



## **FINAL DETERMINATION**

**IN THE MATTER OF**

**ED MAHON AND  
SPOTLIGHT PA,  
Requester**

**v.**

**PENNSYLVANIA DEPARTMENT  
OF HEALTH,  
Respondent**

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**Docket No.: AP 2022-1885**

## **INTRODUCTION**

Ed Mahon, a journalist with Spotlight PA (collectively, “Requester”), submitted a request (“Request”) to the Pennsylvania Department of Health (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records relating to discipline against an identified physician. The Department granted the Request in part, but redacted personal health information, personal identification information, and information covered by a regulation from the responsive records. For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the Department is required to take further action as directed.

## **FACTUAL BACKGROUND**

On July 22, 2022, the Request was filed, seeking:

1. [T]he entire disciplinary case file for Theodore Colterelli, DO, MM-21-003 AA, including any proposed report from Debra Sue Rand or another chief hearing

examiner, any transcript of proceedings, as well as any replies, motions, or other documents.

2. Any disciplinary action taken against Theodore Colterelli, including the suspension or revocation of his registration as an approved medical marijuana physician.

3. Any applications from Theodore Colterelli to be an approved medical physician in the state's medical marijuana, as well as any subsequent communications between Colterelli and state officials regarding his application. I am requesting this information from Jan. 1, 2016 to the present.

On August 4, 2022, following a thirty-day extension, 65 P.S. § 67.902, the Department granted the Request in part, but redacted certain information as exempt personal identification information, 65 P.S. § 67.708(b)(6), and denied other records as containing medical history, 65 P.S. § 67.708(b)(5), and pursuant to the Medical Marijuana Act (the “Act”) and related regulations. 35 P.S. § 10231.302(b)(2); 28 Pa. Code § 1141.22(b)(1).

On August 15, 2022, the Requester appealed to the OOR, arguing that the records were over-redacted. The OOR invited the parties to supplement the record and directed the Department to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On August 30, 2022, the Requester submitted a position statement, arguing that the Act makes information relating to disciplinary actions explicitly public and not subject to redaction; that the Department had previously released unredacted information; that a number of redactions did not appear to relate to personal, identifiable health information; that the specific and redacted details of the documents are required for the public to determine if discipline was warranted in this case; and that the hearing examiner had already announced that the record would be public.

On September 2, 2022, the Department submitted a position statement, arguing that the responsive records had been properly redacted of individualized medical history information, which is covered by both the exemption at 708(b)(5) of the RTKL and the state constitutional right

to privacy. The Department further argued that the phone numbers of involved physicians were properly redacted pursuant to the Department's regulations. In support of this argument, the Department submitted the verification of Danica Hoppes, the Department's Open Records Officer, who attests that the Department had only redacted a specific set of identified information within the records.

The same day, the Requester submitted a brief response, challenging the accuracy of the identified categories of redacted patient information, reiterating a desire for review *in camera* and arguing that if the identity of the patient is redacted, it should be permissible to reveal the actual services provided.

### **LEGAL ANALYSIS**

"The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is "designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions." *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the request" and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here,

the Requester sought a review *in camera*, but that request is denied and the OOR has the requisite information and evidence before it to properly adjudicate this matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

The Request seeks information related to Dr. Theodore Colterelli, D.O., a Doctor of Osteopathic Medicine, and discipline sought against Dr. Colterelli by the Department. The Department produced several responsive records, including copies of the filings and briefs in the

action against Dr. Colterelli, and a hearing transcript. The Department redacted patient names, pronouns, the dates and details of treatments, and contact information, citing primarily to Section 708(b)(5) of the RTKL. 65 P.S. § 67.708(b)(5). Section 708(b)(5) of the RTKL exempts from disclosure:

[a] record of an individual's medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information.

65 P.S. § 67.708(b)(5). The Requester argues that this information should not be redacted because the records are made public by the Act, the patient's privacy interests were knowingly waived during the related proceeding, and because of the significant public interest served by disclosure.

To understand the Requester's position, additional background is necessary. The record indicates that Dr. Colterelli was a practitioner certified for prescription of medical marijuana by the Department. On or about April 28, 2021, Dr. Colterelli was served with an Order to Show Cause, which alleged that he had issued a certification for medical marijuana use to an identified patient without first reviewing the patient's medical records. Dr. Colterelli responded with briefing both on the nature of his prescription and on the legality of the temporary regulation under which he was charged. During this proceeding, the identified patient was called to testify, and a hearing regarding the facts of the prescription was held. The identified patient testified under oath, after consenting to being named as part of the public record.

The Requester first argues that these records are part of the disciplinary record against Dr. Colterelli and are made explicitly public by the Act. Section 302(b) of the Act provides that:

(b) Public information.--The following records are public records and shall be subject to the Right-to-Know Law:

- (1) Applications for permits submitted by medical marijuana organizations.
- (2) The names, business addresses and medical credentials of practitioners authorized to provide certifications to patients to enable them to obtain and use medical marijuana in this Commonwealth. All other practitioner registration information shall be confidential and exempt from public disclosure under the Right-to-Know Law.
- (3) Information relating to penalties or other disciplinary actions taken against a medical marijuana organization or practitioner by the department for violation of this act.

35 P.S. § 10231.302(b). The Requester argues that because all of the records constitute “[i]nformation relating to penalties or other disciplinary actions taken against a ... practitioner by the department for violation of this act[.]” the records are expressly public, and not subject to exemption under Section 708(b)(5) of the RTKL.

However, the same section of the Act states that:

(a) Patient information. — The department shall maintain a confidential list of patients and caregivers to whom it has issued identification cards. All information obtained by the department relating to patients, caregivers and other applicants shall be confidential and not subject to public disclosure, including disclosure under the act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law, including:

- (1) Individual identifying information about patients and caregivers.
- (2) Certifications issued by practitioners.
- (3) Information on identification cards.
- (4) Information provided by the Pennsylvania State Police under section 502(b).
- (5) Information relating to the patient’s serious medical condition.

35 P.S. § 10231.302(a). Here, it is undoubtedly the case that the identified patient’s name is “[i]ndividual identifying information about patients...” and information regarding treatment is “[i]nformation relating to the patient’s serious medical condition[.]” Therefore, the Department

asserts that it was required to redact all identifying patient information and medical proceedings.<sup>1</sup>

In support of this argument, the Department submitted the verification of Ms. Hoppes, who attests:

4. I have reviewed the records responsive to this request and the information redacted by the Department contained in the responsive records.

5. The Department provided all the records in its possession, custody or control that comprised the “disciplinary file” for Dr. Theodore Colterelli, including motions and other pleadings filed by the parties and the proposed report from the hearing examiner.

6. Because the disciplinary action(s) proposed by the Chief Hearing Officer have not been finalized, there were no records of final “disciplinary actions” taken against Dr. Colterelli.

7. The records provided by the Department were redacted of (1) Dr. Colterelli’s phone number and (2) information relating to a single patient seen by Dr. Colterelli.

8. Redactions relating to the patient are limited to:

- a. Name;
- b. References to gender (not applied throughout);
- c. Age;
- d. Descriptions of her past and present medical condition(s);
- e. Descriptions of her past and present diagnoses;
- f. Descriptions of her past and present prognoses;
- g. Descriptions of prior medical interventions including surgeries, medications, medical devices, therapies, remedies and the like;
- h. Testimony that would reveal the length of time the patient has suffered from medical condition(s);
- i. Information about the patient’s other physicians, including their names and specialties which would tend to reveal the medical conditions for which she sought treatment;
- j. Descriptions of her symptoms and physical condition;
- k. Information about medications prescribed and/or used to treat her medical condition(s)
- l. Images representing her diagnosed medical condition; and

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<sup>1</sup> On appeal, the Department’s arguments are primarily based on 65 P.S. § 67.708(b)(5), which has substantial overlap with 35 P.S. § 10231.302(a). However, to the extent that 35 P.S. § 10231.302(a) applies to a record, it provides that covered information is “not subject to public disclosure,” including through the RTKL, and supersedes the RTKL’s provisions. 65 P.S. § 67.306 (“[n]othing in [the RTKL] shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree.”); see also 65 P.S. § 67.3101.1 (“If the provisions of this act regarding access to records conflict with any other federal or state law, the provisions of this act shall not apply.”) Nonetheless, the Department’s arguments under Section 708(b)(5) of the RTKL are largely applicable to the provisions of 35 P.S. § 10231.302(a).

m. Images representing the medical marijuana product recommended by a pharmacist at a medical marijuana dispensary

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Department has acted in bad faith, “the averments in the [attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (*citing Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Here, although 35 P.S. § 10231.302(b) mandates the disclosure of records related to discipline, it does not explicitly nullify the provision at 35 P.S. § 10231.302(a), which forbids the dissemination of certain patient information under the RTKL. The Department resolved this by providing the records related to discipline, but redacting information pursuant to 35 P.S. § 10231.302(a), which is the procedure outlined in the RTKL for public records which contain exempt information. 65 P.S. § 67.706. Because the Department correctly applied Section 706 of the RTKL, and because the Department is entitled to deference in its construction of the Act, the Department permissibly redacted the records under 35 P.S. § 10231.302(a). *Highmark, Inc. v. Voltz*, 163 A.3d 485, 493 (Pa. Commw. Ct. 2017) (finding that an agency was entitled to great deference in its construction of the Insurance Statutes because “[it] is specifically delegated administration and enforcement of insurance matters”).

The Requester’s second argument is that the identified patient authorized the use of her name as part of the public record during the Department’s hearing. The record reflects that the hearing officer asked the identified patient if she “would like [the hearing officer] to direct the court reporter to redact your name, or do you not care? Because this is a public proceeding and



anybody could come in and read this transcript.” The identified patient responded, “I don’t really mind either way.” The Requester argues that this, along with the context for the hearing, indicates that the identified patient did not object to publication of her name and medical history.

This argument, while potentially relevant to the invocation of a constitutional right to privacy, does not transform material exempt under 35 P.S. § 10231.302(a). As the Department notes on appeal, the subject of a medical record cannot waive an exemption on an agency’s behalf, and the Act features no provisions which render 35 P.S. § 10231.302(a) inoperative based on the patient’s statements. *See, e.g., Pryzbeyszewski v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2012-2112, 2013 PA O.O.R.D. LEXIS 18 (“the [medical] records of [a requester] are not subject to disclosure to any person for any reason”). Because the Act has no provision for a patient to authorize publication of their own information, the OOR cannot conclude that the identified patient’s statements are relevant to the appeal.

Next, the Requester notes that the Department has made the identity of the identified patient public in response to a prior request. In support of this argument, the Requester submitted a set of records, including copies of the Notice to Defend and briefing in the case against Dr. Colterelli, which identify the name of the identified patient. A review of those records confirms that the identified patient is named in the records which the Department provided.

Although it is apparent that the Department previously provided the name of the identified patient, the appeal must be considered on the legal merits of the Department’s partial denial alone, and without consideration of the fact that the Requester already knows who the identified patient is. *Padgett v. Pa. State Police*, 73 A.3d 644, 647 (Pa. Commw. Ct. 2013). Under the RTKL, whether the document is accessible is based only on “whether a document is a public record, and if so, whether it falls within an exemption that allows that it not be disclosed. The status of the

individual requesting the record and the reason for the request, good or bad, are irrelevant as to whether a document must be made accessible under Section 301(b) [of the RTKL].” *Hunsicker v. Pa. State Police*, 93 A.3d 911, 913 (Pa. Commw. Ct. 2014); *see also* 65 P.S. § 67.102; 65 P.S. § 67.305; *Cafoncelli v. Pa. State Police*, 2017 Pa. Commw. Unpub. LEXIS 405 (Pa. Commw. Ct. 2017) (citing *Hunsicker*).

Next, the Requester argues that the Department has over-redacted the records, identifying specifically:

1. Several instances where the Department redacts the date on which Dr. Colterelli met with the identified patient;
2. Instances where the Department redacts information about other specialists seen by the identified patient;
3. Redaction of the name of another physician;
4. Redaction of Dr. Colterelli’s past training;
5. Redaction of the name of an online portal for medical records;
6. Redaction of exhibits;
7. Redaction of the date of patient certification; and,
8. Redaction of information which is important to the assessment of the truth or falsity of Dr. Colterelli’s defense or the Department’s allegations.

The Requester also argues that, to the extent Section 708(b)(5) permits redaction of these records, it should be sufficient to redact either the name of the patient or details of medical history, as redaction of one means that provision of the other will not disclose individually identifiable medical history. The Requester’s identification of this information relies largely on the text of Section 708(b)(5), which exempts specific information which might not include, for example, the redacted dates. However, as noted above, the provisions of the Act control in this instance, and they exempt from disclosure “[a]ll information obtained by the department relating to patients[.]”

*See, e.g., Pa. Dep't of Health v. Mahon*, 2022 Pa. Commw. Unpub. LEXIS 358 (Pa. Commw. Ct. 2021) (explaining that Section 302(a) of the Act creates a narrow, non-exclusive prohibition on release of data about an individual patient).<sup>2</sup> To that end, information about other physicians and specialists the identified patient met with, exhibits showing images or information about the identified patient, the date of the patient's certification, and all similar treatment data are encompassed by Section 302(a) of the Act, and the Department was permitted to redact them.

Although Dr. Colterelli's past training is not covered by Section 302(a) of the Act, Section 302(b) generally exempts provider information other than names, business addresses and medical credentials. Therefore, the Department was permitted to redact information about Dr. Colterelli's past training except for any specific credentials which he obtained thereby. To the extent that the Department redacted any of Dr. Colterelli's medical credentials, however, that information must be provided.

Likewise, while it may be permissible under the Act to redact the gender of a patient as confidential "patient information", the Department admits that it has made inconsistent redactions, and that the patient in question is female. Because the Department has not provided any rationale for redacting references to the patient's gender in some instances but not all instances, the Department has not demonstrated that it was required to make such redactions under the Act, and it must provide the Requester with a copy of the responsive records without redaction for gender alone.<sup>3</sup>

Finally, the Requester argues that certain records regarding the patient's condition must be provided to permit the public to discern whether the discipline was warranted or appropriate. As

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<sup>2</sup> An unpublished opinion of the Commonwealth Court may be cited for its persuasive value. 210 Pa. Code § 69.414.

<sup>3</sup> As noted above, the Requester already knows the patient's gender. The Department may ask the Requester to waive this part of production, if the Requester does not believe that additional work is necessary.

noted above, the Act's provision of disciplinary records contains no modification of its prohibition on release of patient records. "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b). While the General Assembly may have intended to make as much information about provider discipline public as possible, there is no indication in the statute that this provision was intended to overrule the Act's protection for patient records. Therefore, the Department was permitted to redact records of patient prescriptions and conditions, even though information regarding such would be useful in judging the provider's conduct.

### CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part** and the Department is required to provide copies of the responsive records without redaction for any of Dr. Colterelli's medical certifications or the gender of the identified patient within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>4</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: October 3, 2022**

*/s/ Jordan C. Davis*

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Jordan C. Davis, Esq.  
Appeals Officer

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<sup>4</sup> See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

Sent to: Ed Mahon (via email);  
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