SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

CALIFORNIA NEWSPAPER PARTNERSHIP, dba THE BAY AREA NEWS GROUP, and THE EAST BAY TIMES, Petitioners v. COUNTY OF ALAMEDA, and THE ALAMEDA COUNTY PUBLIC HEALTH DEPARTMENT, Respondent.	Case No. RG20062745 ORDER GRANTING WRIT OF MANDATE

Petitioner California Newspaper Partnership, dba The Bay Area News Group's, and The East Bay Times' verified petition for writ of mandate to the County of Alameda and the Alameda County Public Health Department under the California Public Records Act came on for hearing on October 22, 2020 in Department 15. Petitioner California Newspapers Partnership was represented by Duffy Carolan; and Respondents Alameda County Public Health Department and County of Alameda were represented by Raymond Lara. All counsel appeared via BlueJeans Video Conferencing remotely.

The court, having reviewed the pleadings and heard the arguments of counsel, GRANTS the writ, as follows.

I. THE CPRA RECORDS ACT REQUEST

Petitioners California Newspaper Partnership, dba The Bay Area News Group and The East Bay Times ("Petitioners") seek a writ of mandate pursuant to the California Public Records Act, Government Code §§ 6250 and 6258 ("CPRA") and Article I, § 3(b) of the California Constitution to obtain the names of long-term care facilities, including skilled nursing homes, assisted living facilities, residential care facilities, and other congregant care facilities in Alameda County with COVID-19 cases, and the cumulative number of infections and deaths involving both patients and staff at each facility. Petitioners' counsel, Duffy Carolan, made the CPRA request by letter dated April 9, 2020, to Neetu Balram, Public Information Officer for the Alameda County Health Department. Petitioner's CPRA request sought "the names of long-term health-care facilities withing the County with confirmed cases of Covid-19, along with the number of infected patients and staff at each facility." (Verified Petition for Writ of Mandate, at¶¶ 3, 13 and Exhibit 3.) After some back and forth, Petitioners' CPRA request was formally denied in a letter from the Office of County Counsel dated April 20, 2020. In the April 20 letter, County Counsel, citing Government Code § section 6254(k) and the Health Insurance Portability and Accountability Act, 42 U.S.C.A. § 1320(d); 45 C.F.R. 160.103 ("HIPAA), informed Petitioners' counsel that Respondents the County of Alameda and the Alameda County Public Health Department ("Respondents" or "the County") would not produce the requested documents because HIPAA prohibited the disclosure of the requested information and the HIPAA requirements for de-identification could not be met. (Verified Petition at ¶¶ 21, 26-27 and Exhibit 8, Exhibit 10.) Petitioners filed their Verified Petition on June 1, 2020.

II. DISCLOSURE UNDER THE CPRA: THE APPLICABLE LEGAL STANDARD

Article I Section 3(b) of the California Constitution, provides in pertinent part that "[t]he people have the right of access to information concerning the conduct of the people's business." In order to preclude disclosure of public records, the party opposing the CPRA request bears the burden of showing the disclosure of such records is either exempted or prohibited pursuant to federal or state law. (Government Code 6254(k); *Nat'l Lawyers Guild v. City of Hayward* (2020) 9 Cal.5th 488, 507.) Under the California Public Records Act, public records ***shall*** be open to public scrutiny unless an exemption applies, and that the right to access shall be broadly construed, while any statute that limits access, narrowly construed. Any doubts should be resolved in favor of public access. (*Nat'l Lawyers Guild, supra,* at 507.)

"[T]he right of public access to public records is not absolute" and that access should be mindful of an individual's right to privacy. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1282; Government Code § 6250.) In enacting the CPRA, the Legislature, though recognizing "the right of access to information concerning the conduct of the people's business," also expressly declared that it was "mindful of the right of individuals to privacy." (Government Code § 6250.) Thus, the Legislature's policy declaration in § 6250 "bespeaks legislative concern for individual privacy as well as disclosure." (*Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 652 ("*Kehoe*").) "In the spirit of this declaration, judicial decisions interpreting the Act seek to balance the public right to access to information, the government's need, or lack of need, to preserve confidentiality, and the individual's right to privacy. [Citations.]" (*American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 447) "The same dual concern" for privacy and disclosure the Legislature stated in Government Code section 6250 "appears throughout the [A]ct." (*Kehoe, supra,* 42 Cal.App.3d at p. 652, 117) The Legislature

resolved the tension between these competing concerns by limiting language in the CPRA by allowing for the inspection of public records "except as hereafter provided." (Government Code section 6253(a).) The CPRA has codified these exemptions as Government Code § 6254. "In large part, these exemptions are designed to protect the privacy of persons whose data or documents come into governmental possession." (*Kehoe, supra,* 42 Cal.App.3d at p. 652)

"A qualifying agency refusing to disclose a public record must "justify" its decision "by demonstrating that the record ... is exempt under" one of the CPRA's "express [exemption] provisions ... or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." (Gov. Code, § 6255, subd. (a); *Copley Press, Inc. v. Superior Court, supra,* 39 Cal.4th at 1282, citing Gov. Code, § 6255, sub. (a); *Nat'l Lawyers Guild, supra* at 501.)

III. PRIVACY PROTECTIONS UNDER HIPPA

In 1996, Congress enacted HIPAA, in part, to "improve the efficiency and effectiveness of the health care system by facilitating the electronic exchange of information with respect to financial and administrative transactions carried out by health plans, health care clearinghouses, and health care providers." (67 Fed.Reg. 14776, 14776 (March 27, 2002).) HIPAA authorized the U.S. Department of Health and Human Services ("HHS") to issue safeguards to protect the confidentiality and security of health information. (*Id.;* 42 U.S.C.A. §§ 1320d–1(d), 1320d–2.) Privacy rules promulgated by the HHS under title 45 of the Code of Federal Regulations ("Privacy Rules") prohibit a "covered entity" from disclosing "protected health information" except as specifically permitted by the Rule. (45 C.F.R. § 164.502; *see also id.* §§ 164.506 (covered entities may disclose health information to carry out treatment, payment, or health care

operations or with individual's consent), 164.508 (covered entity may not disclose protected health information without authorization).

HIPAA defines a "covered entity" as:

> (1) A health plan.
>
> (2) A health care clearinghouse.
>
> (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter [Subchapter 6].
>
> (45 C.F.R. §160.103.)

Protected health information means individually identifiable health information:

> (1) ... that is:
>
> (i) Transmitted by electronic media;
>
> (ii) Maintained in electronic media; or
>
> (iii) Transmitted or maintained in any other form or medium. (*Id.*)

HIPAA defines "individually identifiable health information" as follows:

> (6) Individually identifiable health information. The term "individually identifiable health information" means any information, including demographic information collected from an individual, that—
>
> (A) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
>
> (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and
>
> (i) identifies the individual; or
>
> (ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.

(42 U.S.C.A § 1320d(6).)

Finally, under HIPAA:

> Health information means any information, including genetic information, whether oral or recorded in any form or medium, that:
>
> (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual. (42 U.S.C.A § 1320d(4).)

With this understanding of statutory framework of the HIPAA, the court addresses the parties' evidence and arguments.

IV. PARTIES ARGUMENTS

Respondents argue that they are not required to comply with Petitioners' CPRA request because information requested is exempt pursuant to Government Code §6254(k) as records "which [are] exempted or prohibited pursuant to federal or state law." (Government Code section 6254(k).) Respondents argue the ACPHD is a covered entity under HIPAA, that as a covered entity, the ACPHD is prohibited pursuant to 42 U.S.C. § 1320d, 45 C.F.R. § 164.502, 45 C.F.R. 164.508 (a)(1) from disclosing individually identifiable health information, unless the ACPHD meets the deidentification requirements of 45 C.F.R. § 164.514. (Respondents' Brief at 8:14-9:15) Respondents further argue that the ACPHD cannot meet the identification requirements

and therefore it is not required to comply with Petitioners' CPRA request[1]. (Respondents' Brief at 9:17-11:2).

The court begins its analysis with the observation that the party opposing CPRA request bears the burden of showing the disclosure of such records is either exempted or prohibited pursuant to federal or state law. (Gov. Code 6254(k); *Nat'l Lawyers Guild v. City of Hayward* (2020) 9 Cal.5th 488, 507.) Stated another way, under the CPRA, the burden of proof is on Respondents to demonstrate by a preponderance of the evidence that the disclosure of the records sought by Petitioners is prohibited pursuant to federal law. This in turn requires Respondents to at a minimum establish by a preponderance of the evidence that: (1) Respondent is a covered entity as defined by HIPAA, (2) the information requested by Petitioners is individually identifiable information, and (3) disclosure of the individually identifiable information is either prohibited by HIPPA, or is exempt from disclosure under the CPRA.

A. RESPONDENTS HAVE NOT ESTABLISHED THAT THEY ARE A COVERED ENTITY

The evidentiary basis of Respondents' claim to be a covered entity under HIPPA is a request for judicial notice of a copy of Resolution No. 2003-434 of the Alameda County Board of Supervisors, a copy of § 2.100.040 of the Alameda County Administrative Code, and the Declaration of Kimi Watkins-Tartt, the Public Health Director with (sic) the Alameda County

[1] 45 C.F.R. § 164.514 states that "health information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual is not individually identifiable health information." Under 45 C.F.R. § 164.514 provides that a covered entity may determine that health information is not individually identifiable health information only if: a person with appropriate knowledge and experience with statistical and scientific principals and methods for rendering information not individually identifiable applies such principals and methods to determine the risk is very small that the information could be used to identify an individual and must remove all geographic subdivisions smaller than a state including street address, city, county, zip code, etc. (45 C.F.R. § 164.514(b).)

Public Health Department, all of which were submitted with Respondents' opposition. On the authority of Resolution 2003-434 and the Watkins-Tartt Declaration, the County argues that the County designated HCSA and all of its units, including ACPHD as a covered component. (County's Brief at 14:14-20.) The county also argues on the basis the Watkins-Tartt Declaration that ACPHD would be a covered entity in its own right because it provides health care services and cites 45 C.F.R. § 160.102(a)(3) as support for that proposition. (*Id.*) The evidence in the record does not establish the fact of ACPHD's status as a covered entity, as defined by HIPAA.

Resolution 2003-434 was adopted by the Alameda County Board of Supervisors on April 15, 2003, and recites the that the HIPAA "Privacy Rule" will take effect April 14, 2003, that existing state and federal law protects certain types of individually identifiable health and medical information from discovery, and that the County of Alameda is a covered entity whose business activities include both HIPPA covered and non-covered functions and must implement appropriate administrative, technical and physical safeguards to protect individually identifiable health information protected by HIPAA. Resolution 2003-434 does not, as contended by County, state that "HCSA and all of its units –including HCPHD—are "covered components." Rather, Resolution 2003-434 states that the County of Alameda is a hybrid covered entity and that "the covered component of which shall consist of the Alameda County Health Care Services Agency and other Alameda County agencies, departments and programs deemed appropriate by the Alameda County Administrator. . . .) (Respondent's RJN, Exhibit A.) The Watkins-Tartt Declaration states that the HCPHD is a unit of the HCSA (*i.e.*, the Health Care Services Agency), and that the HCPHD provides several medical services including immunizations through the Health Nursing Division, and case management and medical therapy services to

children with chronic, disabling medical conditions through the Family Health Services Division. (Watkins-Tartt Declaration at ¶¶ 2-3.)

Neither Respondent's request for judicial notice, nor the Watkins-Tartt Declaration address whether the Alameda County Health Department is a "covered entity" under HIPPA (*i.e.*, a health plan, health care clearinghouse, or health care provider who transmits any health information in electronic form in connection with a transaction covered by HIPAA (45 C.F.R. § 160.103), or whether the information sought by Petitioners was "created or received by a health care provider, health plan, public health authority. . . .and. . .[r]elates to the past, present, or future physical or mental health or condition of an individual;[or] the provision of health care to an individual." (*Id.*) The designation in Resolution No. 2003-434 of the County as a hybrid "covered entity" and the fact of the ACDPH providing immunizations as established by the Watkins-Tartt Declaration, together, do not establish the ACDPH status as a covered entity. The Watkins-Tartt Declaration, notable for its brevity, does not affirmatively state that the services provided by the HCDPH involved the transmission of health information in electronic form in connection with a transaction covered by HIPAA, (45 C.F.R. § 160.103), or that these services were rendered by the HCDPH acting in the capacity of a health plan. There is no other admissible evidence in the record from which the court can make this determination. The resolution of the ACDPH's status as a "covered entity" would depend on how immunization, case management and medical therapy services were provided, *i.e.*, directly by the ACDPH acting as a health care provider, or as acting as an intermediary or service facilitator with other medical providers; whether information was received from the individual by the ACDPH, and whether the information was transmitted electronically by the County acting in the capacity of a health care provider. The County's contention that the ACDPH is covered entity as defined by

HIPAA, *i.e.*, a health plan, a health care clearinghouse or a health care provider who transmits information electronically, is not supported by the evidence in the record. The County has failed to meet its burden of proof.

B. RESPONDENTS HAVE NOT ESTABLISHED THAT THE REQUESTED INFORMATION IS INDIVIDUALLY IDENTIFIABLE INFORMATION

Petitioner and Respondent devote much of their briefing to arguing over the status of the Alameda County Public Health Department's status as either a hybrid entity or a covered entity under HIPAA, much to no import. Even if Respondents had met their burden of proof and even if the court had determined that the ACPHD was a covered entity under HIPAA, Respondents have not established that the information requested falls under the definition of "individually identifiable health information" under 45 C.F.R. § 160.103 and 42 U.S.C. § 1320d (6).

Petitioner's CPRA request seeks information regarding the names of the nursing homes and congregant care facilities, the number of patients and/or staff who have tested positive for COVID-19 at those facilities, and not the names, identity or identifying information of those individuals. Respondents do not provide evidence or argument as to why the facility names and the number of COVID-19 positive patients and staff would provide a "a reasonable basis to believe that the information can be used to identify the individual." (42 U.S.C. §1320d(6)(B).)

HIPAA does not invalidate or limit the authority, power or procedure established under any law providing for the reporting of disease...., or death, public health surveillance, or public health investigation or intervention." (42 U.S.C. § 1320d-7(b). HIPAA authorizes disclosure of protected health information to public health authorities for the purpose of "presenting or controlling disease...including but not limited to the reporting of disease... death and the conduct of public health surveillance, public health investigations and public health interventions." (45 C.F.R. § 164.512(b)(l)(i).) This authorization extends to public health

authorities when they are also operating as covered entities under HIPAA. (45 C.F.R. § 164.512(b)(l)(I).) The disclosure requested does not relate to the County's activities as a health care provider, health plan, employer, or health care clearinghouse, but rather, the Counties activities as a public health authority charged with reporting disease, death and the conduct of public health surveillance. (*See, e.g.,* 45 C.F.R. §160.103 (individually identifiable information includes information, including demographic information *collected from an individual*, that—is *created or received* by a *health care provider, health plan, employer, or health care clearinghouse*.) The county received the requested data to carry out its public heath mandate, and not as a provider of health care services to individuals.

The court finds that Respondent has not met it burden of proof to show that the information requested is "individually identifiable health information" that would preclude the release of the information requested under HIPAA.

C. DISCLOSURE OF THE REQUESTED INFORMATION IS EXEMPT FROM THE PROTECTIONS AS REQUIRED BY LAW

Respondents also argue that disclosure of the information requested through Petitioners CPRA response is prohibited by HIPAA's restrictions on the disclosure of individually identifiable information, 45 C.F.R. §164.514. (Respondents' Brief at (9:16-11:22). Respondents' argue that under 45 C.F.R. §164.514, a covered entity (such as the Alameda County Public Health Department) may only disclose protected health information if the health information does not identify an individual and only if there is no reasonable basis to believe that the information can be used to identify an individual. (Respondents' Brief at (9:22-10:2.) HIPAA regulations, Respondent argues, require the de-identification process to include a statistical analysis to confirm under generally accepted statistical and scientific principles and methods that the risk is very small that the information could be used to identify an individual. (45 C.F.R.

§164.514(b).) Petitioners argue that the disclosure of the information , even if individually identifiable information, falls within the "required by law" exception to the privacy rule under 45 C.F.R. § 164.502(a).

Neither Petitioner, nor Respondent has cited any California or federal authority addressing the argument presented by Respondent in this writ proceeding, *i.e.*, whether the HIPAA restrictions contained in 45 C.F.R. §164.514 which limit the disclosure of individually identifiable information and impose de-identification requirements on the release of protected information supersede other HIPAA regulations (45 C.F.R. §164.514) which govern to whom and under what conditions protected information may be disclosed or released by a covered entity. In absence of any controlling California or Federal authority, the court will look to the language of a statute as the best indicator of the meaning of the statute and how the court should interpret the statute. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 826; *Ex Parte Goodrich* (1911) 160 Cal. 410, 416-417.)

The regulation at issue here, 45 C.F.R. §164.512, allows for the a covered entity to "disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law." (45 C.F.R. §164.512(a)(1).) The regulation specifies that "[a] covered entity must meet the requirements described in paragraph (c), (e) or (f) of this section for uses or disclosures required by law. (45 C.F.R. §164.512(a)(2).) Subsections (c) and (f) of §164.512 contain the standards for the disclosure of protected information about victims of abuse, neglect or domestic violence (subsection c) and to law enforcement (subsection (f)). Subsection (e)(1)(i) contains the standard for disclosures for judicial and administrative proceedings, and provides as follows:

> (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if. . . .

Subsection (e)(1)(i), allows disclosure of protected information in response to a court order without imposing any additional conditions or requirements for review before the release of the information. Subsections (c) and (f) both allow for the disclosure or protected information subject to additional restrictions and requirements. Other than subsection (e)(1)(i), each of the subsections within 45 C.F.R. §164.512 contain text –often quite detailed—restricting or limiting the conditions under which protected information can be disclosed. There is no text in 45 C.F.R. §164.514 imposes additional restrictions or conditions on the release of protected information pursuant to 45 C.F.R. §164.512. The only reference in 45 C.F.R. §164.514 to de-identified information is in subsection (f)(1)(ii)(C), which limits the disclosure of protected information in response to an *administrative subpoena* if de-identified information cannot reasonably be used. (45 C.F.R. §164.512(f)(1)(ii)(C)(3).)

A plain reading of the regulation at issue, 45 C.F.R. §164.512, strongly suggests that the de-identification requirements of 45 C.F.R. §164.514 have no application to and were not intended to apply to disclosures of protected information "required by law" pursuant to 45 C.F.R. §164.512 (e)(1)(i) This reading of 45 C.F.R. §164.512 finds support in the regulatory history of §164.514. Since its original adoption in August 2000, §164.514 has been amended or revisited by its promulgators five times, and in none of these revisions has made the de-identification provisions of §164.514 applicable to §164.512. (66 FR 12434, Feb. 26, 2001; 68

FR 8374, Feb. 20, 2003; 71 FR 8433, Feb. 16, 2006; 74 FR 42767, Aug. 24, 2009; 78 FR 5692, Jan. 25, 2013; 78 FR 5695, Jan. 25, 2013; *see also, Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1118 (When a term has been carefully employed one place of a statute or regulation and has been excluded in another, the court should not imply the term where it has been excluded).)

Finally, were the court to accept of Respondents interpretation of 45 C.F.R. §164.514, *i.e.*, that all authorized disclosures of protected information under 45 C.F.R. §164.512 are subject to the de-identification requirements of 45 C.F.R. §164.514, the result would be an absurdity. Several of the provisions of 45 C.F.R. §164.512 by their very nature require or allow protected health information to be released in response to a request made pursuant to the regulation. Most notably, 45 C.F.R. §164.512(f) allows for the release of extensive, protected health information to law enforcement including name, social security number, type of injury and treatment, and distinguishing characteristics of an individual. (45 C.F.R. §164.512(f).) The very utility of the information released to such agencies under §164.512 would be lost if all of the information requested were required to be de-identified pursuant to 45 C.F.R. §164.514 before being released to the law enforcement agency. Similar considerations would apply to the release of personal identifying information under the domestic violence, health oversight, and other provisions of 45 C.F.R. §164.512. Courts should apply common sense to the language of a regulation should not interpret a regulation or statute to create absurdity (*Wasatch Property Management v. Degrate, supra,* at 1123.) The reasonable interpretation of §164.512 is that the provisions of the regulation are not subject to the de-identification requirements of §164.514. The court adopts that interpretation of the statute.

Although the court has concluded that the de-identification provisions of 45 C.F.R. §164.514 do not apply to the disclosure of protected information when ordered by a court pursuant to 45 C.F.R. §164.512(e), based on the court's independent analysis of the plain language of the statue, the court would be remiss if it did not discuss the out of state authorities cited by Petitioners, and argued extensively by both parties. As noted above, neither party has cited, and the court has not identified any controlling California appellate case that addresses the issue presented by this writ petition. Where there is no published California decision that addresses the precise issue before the court, out-of-state decisions may provide "useful guidance." (*Jackson v Superior Court* (2019) 25 Cal.App.5th 515, 532, n.11; *see also, August Entertainment, Inc. v. Superior Court* (2007) 146 Cal.App.4th 565, 577 (California courts often look to decisions of California federal courts and out-of-state cases in resolving coverage issues and interpreting policy provisions).) With this principle in mind, the court turns to the two main out-of-state authorities cited by Petitioners, *Abbott v. Texas Dept. of Mental Health and Mental Retardation* (Texas 2006) 212 S.W.3d 648, and *State ex rel. Cincinnati Enquirer v. Daniels* (2006) 108 Ohio St.3d 518.) The court finds both A*bbott* and *Daniels* persuasive.

In *Abbot,* the issue before the court was the Texas Department of Mental Health and Mental Retardation's refusal to release statistics regarding allegation of patient abuse in response to a reporter's request under the Texas Public Information Act, the Lonestar State's equivalent of the California Public Records Act. (Tex.Gov't Code Ann. §§552.001-.353.) At issue in Abbot, as in the case at bar, was whether the federal standards for Privacy of Individually Identifiable Health Information promulgated under HIPAA preempted the provisions of the Texas Public Information Act. In *Abbott,* the Texas Department of Public Health contended, as do Respondents here, that the information requested could not be produced under the HIPAA

Privacy Rules because the Department was "prohibited from disclosing information because it is 'individually identifiable health information'" (*Abbott,* 212 S.W.3d 648, at 652.)

On appeal, [2] the Texas Court of Appeals, citing HIPAA Privacy Rules, 45 C.F.R. §164.512(a), considered whether the Privacy Rules authorized the release of the information requested under the Texas Public Information Act as an authorization required by law. (*Abbott,* 212 S.W.3d 648 at 657.) The Texas Department of Public Health argued that the Texas Public Information Act was not a statute requiring the disclosure of protected health information, therefore, 45 C.F.R. §164.512(a) did not apply, and the information did not have to be disclosed "as required by law." (*Id.*) The Texas Court of Appeal, after conducting an extensive analysis of the HIPAA Privacy Rules and protections in the context of a request for information under the Texas Public Information Act, rejected the Department's contention and held the Public Information Act was a statute requiring the disclosure of protected health information as described in section §164.512(a) of the HIPAA Privacy Rule, *i.e.*, as required by law. (*Id.* at 660.) In so holding, the Texas Court of Appeal relied on both the plain language of the statute, as well as the Privacy Rule's commentary which "makes it clear that when determining whether to release protected health information in response to a Freedom of Information Act request, an agency must look to the limits and exemptions in the Act, not the Privacy Rule." (*Abbott,* 212 S.W.3d 648, at 659-660.)

The Texas Court of Appeal next considered the second of the arguments made by the Texas Department Mental Health and which are also made by the Respondents in this case –that

[2] The Texas Court of Appeal heard the case on the Attorney General of Texas' appeal of the trial court grant of summary judgment in favor of the Department of Mental Health Services in which the trial court concluded that the information requested was confidential and therefore exempt from disclosure under the Texas Public Information Act.

protected health information cannot be released unless the information is de-identified pursuant to the provisions of 45 C.F.R. §164.514, and that governmental agencies contemplating disclosure under public information acts are required to refer back to HIPAA and the Privacy Rules, and that because HIPAA and the Privacy Rules prohibit the disclosure of protected health information, health information is considered confidential by law and is not subject to disclosure under public information acts. (*Abbott,* 212 S.W.3d 648, at 659-660.) The Texas Court of Appeals rejected such logic as circular and noted that that analysis would prevent the disclosure of all protected health information despite the Public Information Act's provisions favoring disclosure of information. (*Abbott,* 212 S.W.3d 648, at 659-660.)

The court agrees with and finds *Abbott's* analysis persuasive. The court also agrees with *Abbott's* ultimate conclusion:

> [I]f a request is made under the authority of a statute that requires disclosure, then the exception found in section 164.512(a) [disclosures required by law] applies, and the agency must disclose the information as long as the disclosure complies with all relevant requirements of the statute compelling disclosure.

In *Daniels,* the Supreme Court of Ohio reached the same conclusion as *Abbott* as to the interplay between the disclosure requirements under the Ohio Public Records act and the HIPAA Privacy Rules. (*State ex rel. Cincinnati Enquirer v. Daniels* (2006) 108 Ohio St.3d 518 ("*Daniels*").) Though *Daniels* involved a request for disclosure of documents under the Ohio Public Records Act, which the Ohio Supreme Court ultimately concluded did not contain protected health information, the court's analysis of the perceived conflict between HIPAA and the disclosure imperatives under the Ohio Public Records Act is instructive. *Daniels, supra,* 108 Ohio St.3d at 520.) In reviewing the HIPAA "required by law" exception under 45 C.F.R. §164.512(a)(1) the Ohio Supreme Court noted the tension between the HIPAA Privacy Rules,

that is to say, HIPAA's requirement that a "covered entity may disclose protected health information to the extent that such disclosure is required by law," and the Ohio Public Records Act's requirement for the disclosure of records unless the disclosure or release is prohibited by federal law. (*Id.* at 523.) The *Daniels* court characterized the conflict as one involving "a problem of circular reference because the Ohio Public Records Act requires disclosure of information unless prohibited by federal law, while federal law allows disclosure of protected health information if required by state law.) (*Id.* at 524.) In resolving this seemingly intractable "problem of circular reference, the Ohio Supreme Court relied on the regulations promulgated by the Department of Health and Human Services in 2000 which specifically addressed the apparent conflict between the HIPAA Privacy Rules and state public information acts. The Ohio Supreme Court cited the Standards for Privacy of Individually Identifiable Health Information (2000), 65 F.R. 82462, 82667–82668, which state:

> "[W]e intend [160.512(a)] to preserve access to information considered important enough by state or federal authorities to require its disclosure by law"; "we do not believe that Congress intended to preempt each such law"; and "[t]he rule's approach is simply intended to avoid any obstruction to the health plan or covered health care provider's ability to comply with its existing legal obligations."

In arriving at its ultimate conclusion, the Ohio Supreme Court also cited the Secretary of the Department of Health and Human Services' statement in the regulations that federal FOIA requests "come within § 164.512(a) of the privacy regulation that permits uses or disclosures required by law if the uses or disclosures meet the relevant requirements of the law." (citing 65 FR 82462, 82482.) The Ohio Supreme Court's ultimate conclusion was:

> an entity like the Cincinnati Health Department, faced with an Ohio Public Records Act request, need determine only whether the requested disclosure is required by Ohio law to avoid violating HIPAA's privacy rule.

(Daniels, supra, 108 Ohio St.3d at 523-524.)

The court finds the analysis provided by *Daniels* and *Abbott* to be persuasive and in harmony with a plain reading of the statute.

V. EVIDENCE CONSIDERED

On a petition for a writ of mandate under the CPRA, the court makes factual findings based on its evaluation of the evidence. (*San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356, 1409.) Where the evidence is in dispute or could support alternative factual findings, the court has weighed the evidence and made factual findings.

The court considered the documents attached to the petition and attached to the opposition, specifically the Declaration of Thomas Peele, a reporter that was part of a regional team of reporters for the Bay Area News Group in support of the petition and Declaration of Senior Deputy County Counsel Raymond S. Lara and the Declaration of Kimi Watkins-Tartt, Public Health Director for Alameda County Public Health Department in support of the opposition.

The court has considered all the evidence. There are no objections to evidence.

The court GRANTS Respondent's Request for Judicial Notice of the Resolution of the Board of Supervisors of the County of Alameda, Resolution No. 2003-434, County of Alameda Compliance with the Heath Insurance Portability and Accountability Act of 1996 (HIPAA) and the County of Alameda Administrative Code section 2.100.040 under Evidence Code sections 452, and 453.

VI. CONCLUSION

The Writ of Mandate is GRANTED. The Clerk of the Court shall prepare and issue a writ within seven days from the date of this Order ordering Respondents to produce forthwith the

records requested in Petitioner's April 9, 2020, CPRA request made to Neetu Balram, Public Information Officer for the Alameda County Health Department. Petitioner's CPRA request .

Dated: JAN 07 2021

Evelio Grillo
Judge of the Superior Court

CLERK'S CERTIFICATE OF SERVICE BY MAIL
CCP 1013a(3)

CASE NAME: CALIFORNIA NEWSPAPER PARTNERSHIP, vs COUNTY OF ALAMEDA
ACTION NO.: RG20-062745

I certify that the following is true and correct: I am the clerk in **Dept. 15** of the Superior Court of California, County of Alameda **ORDER GRANTING WRIT OF MANDATE** by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

Duffy Carolan
JASSY VICK CAROLAN LLP
601 Montgomery Street, Suite 850
San Francisco, CA 94111

Donna R. Ziegler
Raymond S. Lara
Office of the County Counsel, County of Alameda
1221 Oak Street, Suite 450
Oakland, Ca 94612

I declare under penalty of perjury that the following is true and correct
Executed on January 7, 2021 at Oakland, California.

Chad Finke
Executive Officer/Clerk of the Superior Court

By 
Pam Williams - *Deputy Clerk*