

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**PENNSYLVANIA DEPARTMENT OF
HEALTH,**

Petitioner,

v.

**ED MAHON AND SPOTLIGHT PA,
Respondent.**

No. _____

**PENNSYLVANIA DEPARTMENT OF HEALTH'S
PETITION FOR REVIEW
(APPELLATE JURISDICTION)**

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PETITION FOR REVIEW

AND NOW comes the Pennsylvania Department of Health (“Department”), by and through its undersigned counsel, and petitions this Honorable Court for review of the January 13, 2023, Final Determination (“Final Determination” attached hereto as “Exhibit A”) issued by the Office of Open Records (“OOR”) in Docket Number AP 2022-2635. In accordance with Pa.R.A.P. 1513, the Department provides the following:

Statement of Jurisdiction

1. This Honorable Court has jurisdiction in this matter under Section 763(a) of the Judicial Code, 42 Pa.C.S. § 763(a). In reviewing a determination issued by the OOR, this Court’s standard of review is de novo, and its scope of review is plenary. *State Emps. Ret. Sys. v. Campbell*, 155 A.3d 1153 (Pa. Cmwlth. 2017).

Parties

2. Petitioner is the Department, an agency subject to the Right-to-Know Law (RTKL). *See* 65 P.S. § 67.301.

3. Respondent is Ed Mahon a journalist for Spotlight PA (“Mahon”).

Factual and Procedural Background

4. On October 31, 2022, Mahon filed a request under the RTKL seeking, in relevant part:

1. [A]ggregate data of the number of medical marijuana certifications issued by each approved practitioner in the state's medical marijuana program. I am not requesting the names of patients, but I am requesting the names of practitioners. If this information exists broken down by year, I am requesting it in that format.
2. I am requesting a database, databases, spreadsheet, or spreadsheets of all medical marijuana certifications issued by each practitioner in the medical marijuana program, including the date the certification was issued, the qualifying condition or conditions listed in support of the certification, zip code of patient, and any other info. I am requesting this information with the identity of patients removed or redacted. I am requesting the names of individual practitioners.¹

5. On November 7, 2022, the Department denied the request pursuant to the Medical Marijuana Act (“Act”), 35 P.S. § 10231.302.
6. On November 21, 2022, Mahon filed a timely appeal to the Office of Open Records (“OOR”).
7. On December 6, 2022, the Department submitted a position statement, arguing that the requested records are exempt under the Act even as aggregate data

¹ The appeal of the Department’s denial of a request for similar records is presently pending before the Commonwealth Court in *Pa. Dep’t of Health v. John Finnerty, et al.*, 1356 C.D. 2021.

because such records are designated as confidential and are not included in the list of public records. 35 P.S. §§ 10231.302(a), (b). The Act states that “[a]ll information obtained by [D]epartment 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.” 35 P.S. § 10231.302(a). This specifically includes “[c]ertifications issued by practitioners.” 35 P.S. § 10231.302(a)(2).

8. On December 7, 2022, Mahon submitted a position statement arguing that the Act’s confidentiality provisions do not apply to the information being sought and that the Department has provided this information before in public testimony.
9. On December 21, 2022, Mahon submitted a copy of a document which had failed to upload with his previous position statement, explaining why he believed that the Department’s rationale for withholding the documents was incorrect.
10. On January 4, 2023, Mahon notified the OOR that a final determination in a similar OOR appeal had been issued at *Mahon v. Pa Dep’t of Health*, OOR Dkt. Ap 2022-2503.²
11. On January 13, 2023, the OOR issued a final determination that granted in part and denied in part the request for records.

² A Petition for Review has been filed in this matter as well. It is currently docketed at *DOH v. Ed Mahon and Spotlight PA (OOR)*, 84 CD 2023.

12. Of relevance here, the OOR held that aggregate data reflecting the total number of certifications issued by a practitioner is not related to an individual patient and is therefore not exempt under Section 302(a)(2) of the Act.

13. The Final Determination ordered the Department of Health to provide all records responsive to Paragraph 1 of the request within thirty days.

Determination Sought to be Reviewed

14. The OOR's January 13, 2023, Final Determination and accompanying Order issued in Docket Number AP 2022-2635, which directed the Department to provide Mahon with all records responsive to Paragraph 1.

Objections to the Determination

15. The OOR erred in its determination that records sought in Paragraph 1 of the request are not confidential under Section 302(a)(2) of the Medical Marijuana Act and by requiring the release of the aggregated number of medical marijuana certifications issued by individual practitioner in contravention of Section 302 of the Medical Marijuana Act.

16. The OOR erroneously interpreted the Act by creating an exception for aggregated data which is not based on the language of the statute.

17. The OOR erroneously interpreted the Act by determining that only information relating to individual patients is confidential despite the broad language of the

Act that “[a]ll information obtained by department relating to patients, caregivers and other applicants shall be confidential.”

Relief Sought

The Department respectfully request this Honorable Court reverse the OOR’s Final Determination issued January 13, 2023.

Respectfully submitted,

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Attorney I.D. 204384

By: /s/ Kevin J. Hoffman
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Department of Health

Date: 2/13/2023

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

By: /s/ Kevin J. Hoffman
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EXHIBIT A

On November 21, 2022, the Requester appealed to the Office of Open Records (“OOR”), providing reasons for disclosure. 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 December 7, 2022, the Requester submitted a position statement, arguing that the Act’s confidentiality provisions do not apply to the information being sought in the Request and that the Department has provided this information before in public testimony. In support of this argument, the Requester also submitted filings from the appeal pending at *Mahon v. Pa. Dep’t of Health*, OOR Dkt. AP 2022-2503, and argued that a previous ruling of the Commonwealth Court prohibits the Department from relying on a broad interpretation of the Act’s confidentiality provision.

On December 8, 2022, the Department submitted a position statement, arguing that the records are exempt under the Act even as aggregate data because it is not contained on the list of public records in the Act but does constitute “information obtained by the [D]epartment relating to patients, caregivers and other applicants.”

On December 21, 2022, the Requester submitted a copy of a document which had failed to upload with his previous position statement, explaining why he believed that the Department’s rationale for withholding the documents was incorrect.

On January 4, 2022, the Requester notified the OOR that a similar OOR appeal had been issued at *Mahon v. Pa. Dep’t of Health*, OOR Dkt. AP 2022-2503.

LEGAL ANALYSIS

The Department is a Commonwealth agency subject to the RTKL. 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. As an agency subject to the RTKL, the Department is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the factfinder ... 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)).

Item 1 of the Request seeks the number of medical marijuana certifications issued by each approved practitioner, including the practitioner’s name; Item 2 of the Request seeks records showing partially de-identified patient information for each of those practitioner’s certifications. The Department denied the Request in full, arguing that this information is exempt under Section 302 of the Act, which provides that:

(a) Patient information. — The [D]epartment shall maintain a confidential list of patients and caregivers to whom it has issued identification cards. All information obtained by the [D]epartment 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.

(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. The issue on appeal is whether or not the responsive records fall within the Act’s prohibition on release of “[a]ll information obtained by the [D]epartment relating to patients [and] caregivers[.]”¹ or “[a]ll other practitioner registration information[.]” The Department argues that the categories of data sought by the Request implicate the language in Section 302 of the Act, while the Requester responds that the Department is construing the language of the Act too broadly.

Both parties turn to the Commonwealth Court’s decision in *Pa. Dep’t of Health v. Mahon* for support in analyzing this language. 2022 Pa. Commw. LEXIS 136 (Commw. Ct. 2021) (*publication ordered* October 18, 2022). In *Mahon*, the Requester sought, in relevant part, “[a]ggregate data for the number of medical marijuana certification issues [sic] for each of the eligible qualifying conditions[.]” *Id.* The OOR granted the appeal in part, concluding that “subsection (a) concerns information and records relating to specific patients and caregivers, rather than information in the aggregate about the program[.]” and that “[the request] expressly seeks data of the medical marijuana certifications by category, not information that would be related to a specific patient, caregiver or applicant certification.” *Id.* In affirming the OOR’s holding, the Commonwealth Court observed that “[t]he larger context of the confidentiality provision suggests a similar construction, with the Department required to “maintain a confidential list of [individual] patients . . . to whom it has issued identification cards” and a list of examples of such information,

¹ Notably, “caregiver” as used in the Act does not refer to the practitioner who issued a certification; rather, it is meant to encompass personal designees and nurses who are acting on the patient’s behalf. 35 P.S. § 10231.103.

albeit non-exclusive, which are by their nature individual [....] The relationship to individual patients in these prohibitions is manifest and exclusive. Thus, we conclude that the aggregated data requested is not patient information under Section 302(a)[.]” *Id.*

Helpfully, the Court also drew distinctions between the language of the Act and the broader confidentiality provision in another recent case, *Pennsylvania Department of Revenue v. Wagaman*, 271 A.3d 553 (Pa. Commw. Ct. 2021).² In that case, the requester sought aggregate data showing revenues for each type of tax in the total business trust fund tax, corporate tax, and miscellaneous tax revenues in the Allentown Neighborhood Improvement Zone. *Id.* On appeal to the OOR, the Department argued that the newly amended Fiscal Code prohibited any disclosure. *Id.* The OOR ordered aggregate data released to the extent that it could not be used to identify any individual taxpayers, but was reversed on appeal because the language of the Fiscal Code exempts “any information gained by any administrative department, board, or commission, as a result of any returns, reports, correspondence, claims, investigations, hearings, certifications or verifications[.]” *Id.* Thus, the Fiscal Code’s prohibition on release of information depends only on the source of that information; even if aggregated or de-identified, the information could not be provided. *Id.* (“Although OOR determined the Tax Totals were subject to disclosure to the extent that the tax liability of individual taxpayers was not discernible, the use of the information is not the touchstone for protection or disclosure.”).

Item 1 of the Request seeks a count of certifications issued by each practitioner. In this case, aggregating data by provider is sufficient to satisfy the section of the Act’s requirements dealing with disclosure of patient data because, as in *Mahon*, it is not *individual patient data* at that level, and Section 302(a)(2), which exempts information regarding certifications, does so only

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

to the extent that they “relate to patients”. 35 P.S. § 10231.302(a)(2); 2022 Pa. Commw. LEXIS 136 (“The relationship to individual patients in these prohibitions is manifest and exclusive.”). However, the Requester seeks that aggregated patient data in relation to explicitly identified provider information; that is, he wants to learn how many certifications each provider has issued. Therefore, while the Request is seeking aggregated data that does not relate to individual patients, it is explicitly seeking individualized provider data, and so the holding in *Mahon* controls only if the Act’s prohibition does not extend to this type of provider data.

Section 302(b) of the Act states that “[t]he names, business addresses and medical credentials of practitioners” are public record, but “[a]ll other practitioner registration information shall be confidential and exempt from public disclosure under the Right-to-Know Law.” 35 P.S. § 10231.302(b)(2). Unlike the patient protections in Section 302(a), Section 302(b) lists explicitly public information about providers, and then exempts “all other *practitioner registration* information” from disclosure. Under the Act, practitioner registration is governed by Section 402, which lists the requirements to register with the Department and be evaluated for suitability to issue medical marijuana certifications. 35 P.S. § 10231.401. These registration requirements do not include the requirement to file a copy of the medical marijuana certification with the Department; that administrative requirement is found under Section 403 of the Act, “Issuance of certification,” and does not actually compel the Department to track the number of certifications each practitioner issues. 35 P.S. § 10231.403 (“The practitioner shall: Provide a copy of the certification to the department, which shall place the information in the patient directory within the department's electronic database.”).

Because aggregate data showing how many certifications a practitioner has issued is not related to an individual patient, it is not exempt under Section 302(a) of the Act. Since

certifications are not “practitioner registration information,” information about them is not confidential under Section 302(b) of the Act. *See Finnerty v. Pa. Dep’t of Health*, OOR Dkt. AP 2021-1833, 2021 PA O.O.R.D. LEXIS 2154.³ Therefore, the records sought in Item 1 of the Request are not confidential under the Act, and the Department must provide them to the extent that such records exist.

Meanwhile, Item 2 of the Request seeks a spreadsheet of individual certifications, including “the date the certification was issued, the qualifying condition or conditions listed in support of the certification, zip code of patient, and any other info[.]” Item 2 of the Request explicitly asks the Department to de-identify the certification data, but Item 2 of the Request runs up against the same issue the requester in *Wagaman* faced; the Act’s prohibition on release of data is not contingent upon whether the patient can be identified by the release, but rather whether the information relates to individual patients at all. *Mahon* dealt with aggregate numbers that were not based on any individual patient’s information and Item 1 of the instant Request is seeking aggregate numbers relating only to practitioners; Item 2 of the Request is seeking information taken from individual certifications. 2022 Pa. Commw. LEXIS 136. That information, as it relates to individual patients, is explicitly exempt under Section 302(a)(2) of the Act, whether or not the individual is identifiable. 35 P.S. § 10231.302(a)(2). Accordingly, Item 2 of the Request seeks records rendered confidential by the Act, and the Department was not required to provide them.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part** and **denied in part**, and the Department is required to provide all records responsive to Item 1 of the Request within

³ As the Department notes, the OOR decided essentially the same issues as those presented for Item 1 of the Request in *Finnerty*; however, the OOR analyzes those issues separately here to account for the rationale set forth by the Commonwealth Court in *Mahon*.

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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: January 13, 2023

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Ed Mahon (via email);
Anna LaMano, Esq. (via email)

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

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CERTIFICATE OF SERVICE

I, Kevin Hoffman, Deputy Chief Counsel, Pennsylvania Department of Health, Office of Legal Counsel, hereby certify that on this 13th day of February 2023, I served a true and correct copy of the Department's Petition for Review upon the person(s) indicated below, which satisfies the requirements of Pa.R.A.P. 121-122 and 1514(c).

Service via First-Class Mail

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