision to this vulnerable population.

[4] The newly submitted declaration offered by DPH provides no meaningful information for the Court. DPH does not provide any actual citations it has redacted in accordance with the Court of Appeal's decision. It merely claims in a conclusory faction that medical information, diagnosis, and the like are included in the information withheld. Curteman Decl., ¶ 4.

a plan to protect residents, resulting in assault on female resident); 1 PE 211-212 (describing client's grave disability and lack of awareness of surroundings in connection with facility's inattention during outing, resulting in her being left behind, temporarily placed in protective custody and put at risk of significant anxiety).

Indeed, DPH's near-blanket redaction of citations issued before the Court of Appeal's order evidences its own view that injuries resulting from egregious incidents of abuse can be withheld from the public as reflecting the resident's medical condition, even when the incidents result in a patient's death. See, e.g., 2 PE 300:1-20; 540-555 (2012 citation issued to Fairview Developmental Center involving alleged 2009 murder of resident by roommate; only indication from redacted citation that violence occurred was obscure reference that detective "working overtime as a patrol officer, responded to the residence" (id. at 552)); see also 5 PE 1383-1386 (heavily redacted citation issued to Sonoma Developmental Center obscuring fact that 11 of 27 patients in a single unit received significant thermal burn injuries consistent with being shot with a high-voltage probe or Taser gun).

Moreover, as DPH's newly submitted declaration shows, the redaction process has triggered a new layer of bureaucratic oversight – delaying the posting of citations at facilities, and thus notice to residents, families and the public of facility violations posing grave risk of bodily harm to residents. See Curteman Decl., ¶ 2.

Just as importantly, reading Lanterman Act protections into the Long-Term Care Act undoubtedly will lead to less information being disclosed to residents and the public. Welf. & Inst. Code § 5330. DPH's vague claim that public employees cannot be sanctioned for following the law does not mitigate the substantial civil liabilities its position invites for itself, DDS and

the facilities, should it guess wrong. This could not have been the Legislature's intent in adopting a comprehensive statutory scheme governing citation investigations and expressly making citations public.

In sum, the statutes cannot be harmonized by selectively repealing portions of both statutes to suit a court's view of what is most important to each. These policy decisions should be left to the Legislature.

C. DPH Misapplies Case Law in Arguing that the Lanterman Act is the More Specific Statute that Governs Over the Long-Term Care Act.

DPH's argument that the Lanterman Act's confidentiality provision is the more specific law that controls over the Long-Term Care Act's public posting and access mandates ignores this Court's decision in Albertson v. Superior Court, 25 Cal. 4th 796 (2001), the Attorney General's opinions addressing the Lanterman Act's confidentiality provisions, and general rules of statutory construction.

DPH argues that "[t]he Lanterman Act's focus on a small subclass of patients in long-term care facilities makes it the more specific statute..." AB 23. Initially, this argument misstates the Lanterman Act's reach. The Lanterman Act's provisions extend to developmentally or mentally impaired individuals who reside with their families [see, e.g., Welf. & Inst. Code § 4685], or receive services through outpatient treatment programs [see, e.g., id. § 6552 (services to juvenile wards of the court)], or community care facilities [id., § 4680]. Lanterman Act services extend well beyond the skilled nursing and intermediate care facilities covered under the Long-Term Care Act, and include, for example, acute psychiatric hospitals and acute care hospitals expressly exempt from the Long-Term Care Act. Compare Welf. & Inst. Code § 7100 with Health & Safety Code § 1418. Moreover, the

Lanterman Act not only assures services to developmentally and mentally impaired individuals but also covers individuals receiving services for chronic alcoholism or drug abuse. Welf. & Inst. Code §§ 5225-5230. In short, there is no support for the notion that individuals receiving services under the Lanterman Act are a subset of those covered under the Long-Term Care Act.

Even if DPH's argument accurately characterized the reach of the Lanterman Act, it errs in focusing on the class of individuals covered by the statutes rather than their subject matter. As the court stated in People v. Superior Court (Ruiz), 187 Cal. App. 3d 686, 692 (1986), "[a] basic rule of statutory construction is that a special statute dealing expressly with a particular subject controls over a more general statute covering the same subject matter." (Emphasis added.) Thus, a statute dealing with "the special question of bail in an extradition proceeding" controlled over the general bail statutes for criminal charges. Id. Similarly, in Marsh v. Edward Theatres Circuit, Inc., 64 Cal. App. 3d 881, 890 (1976), the court stated that "[a] special statute dealing expressly with a particular subject controls and takes precedence over a more general statute covering the same subject." (Emphasis added.) There, because Civil Code Section 54.1 "deals specifically with discrimination against physically handicapped," it controlled over the general Unruh Civil Rights Act (Civil Code § 51). Id.

These cases rest on this Court's holding in In re Williamson, 43 Cal. 2d 651, 654 (1954), where the Court reiterated the "general rule that where the statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment." (Emphasis added.) Applying what is now known as the

"Williamson rule," the Court held that a statute in the Business and Professions Code dealing with the crime of conspiracy to violate licensing provisions was a "specific enactment" that controlled over the general statute in the Penal Code for conspiracies. See also Civ. Proc. Code § 1859 (since 1872, statute reflecting that "when a general and [a] particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.").

Here, when properly focused on the subject matter of the two statutes, it is clear that the Lanterman Act is the general statute dealing with records obtained in the course of providing services to developmentally and mentally impaired individuals, as well as those impaired by alcohol and drugs. The Long-Term Care Act is the special statute that deals with a specific type of record – citations issued to facilities where mentally and developmentally impaired persons receive services that have violated laws or regulations. Put another way, the Lanterman Act covers a much broader scope of records and information than the Long-Term Care Act. Hence, the Lanterman Act is the general statute, and the Long-Term Care Act is the special statute that establishes an exception to the general statute for that specific category of records.

Neither of DPH's cases support its attempt to recast the statutory construction rule. McDonald v. Conniff, 99 Cal. 386 (1893), did not involve statutory construction, as the dissent below recognized. Dis. Opn. at 9, n.9. Rather, that case involved Article IV, Section 25 of the 1879 California Constitution, prohibiting the Legislature from passing special or local laws regulating the practice of courts of justice. This provision was akin to the equal protection clause of the federal Constitution. See County of Los Angeles v. Southern California Tel. Co., 32 Cal. 2d 378, 389 (1948) (holding

that the test for evaluating the validity of a statute is the same under the California Constitution as under the federal equal protection clause). In discussing the Constitution and equal protection, the Court explained that a statute may be considered a general law (and hence constitutional) even though it does not affect all the people of the state. Id. at 391. As examples, the Court explained that a statute may regulate married women, or place restrictions on foreign corporations, and that the statute is still a permissible "general law" because it affects all the individuals of the class across the state. Id. By contrast, a law that targeted a particular Mexican corporation or unmarried mothers in Pasadena would be a "special" or "local" law, prohibited by the California Constitution if it denied those persons equal protection of the law. It was in this context that the Court explained, "[a] statute which affects all the individuals of a class is a general law, while one which relates to particular persons or things of a class is special." Id. McDonald thus has no application to this case because it says nothing about statutory construction or how to determine which of two conflicting statutes controls.

The only other case cited by DPH, In re Ward, 227 Cal. App. 2d 369 (1964), involved two sentencing statutes that conflicted when applied against a minor defendant convicted of selling marijuana. One statute (former Health and Safety Code Section 11531) established minimum sentencing requirements for all persons convicted of selling marijuana. The other statute (former Penal Code Section 1202b) provided that, notwithstanding any other provision of law establishing a felony penalty, persons under the age of 23 could receive shorter minimum terms. The court concluded that the latter statute was the more specific provision, and created an exception to the general sentencing statute. This was because the sentencing statute began

with the "generic" phrase "[e]very person," while former Section 1202b applied only to persons under the age of 23 years and used the phrase "notwithstanding any other provision of law fixing or affecting the penalty for the offense." In re Ward, 227 Cal. App. 2d at 374-75.

As recognized by the dissent, the Lanterman Act's confidentiality provisions do not apply "notwithstanding any other provision of law." Dis. Opn. at 9, n.9. Rather, "these provisions have been held to be general in nature and subject to numerous exceptions, both within the Lanterman Act and outside of that enactment. (See Welf. & Inst. Code, §§ 5328, subds. (a)-(y), 5328.01 et seq.; Albertson, supra, 25 Cal. 4th at p. 805.)" Id. The Long-Term Care Act, by contrast, is phrased in specific language mandating the disclosure of the exact administrative record at issue in this case, and thus is the specific statute that controls.

Moreover, the construction given the statutes in In re Ward was consistent with the Legislature's explicit purpose to provide lesser penalties for young violators; denying a 21-year old a hearing until he was three years into his prison term – when under the special statute he was eligible for a parole hearing after six months – frustrated that purpose. Here too, construing the Lanterman Act as the special statute – even though it contains general language – and the Long-Term Care Act as a general statute – even though it includes specific language – would frustrate the purposes of both statutes. See 5 PE 1447 (withholding the citation information "undermines the public's interest in protecting patients" and thus fails to serve the purpose of the Lanterman Act and the Long-Term Care Act to protect the health and safety of mental health patients).

In advancing its novel theory of statutory construction, DPH ignores entirely the import of this Court's decision in Albertson and the Attorney

General's opinions recognizing that the Lanterman Act's confidentiality provision is a general law that can be trumped by more specific laws authorizing the disclosure of records or information obtained in the course of providing services. DPH concedes that these authorities, which address the very law as at issue here, apply "fundamental principles of statutory interpretation." AB 24. Nevertheless, DPH contends that because the statutes at issue in Albertson and the AG opinions authorized specific disclosures that did not result in broader disclosure to the public, they are "unavailing." AB 24.

DPH's argument misses the point. This Court's decision in Albertson and the AG opinions all involved an apparent conflict between the general confidentiality law of the Lanterman Act and more specific laws requiring disclosure of records or information presumptively covered under the Lanterman Act. Each concluded that the Lanterman Act's confidentiality provision is a general law that can be trumped by a more specific law authorizing disclosure of the information. The application of fundamental principles of statutory interpretation in these authorities did not turn on the scope of the authorized disclosures. Like the citations here, all of these authorities involved statutes governing a specific type of information presumptively falling within the broader category of information protected under the Lanterman Act. Thus, far from being unavailing, Albertson should control the Court's analysis here, and the AG opinions should be given great weight.

D. Neither Senate Bill 1377, Which Clarifies the Protection and Advocacy Agency's Right to Review Records, Nor Welfare and Institutions Code Section 5328.15 Repeals the Long-Term Care Act's Public Posting and Access Mandates.

DPH argues that confidentiality provisions in SB 1377 (Corbett) (clarifying the P&A's right to unredacted records) and Welfare and Institutions Code Section 5328.15 (governing licensing investigations) evince the Legislature's intent that citations are confidential. AB 15, 25. In no way, however, do these provisions indicate an intent to repeal the public posting and access mandates of the Long-Term Care Act.

SB 1377 authorizes the release of various records to the P&A, including but not limited to unredacted citation reports – which would include patient identifying information in the reports – but states that the records "shall remain confidential and subject to the confidentiality requirements of subdivision (f) of Section 4903." See Welf. & Inst. Code §§ 5328.15, 4514(v). DPH argues that these amendments would be pointless if the citations were already available to the general public under the Long-Term Care Act. AB 15.

As more fully explained in CIR's Opening Brief, SB 1377 did not create any new right of access to facility records. Rather, as the legislative history of the bill makes clear, it was enacted to clarify P&A's existing rights of access to facility reports in connection with abuse investigations because after many years of providing unredacted facility reports to P&A, in 2009, DPH adopted a new policy requiring P&A to submit "an individual written request to receive an unredacted record for the case." See CIR's RJN, Ex. 4 (Senate Bill Analysis). Though there was no dispute as to P&A's right of access to the reports, and it would eventually receive unredacted reports under existing law, this "extra layer of bureaucratic process" caused

significant delays "jeopardiz[ing] the well-being of the individuals involved." Id. at 5. The law was necessary because DPH was arbitrarily thwarting P&A's right under Welfare and Institutions Code Section 4903(c)(2) to obtain reports prepared by the agency charged with investigating incidents of abuse and neglect.

DPH's argument that the law would not be necessary if unredacted citations were available through the Long-Term Care Act also misstates the purpose of the new law. It delineates the specific type of reports from both DSS and DPH that are to be made accessible to P&A in conducting its own investigation of abuse. Welf. & Inst. Code § 5328.15(c)(1), (2). The law is not limited to citations. The Long-Term Care Act's mandate that citations, once final, shall be made available to any member of the public upon request, thus would not be sufficient for P&A's investigatory purposes.

DPH also misstates the legislative history of SB 1377 and Section 4903 in arguing that prior to adoption of SB 1377, DPH was required to redact citations in accordance with the Lanterman Act unless P&A had obtained consent, established probable cause to believe that the health or safety of an individual was in serious or immediate jeopardy, or the case involved the death of an individual. AB 15. Under Section 4903(e)(2), cited by DPH, probable cause is necessary to obtain records immediately, defined as no less than 24 hours after P&A makes the request. Under Section 4903(e)(1), absent consent, P&A has a right of access to records on a three-business day turn-around, without a showing of probable cause, when it has received a complaint of abuse or neglect. Id., §§ 4903(a)(2)(C), 4903(e)(1).

Nor does the legislative history of SB 1377 support DPH's contention that the Lanterman Act required redaction of reports. AB 15. At most, the cited legislative history shows that DPH's "purported reason why redacted

versions have been provided [to P&A] in recent years," was its belief that existing protections under the Lanterman Act required it to redact specified reports pertaining to developmentally and mentally impaired individuals. CIR's RJN, Ex. 1 at p. 10. The legislative history evidences no concession on this point.

Simply put, SB 1377 does not support the conclusion that citations involving developmentally or mentally impaired individuals are confidential, even if this Court were to find that the plain language of the Long-Term Care Act was ambiguous and that a latter enacted statute was relevant to determine the Legislature's intent in enacting an earlier law.[5] See Op. Br. at 33-34.

DPH's argument that Section 5328.15's disclosure authorizations and related confidentiality provisions apply to complaint investigations under the Long-Term Care Act is equally misplaced. AB 25. As found by Respondent Court and reiterated by the dissent below, Section 5328.15 authorizes disclosure of information to licensing personnel conducting licensing duties under separate chapters of the Health and Safety Code. Welfare & Institutions Code § 5328.01. It neither incorporates the separately chaptered provisions of the Long-Term Care Act in Chapter 2.4 of Division 2 of the Code, nor repeals by implication these provisions. 5 PE 1448; Dis. Opn. at 11.

Indeed, it makes sense that Section 5328.15's provisions authorizing disclosure of various records in licensing investigations do not govern

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[5] CIR's reliance on Jones v. The Lodge at Torrey Pines Partnership, 42 Cal. 4th 1158, 1171 (2008), for the well-established proposition that the declaration of a later Legislature is of little weight in determining the intent of the Legislature that enacted an earlier law, was not misplaced, as DPH contends. AB 16. That case involved an enrolled bill report that purported to state existing law, not a bill that never became law.

citation investigations because all of the necessary authorizations to conduct a citation investigation already were set forth in the earlier-enacted Long-Term Care Act. See, e.g., Health & Safety Code §§ 1420(a)(1); 1420(a)(2)(A)-(C); 1421(a); 1428(f). Thus, DPH's reliance on Section 5328.15 and its confidentiality provisions, as purportedly the later enacted provision that controls over the Long-Term Care Act, remains misplaced. That section does not purport to repeal by implication the public access mandates of the Long-Term Care Act.

E. DPH's Belated Assertion of the Information Practices Act as a Basis for Withholding Citations Should be Rejected.

1. DPH waived any argument based on the Information Practices Act by failing to raise it.

DPH argues that the Information Practice Act ("IPA") provides an independent basis for withholding "personal information" from the citations even though they do not disclose the patients' name. AB 17. But DPH waived the right to raise this issue on appeal by failing to address it in any meaningful way in the trial court, and by failing to request review of this issue in its answer to CIR's petition for review. See Greenwhich S.F., LLC v. Wong, 190 Cal. App. 4th 739, 767 (2010) (as a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal); Cal. R. Ct. 8.504(c).

In the trial court, DPH made a single reference to "the IPA" in its factual statement in opposition to CIR's petition for writ of mandate, saying that the redactions complied with "sections 4514, subdivision (n), 5328.15 and the IPA." 4 PE 912:15-18. DPH never mentioned the IPA again in the trial court and that court did not address the IPA in its order. On appeal, as recognized by the Court of Appeal, DPH raised the IPA in a "one-paragraph

passage in its writ review petition..." Opn. at 5. The Court of Appeal did not apply the IPA as a separate basis for the withholding. Instead, it recognized that its reconciliation of the Long-Term Care Act and Lanterman Act was intended to foreclose release of personally-identifying information that would be akin to naming someone. Id.

DPH also did not invoke the IPA in its denial letter to CIR's records request. 1 PE 22; 169; 174-176. Under the CPRA, DPH was required to "promptly notify the person making the request of the determination and the reasons therefor." See Gov't Code § 6253(c) (emphasis added). This law not only requires a responding agency to carefully consider whether there is a legitimate basis for refusing a CPRA request, but also ensures that the requester has notice of the alleged justification for the withholding before it initiates suit. Because records requesters are entitled to certainty as to the basis of a withholding before they decide whether to file suit, and because DPH never properly raised this exemption below or preserved it here, DPH's assertion of the IPA as an independent basis to justify its withholding should be rejected.

2. The IPA does not independently justify DPH's withholding.

Even if DPH's exemption claim under the IPA is considered, the IPA itself makes clear that it is not an independent basis for withholding records otherwise discloseable under the CPRA. Specifically, the IPA expressly authorizes the disclosure of personal information when the disclosure is made pursuant to the CPRA. Civ. Code § 1798.24(g).[6] Thus, non-disclosure must

[6] Other exceptions to the IPA's provisions also apply here. Civ. Code §§ 1798.24(e), (f), (i) & (o). DPH never addressed these exceptions.

be predicated on the specific exemptions from the disclosure mandates of the CPRA, not the IPA. See, e.g., Gilbert v. City of San Jose, 114 Cal. App. 4th 606, 696 (2003) (analyzing claim that IPA prohibited disclosure of licensing information gathered pursuant to state gambling law in context of CPRA exemptions because IPA authorizes disclosure under the CPRA). DPH recognizes this in citing to Section 1798.24(g) and arguing that the Lanterman Act's protections apply under the CPRA through Government Code Section 6254(k). That section is not a separate exemption statute, but one that incorporates exemptions under other federal or state law. Gov't Code § 6254(k). Thus, DPH's argument is wholly circular and adds nothing to the analysis that is not already at issue under the Lanterman Act.

In any event, the IPA does not prohibit disclosure of personal information, as DPH contends. Rather, it proscribes disclosure of personal information "in a manner that would link the information disclosed to the individual to whom it pertains..." Civ. Code § 1798.24; see Moghadam v. Regents of University of California, 169 Cal. App. 4th 466, 484 (2008) ("an individual's name constitutes 'personal information' [under the IPA] only when it is linked to information that 'identifies or describes' the individual"). Other laws similarly require a linkage between the name of the individual and the underlying information. See Civ. Code § 56.05(j) (defining "medical information" under the Confidentiality of Medical Information Act as "individually identifiable information")[7]; 45 C.F.R. § 164.514 (permitting

[7] "Individually identifiable" is further defined under subsection (j) as medical information that "includes or contains any element of personal identifying information sufficient to allow identification of the individual, such as the patient's name, address, electronic mail address, telephone number, or social security number, or other information that, alone or in

disclosure of de-identified health records under Health Insurance Portability and Accountability Act if certain conditions are met).

In Sanders v. State Bar of California, 58 Cal. 4th 300, 311 (2013), in evaluating a state bar rule covering applicant records and intended to protect applicant privacy interests, this Court stated that "if the applicant cannot be identified, disclosure of information does not impair his or her privacy interests and the prospects of such disclosure is unlikely to affect the bar's ability to obtain the information it needs." The Court found that "[t]he State Bar's argument that disclosure of the requested data would violate applicants' privacy even if it cannot be connected to them as individuals is not supported by authority." Id. at 326; see also Rudnick v. Superior Court, 11 Cal. 3d 924, 933, n.13 (1974) (in the context of a physician-patient privilege the Court stated, "if disclosure reveals the ailment but not the patient's identity, then such disclosure would not appear to violate the privilege."). As these decisions recognize, this linkage is key given that the purpose of the IPA is to protect individual privacy rights. Id., § 1798.1.

By adopting a law that requires public disclosure of citations with the names of patients and other individuals, other than investigating officers, redacted, the Legislature specifically took into consideration individual privacy interests. Health & Safety Code §§ 1423(a)(2); 1429(a) & (b); 1439. As the trial court explained, "[i]n enacting the accessibility provisions of the Long Term Care Act, the Legislature already has made the determination that disclosure of the citations does not constitute an unwarranted invasion of personal privacy." 5 PE 1448. The Legislature made a considered decision

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combination with other publicly available information, reveals the individual's identity." Civ. Code § 56.05(j).

to sever patient names from the underlying information, striking the proper balance between individual privacy rights and the public's interest in holding facilities and the state entities charged with their oversight accountable for serious violations of laws that put patients at risk of harm.

DPH's practice of publicly posting on its website "AA" citations issued to other long-term health care facilities covered under the Long-Term Care Act in accordance with this law, with minimal redactions to protect patient identity, is an acknowledgment that disclosure of de-identified citations does not violate the IPA, or any other privacy interest. 2 PE 299:20-26; 432-534. Moreover, as Respondent Court recognized, DPH failed to present any evidence that disclosure of any of the 55 citations at issue with names redacted would lead to the identification of any patient. 5 PE 1445, n.3. Such evidence was required, especially given the fact that most of the facilities at issue house hundreds of patients and the conditions and disorders chronicled are often common to this population.

Instead – having failed to meet its burden of presenting evidence to support its claim – DPH now points to one situation in which a citation purportedly could reveal the identity of a patient, if a citation had been issued. AB 26-27.[8] It does not invoke any of the numerous citations in the record but instead a news account by CIR of a 495-page inspection report prepared by DPH on the Sonoma Developmental Center, which houses more than 500 people. Id. The report found rampant abuse and neglect to the point that the center was on the brink of losing its federal certification, necessary for it to receive millions of dollars in federal aid. In addition to the

[8] DPH does not suggest, and has not shown, that this incident led to the issuance of a citation.

finding that 11 patients at the center were repeatedly assaulted with a stun gun by a caregiver – an incident that first came to public light through CIR's reporting – the report outlined immediate improvements to be taken by the center. Among them were additional training for center employees on a condition called pica, where people ingest things that are not food. 5 PE 1401. The report discussed a named patient who consumed part of a "soft knit shirt." Id. The patient previously had been diagnosed with pica and had been know by caregivers to have digested disposable diapers in the past. The point of the report, and CIR's reporting on it, was that despite this knowledge, the center waited for five days after the patient started vomiting to take him to the hospital. An operation removed a bowel blockage, but he died of respiratory failure a few days later. The Office of Protective Services waited six weeks to open an investigation. By then, the caregiver responsible for the patient was gone. Id.

Nothing in the record suggests that this patient's condition was so peculiar to him that disclosing the facts without his name would necessarily reveal his identity, as asserted by DPH. Rather, pica appears to be a common condition warranting a call for additional training of center employees. Id. Nor were any privacy interests actually implicated by this particular incident since the patient died. Personal privacy interests do not survive a person's death. Flynn v. Highman, 149 Cal. App. 3d 677, 683 (1983); Hendrickson v. California Newspapers, Inc., 48 Cal. App. 3d 59, 62 (1975); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 821-22 (1979). Simply put, DPH's claim

that disclosure of information contained in the citations will necessarily identify them is not supported.[9]

If anything this incident illustrates how integral a resident's condition can be to the ultimate determination of neglect and abuse, and thus that DPH's primary argument to support its statutory interpretation – that medical condition can be redacted because it is not core information (AB 9-10) – is utterly baseless. Stripping the patient's condition from a citation, or the details of the ingestion that led to the patient's death, would render the ultimate findings of abuse or neglect meaningless, as would any determination of the risk posed to the patient by the neglect at issue.

3. Neither the Information Practices Act nor the California Constitution require advance notice and opportunity to object before the citations are made public.

In a last ditch attempt to thwart public disclosure of the citations as required by the Long-Term Care Act, DPH argues for the first time in this litigation that even if the Act and the CPRA authorize disclosure of citations with names redacted, the IPA requires advance notice and an opportunity to object to those persons whose "personal information" is to be disclosed. AB 18. DPH's argument fails because it is premised on the incorrect claim that citations with names redacted constitute "personal information" under the IPA. See Section 2, supra.

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[9] Similarly, DPH's claim that disclosure of this type of information even in de-identified form will deter some mental health patients from seeking treatment is not supported by any evidence in the record. AB 27. Being subject to unchecked abuse and neglect presumably would deter residents from seeking treatment as well.

In any event, nothing in the IPA – or the CPRA for that matter – requires an agency to provide advance notice to affected persons of an intent to disclose personal information. DPH's reliance on Gilbert v. City of San Jose, 114 Cal. App. 4th 606 (2003), and Valley Bank of Nevada v. Superior Court, 15 Cal. 3d 652 (1975), to support its argument is misplaced. In both cases, the information involved was "indisputably confidential" and directly identified the individuals to whom the information pertained. Gilbert, 114, Cal. App. 4th at 616; Valley Bank, 15 Cal. 3d at 657-658; see also Sanders, 58 Cal. 4th at 326 (in holding that applicants' constitutional privacy rights did not as a matter of law bar disclosure of the State Bar admissions database in de-identified form, Court distinguished cases involving disclosure of information about named individuals). Gilbert involved personal information required to be disclosed by law in order to obtain a gambling license, and Valley Bank involved bank customer information sought by way of a third party subpoena. The notice requirements were implemented by the courts not because they were required under the IPA but to strike the right balance in light of the particular privacy interests at stake.

Here, disclosure of de-identified citations does not implicate privacy concerns, and the involved residents are on notice that the citations, once issued, will be posted at the facilities or made available upon request by any member of the public since this is what the Long-Term Care Act requires. Health & Safety Code § 1429. Affected residents and their designated family members also are provided a copy of the citation. Health & Safety Code § 1424(j). No justification exists to delay implementation of the Long-Term Care Act's public posting and access mandates to provide notice to residents whose information is reflected in the citations. In advocating such a position, DPH ignores entirely the grave danger facing residents when the conditions

warranting issuance of an "AA" or "A" citations exist. Under DPH's theory, notice to residents, their families and the public about risks posing imminent danger of death or serious physical harm to residents [Health & Safety Code § 1424(d)] should be placed on hold to allow for an individual not named in a citation to move to bar its disclosure. Considering that DPH is the agency charged with enforcing facility compliance with laws, including the Long-Term Care Act's public posting and access mandates, its position should be a concern to this Court.

III. CONCLUSION

In an effort to bring light to the conditions of developmentally and mentally impaired individuals residing in the State's largest institutions, the Center for Investigative Reporting sought access to citations chronicling serious violations of law by the facilities. It received page-after-page of blacked out citations. DPH's theory of construction would continue this trend, shrouding in secrecy egregious abuse in the guise of protecting the privacy rights of individuals who are not even identified in the citations. Its

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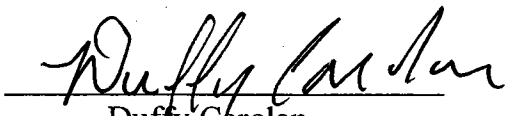
COMPLIANCE CERTIFICATE

I certify that pursuant to Rules of Court 8.204(c) and 8.486(a)(6), the attached Reply Brief on the Merits is proportionately spaced, has a typeface of 13 points, and contains 8,380 words of countable text.

Dated: June 25, 2014.

By: 
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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, at whose direction the service was made. 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.

On June 25, 2014, I caused to be served the following document:

REPLY BRIEF ON THE MERITS OF THE CENTER FOR INVESTIGATIVE REPORTING

I caused the above document to be served on the interested parties at the addresses 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 June 25, 2014, following the ordinary business practice.**

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I am readily familiar with my firm's 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 manner 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 on June 25, 2014, at San Francisco, California.

Janis Wooley