pennsylvania
OFFICE OF OPEN RECORDS

February 21, 2023

FILED VIA PACFILE
Michael Krimmel, Esq.
Chief Clerk
Commonwealth Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 2100
Harrisburg, PA 17106-2575

RE: Submission of Record in:
Pennsylvania Department of Health v. Ed Mahon and Spotlight PA,
84 CD 2023

Dear Mr. Krimmel:

We hereby submit the record in the above-referenced matter. Section 1303 of the Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.*, ("RTKL"), defines the Record on Appeal as "the record before a court shall consist of the request, the agency's response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination of the appeals officer." Pursuant to *Department of Transportation v. Office of Open Records*, 7 A.3d 329 (Pa. Commw. Ct. 2010), this record includes all "evidence and documents admitted into evidence by the appeals officer pursuant to Section 1102(a)(2)." The record in this matter consists of the following:

Office of Open Records Docket No. AP 2022-2503:

1. The appeal filed by Ed Mahon, a reporter with Spotlight PA (collectively, the "Requester"), to the Office of Open Records ("OOR"), received October 28, 2022.

2. Official Notice of Appeal dated October 31, 2022, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.

3. Requester extension request received November 7, 2022.

4. OOR correspondence dated November 7, 2022, granting the Requester's extension request.

5. Requester extension request received November 16, 2022.

6. OOR correspondence dated November 16, 2022, granting the Requester additional time to make a submission.

7. Requester submission dated November 21, 2022.

8. Pennsylvania Department of Health ("Department") Position Statement dated November 21, 2022.

9. Requester extension request received November 21, 2022.

10. OOR correspondence dated November 22, 2022, granting the parties additional time to make a supplemental submission.

11. Requester extension request received November 29, 2022.

12. OOR correspondence dated November 29, 2022, granting the parties additional time to make a supplemental submission.

13. Requester supplemental submission received December 5, 2022.

14. Final Determination issued by the OOR, on January 3, 2023.

The OOR has discretion to hold a hearing on appeals filed but chose not to do so in this matter. Therefore, there is no transcript to transmit. Certification of the record in this case is attached to this letter.

Please feel free to contact us for any reason in connection with this matter.

Sincerely,

Kyle Applegate
Chief Counsel

Attachments

cc: See certificate of service

Commonwealth of Pennsylvania

Agency Docket Number: AP 2022-2503

Appellate Court Docket Number: 84 CD 2023

I, Elizabeth Wagenseller, certify that the accompanying electronically transmitted materials are true and correct copies of all materials filed in the Office of Open Records and constitute the record for :

Pennsylvania Department of Health,
Petitioner
v.
Ed Mahon and Spotlight PA (Office of Open Records),
Respondents

/s/ Elizabeth Wagenseller — 02/21/2023

Executive Director

Volumes:

Agency Record (2)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT OF HEALTH, Petitioner	:	
v.	:	**84 CD 2023**
ED MAHON and SPOTLIGHT PA, Respondent	:	

CERTIFICATION OF RECORD

I hereby certify the contents of the record transmitted with this Certification of Record pursuant to Pa.R.A.P. 1952 in *Ed Mahon and Spotlight PA v. Pennsylvania Department of Health*, OOR Dkt. AP 2022-2503, which is the subject of this appeal.

The record transmitted with this certification is generated entirely from the Office of Open Records database. It is our practice to scan in each and every document submitted in an appeal. Thus, no originals are being transmitted to this Court.

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

Also, my signature on this Certification of Record and on all other correspondence directed to the Commonwealth Court in connection with this matter may be electronic and not original. I hereby certified that this is my true and correct signature and that I have approved the use thereof for these purposes.

Elizabeth Wagenseller, Executive Director
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2334
Phone: (717) 346-9903
Fax: (717) 425-5343
Email: OpenRecords@pa.gov

Dated: February 21, 2023

Received 2/21/2023 10:25:17 AM Commonwealth Court of Pennsylvania

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT OF HEALTH, Petitioner	:	
v.	:	**84 CD 2023**
ED MAHON and SPOTLIGHT PA, Respondent	:	

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the Certified Record upon the following by email only at the email listed below:

Ed Mahon and Spotlight PA
228 Walnut Street, #11728
Harrisburg, PA 17108
emahon@spotlightpa.org

Douglas A.Snyder, Esq.
Kevin J. Hoffman, Esq.
Ahmad Awadalla, Esq.
Department of Health
825 Health and Welfare Building
625 Forester Street
Harrisburg, PA 17120
douglasnyd@pa.gov
kjhoffman@pa.gov
aawadalla@pa.gov

Faith Henry, Administrative Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
Email: fahenry@pa.gov

Dated: February 21, 2023

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT OF HEALTH, Petitioner	:	
v.	:	**84 CD 2023**
ED MAHON and SPOTLIGHT PA, Respondent	:	

CERTIFIED RECORD

Kyle Applegate
Chief Counsel
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2334
Phone: (717) 346-9903
Fax: (717) 425-5343
Email: kyapplegat@pa.gov

February 21, 2023

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT OF HEALTH, Petitioner	:	
v.	:	**84 CD 2023**
ED MAHON and SPOTLIGHT PA, Respondent	:	

TABLE OF CONTENTS
RECORD

Ed Mahon and Spotlight PA v. Pennsylvania Department of Health,
Office of Open Records Docket No. AP 2022-2503:

1. The appeal filed by Ed Mahon, a reporter with Spotlight PA (collectively, the "Requester"), to the Office of Open Records ("OOR"), received October 28, 2022.

2. Official Notice of Appeal dated October 31, 2022, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.

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13. Requester supplemental submission received December 5, 2022.

14. Final Determination issued by the OOR, on January 3, 2023.

OOR Exhibit 1

From:	no-reply@openrecordspennsylvania.com
To:	Mahon, Ed
Subject:	[External] PA Office of Open Records - Appeal Confirmation
Date:	Friday, October 28, 2022 5:41:46 PM
Attachments:	oor_logo_email.png

ATTENTION: *This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the Report Phishing button in Outlook.*

pennsylvania
OFFICE OF OPEN RECORDS

You have filed an appeal of an agency's response to a request for records under the Right-to-Know Law.

Name:	Ed Mahon
Company:	Spotlight PA
Address 1:	228 Walnut St., #11728 Harrisburg, PA 17108-1728
Address 2:	
City:	Harrisburg
State:	Pennsylvania
Zip:	17108
Phone:	717-421-2518
Email:	emahon@spotlightpa.org
Email2:	emahon@spotlightpa.org
Agency (list):	Pennsylvania Department of Health
Agency Address 1:	
Agency Address 2:	
Agency City:	

Agency State:	Pennsylvania
Agency Zip:	
Agency Phone:	
Agency Email:	
Records at Issue in this Appeal:	I'm appealing all denials in this case, which involves aggregate data of the number of medical marijuana certifications issued by a physician. For reference, please see No. 1066 C.D. 2021, Pennsylvania Department of Health v. Ed Mahon and Spotlight PA, in which Commonwealth Court ruled the confidentiality provisions are narrower than what DOH has argued. See also, AP 2021-1833, John Finnerty and CNHI Newspapers v. Pennsylvania Department of Health, which is currently pending in Commonwealth COurt.
Request Submitted to Agency Via:	e-mail
Request Date:	10/11/2022
Response Date:	10/17/2022
Deemed Denied:	No
Agency Open Records Officer:	Danica Hoppes
Attached a copy of my request for records:	Yes
Attached a copy of all responses from the Agency regarding my request:	Yes
Attached any	Yes

letters or notices extending the Agency's time to respond to my request:	
Agree to permit the OOR additional time to issue a final determination:	No
Interested in resolving this issue through OOR mediation:	No
Attachments:	• DOH-RTKL-MM-092-2022 Mahon Final Response (1).pdf • Philadelphia Inquirer Mail - RTK Theodore Colterelli.pdf

I requested the listed records from the Agency named above. By submitting this form, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.

pennsylvania
DEPARTMENT OF HEALTH

October 17, 2022

Ed Mahon
Spotlight PA
225 Market St. Suite 502A
Harrisburg, PA 17101

emahon@spotlightpa.org

RE: Right to Know Law Request
DOH-RTKL-MM-092-2022

Dear Mr. Mahon:

This letter acknowledges receipt by the Pennsylvania Department of Health (Department) of your written request for records under the Pennsylvania Right-to-Know Law (RTKL), 65 P.S. §§ 67.101-67.3104. The Department received your request on October 11, 2022. You requested:

1. Aggregate data of the number of medical marijuana certifications issued by Theodore Colterelli from April 28, 2021 to the present.

2. Aggregate data of the number of medical marijuana certifications issued by Theodore Colterelli from April 1, 2022 to the present.

3. Aggregate data of the number of medical marijuana certifications issued by Theodore Colterelli from Jan. 1, 2017 to the present.

4. I am requesting a database of all medical marijuana certifications issued by Theodore Colterelli, including the date the certification was issued. I am requesting this information with the identity of patients removed or redacted. I am requesting this information from Jan. 1, 2017 to the present.

Your request is denied. The records sought qualify as information obtained by the Department relating to patients, which are deemed confidential under 35 P.S. § 10231.302(a) and 28 Pa. Code 1141.22(b)(4).

If you choose to appeal under the RTKL, your appeal should be submitted in writing to: Executive Director, OOR, 333 Market Street, 16th Floor, Harrisburg, Pennsylvania 17101. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

1) This response;
2) Your request:

3) The reasons why you think the agency is wrong in denying access to the requested records.

Also, the OOR has an appeal form available on the OOR website at:

https://www.openrecords.pa.gov/Appeals/AppealForm.cfm.

Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Sincerely,

Danica Hoppes

Danica Hoppes
Agency Open Records Officer
Pennsylvania Department of Health
625 Forster Street
825 Health and Welfare Building
Harrisburg, PA 17120-0701

Date of Mailing: 10/17/2022

Gmail Mahon, Ed <emahon@spotlightpa.org>

RTK Theodore Colterelli

2 messages

Mahon, Ed <emahon@spotlightpa.org> Fri, Oct 7, 2022 at 12:53 PM
To: PADOHRTK <PADOHRTK@pa.gov>

Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it is required should an appeal be necessary. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: *PA Department of Health*
Date of Request: *Oct. 7 , 2022* **Submitted via:** ☐ Email

PERSON MAKING REQUEST:

Name: Ed Mahon

Company (if applicable): Spotlight PA

Mailing Address:

225 Market St Suite 502A

City: Harrisburg PA 17101 **Email:** emahon@spotlightpa.org

Telephone: 717-421-2518

How do you prefer to be contacted if the agency has questions? **Email or phone**

RECORDS REQUESTED: Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. Use additional sheets if necessary. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law.

1. Aggregate data of the number of medical marijuana certifications issued by Theodore Colterelli from April 28, 2021 to the present.
2. Aggregate data of the number of medical marijuana certifications issued by Theodore Colterelli from April 1, 2022 to the present.

3. Aggregate data of the number of medical marijuana certifications issued by Theodore Colterelli from Jan. 1, 2017 to the present.
4. I am requesting a database of all medical marijuana certifications issued by Theodore Colterelli, including the date the certification was issued. I am requesting this information with the identity of patients removed or redacted. I am requesting this information from Jan. 1, 2017 to the present.

DO YOU WANT COPIES? □ Yes, electronic copies preferred if available.

Do you want certified copies? □ No

RTKL requests may require payment or prepayment of fees. See the Official RTKL Fee Schedule for more details.

Please notify me if fees associated with this request will be more than □ $50.

_____

_____

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY

Tracking: _____ Date Received: _____ Response Due (5 bus. days): _____

30-Day Ext.? □ Yes □ No (If Yes, Final Due Date: _____) Actual Response Date: _____

Request was: □ Granted □ Partially Granted & Denied □ Denied Cost to Requester: $_____

□ Appropriate third parties notified and given an opportunity to object to the release of requested records.

--

Ed Mahon
Reporter
Cell: 717-421-2518
he/him/his
www.spotlightpa.org

SPOTLIGHT PA

A **collaborative** newsroom producing **investigative** journalism for **Pennsylvania.**

PADOHRTK <PADOHRTK@pa.gov> Fri, Oct 7, 2022 at 12:54 PM
To: "Mahon, Ed" <emahon@spotlightpa.org>

The Department of Health's Right-to-Know Law (RTKL) Office has received your correspondence. Requests for records will be processed in accordance with the provisions of the RTKL, 65 P.S.§§67.101, et seq.

Requests received by this account after regular business hours (5 pm) or when the Office is otherwise closed pursuant to Management Directive 530.17 will be marked as received on the next business day.

OOR Exhibit 2

NOTICE OF DEADLINES

The appeal has been docketed by the OOR and it has been assigned to an Appeals Officer. The docket number and the Appeals Officer's contact information are included in the attachments you received along with this notice.

The Final Determination is currently due on **November 28, 2022**.

The timeline for this RTKL appeal may be extended by the OOR during the appeal. This extension will allow the OOR the flexibility it requires to protect due process and to ensure that the agency and requester, along with any third parties, have a full and fair opportunity to meaningfully participate in the appeal.

Evidence, legal argument and general information to support your position must be submitted within seven (7) business days from the date of this letter, unless the Appeals Officer informs you otherwise. *Note: If the proceedings have been stayed for the parties to submit a completed mediation agreement, the record will remain open for seven (7) business days beyond the mediation agreement submission deadline.*

Submissions in this case are currently due on **November 9, 2022**.

If you are unable to meaningfully participate in this appeal under the above deadlines, please notify the Appeals Officer as soon as possible.

Due to delays in U.S. mail, we urge agencies and requesters to use email for all communications with the OOR to the extent possible.

Presently, the OOR is receiving postal mail on a limited basis. Accordingly, we urge agencies and requesters to use email for all communication with the OOR to the extent possible.

If you have any questions about this notice or the underlying appeal, please contact the Appeals Officer. The OOR is committed to working with agencies and requesters to ensure that the RTKL appeal process proceeds as fairly and as smoothly as possible.

pennsylvania
OFFICE OF OPEN RECORDS

October 31, 2022

Via Email Only:

Ed Mahon
Spotlight PA
228 Walnut St.
#11728
Harrisburg, PA 17108
emahon@spotlightpa.org

Via Email Only:

Danica Hoppes
Agency Open Records Officer
Pennsylvania Department of Health
625 Forster Street
825 Health and Welfare Building
Harrisburg, PA 17120
PADOHRTK@pa.gov

RE: OFFICIAL NOTICE OF APPEAL - Mahon and Spotlight PA v. Pennsylvania Department of Health OOR Dkt. AP 2022-2503

Dear Parties:

Review this information and all enclosures carefully as they affect your legal rights.

The Office of Open Records ("OOR") received this appeal under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101, et seq. on October 28, 2022. A binding Final Determination ("FD") will be issued pursuant to the timeline required by the RTKL, **please see the attached information for more information about deadlines.**

Notes for both parties (more information in the enclosed documents):

- The docket number above must be included on all submissions related to this appeal.
- Any information provided to the OOR must be provided to all parties involved in this appeal. Information that is not shared with all parties will not be considered.
- All submissions to the OOR, other than *in camera* records, will be public records. Do not include any sensitive information- such as Social Security numbers.

If you have questions about this appeal, please contact the assigned Appeals Officer (contact information enclosed), providing a copy of any correspondence to all parties involved in this appeal.

Sincerely,

Elizabeth Wagenseller

Elizabeth Wagenseller
Executive Director

Enc.: Description of RTKL appeal process
Assigned Appeals Officer contact information
Entire appeal as filed with OOR

The Right-to-Know Law Appeal Process

Please review this information carefully as it affects your legal rights.

The Office of Open Records ("OOR") has received the enclosed appeal, which was filed under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101, et seq. A binding Final Determination will be issued by the OOR pursuant to the statutory timeline, subject to the notice of deadlines enclosed herein. If you have any questions, please contact the Appeals Officer assigned to this case. Contact information is included on the enclosed documents.

Submissions to the OOR

Both parties may submit evidence, legal argument, and general information to support their positions to the assigned Appeals Officer. Please contact the Appeals Officer as soon as possible.

Any information provided to the OOR must be provided to all parties involved in this appeal. Information submitted to the OOR will not be considered unless it is also shared with all parties.

Include the docket number on all submissions.

The agency may assert exemptions on appeal even if it did not assert them when the request was denied (*Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013)).

Attorneys, counsel and legal representatives may file an Entry of Appearance by contacting the Appeals Officer or completing the form at https://www.openrecords.pa.gov/Appeals/EntryOfAppearance.cfm.

Generally, submissions to the OOR — other than *in camera* records — will be public records. Do not include sensitive or personal information, such as Social Security numbers, on any submissions.

Agency Must Notify Third Parties

If records affect a legal or security interest of a third party; contain confidential, proprietary or trademarked records; **or** are held by a contractor or vendor, **the agency must notify such parties of this appeal immediately and provide proof of that notice by the record closing date set forth above.**

Such notice must be made by: (1) Providing a copy of all documents included with this letter; **and** (2) Advising relevant third parties that interested persons may request to participate in this appeal by contacting the Appeals Officer or completing the form at https://www.openrecords.pa.gov/Appeals/DIPRequest.cfm. (see 65 P.S. § 67.1101(c)).

The Commonwealth Court has held that "the burden [is] on third-party contractors... to prove by a preponderance of the evidence that the [requested] records are exempt." (*Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011)).

A third party's failure to participate in a RTKL appeal before the OOR may be construed as a waiver of objections regarding release of requested records.

NOTE TO AGENCIES: If you have questions about this requirement, please

contact the Appeals Officer immediately.

Statements of Fact & Burden of Proof

Statements of fact must be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge. Statements of fact or allegations submitted without an affidavit may not be considered.

Under the RTKL, the agency has the burden of proving that records are exempt from public access (see 65 P.S. § 67.708(a)(1)). **To meet this burden, the agency must provide evidence to the OOR.**

The law requires the agency position to be supported by sufficient facts and citation to all relevant sections of the RTKL, case law, and OOR Final Determinations.

An affidavit or attestation is required to prove that records do not exist.

Sample affidavits are on the OOR website, openrecords.pa.gov.

Any evidence or legal arguments not submitted or made to the OOR may be waived.

Preserving Responsive Records

The agency must preserve all potentially responsive records during the RTKL appeal process, including all proceedings before the OOR and any subsequent appeals to court.

Failure to properly preserve records may result in the agency being sanctioned by a court for acting in bad faith.

See *Lockwood v. City of Scranton*, 2019-CV-3668 (Lackawanna County Court of Common Pleas), holding that an agency had "a mandatory duty" to preserve records after receiving a RTKL request. Also see generally *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018), holding that "a fee award holds an agency accountable for its conduct during the RTKL process..."

Mediation

The OOR offers a mediation program as an alternative to the standard appeal process. To participate in the mediation program, both parties must agree in writing.

The agency must preserve all potentially responsive records during the RTKL appeal process. Mediation is a voluntary, informal process to help parties reach a mutually agreeable settlement. The OOR has had great success in mediating RTKL cases.

If mediation is successful, the requester will withdraw the appeal. This ensures that the case will not proceed to court — saving both sides time and money.

Either party can end mediation at any time.

If mediation is unsuccessful, both parties will be able to make submissions to the OOR as outlined on this document, and the OOR will have no less than 30 calendar days from the conclusion of the mediation process to issue a Final Determination.

Parties are encouraged to consider the OOR's mediation program as an alternative way to resolve disputes under the RTKL.

pennsylvania
OFFICE OF OPEN RECORDS

APPEALS OFFICER:	**Erin Burlew, Esq.**
CONTACT INFORMATION:	**Commonwealth of Pennsylvania** **Office of Open Records** **333 Market Street, 16th Floor** **Harrisburg, PA 17101-2234**
FACSIMILE:	**(717) 425-5343**
EMAIL:	**eburlew@pa.gov**
Preferred method of contact and submission of information:	**EMAIL**

Please direct submissions and correspondence related to this appeal to the above Appeals Officer. Please include the case name and docket number on all submissions.

You must copy the other party on everything you submit to the OOR. The Appeals Officer cannot speak to parties individually without the participation of the other party.

The OOR website, https://openrecords.pa.gov, is searchable and both parties are encouraged to review prior final determinations involving similar records and fees that may impact this appeal.

The OOR website also provides sample forms that may be helpful during the appeals process. OOR staff are also available to provide general information about the appeals process by calling (717) 346-9903.

pennsylvania
OFFICE OF OPEN RECORDS

IN THE MATTER OF :

_____, :
Requester :

v. : **OOR Dkt. AP** _____

_____, :
Agency :

Please accept my appearance for the _____ in the above captioned case.
(Requester/Agency)

PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.

Attorney: _____

Firm: _____

Address: _____

_____

Email: _____

Phone #: _____

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.

REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.

OOR Docket No: _____ **Today's date:** _____

Name: _____

PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.

Address/City/State/Zip _____

E-mail _____

Fax Number: _____

Name of Requester: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____/_____

E-mail _____

Name of Agency: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____/_____

E-mail _____

Record at issue: _____

I have a direct interest in the record(s) at issue as (check all that apply):

- ☐ An employee of the agency
- ☐ The owner of a record containing confidential or proprietary information or trademarked records
- ☐ A contractor or vendor
- ☐ Other: (attach additional pages if necessary) _____

I have attached a copy of all evidence and arguments I wish to submit in support of my position.

Respectfully submitted, _____(must be signed)

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.

Rev. 6-20-2017

OOR Exhibit 3

Good afternoon: I am requesting a one-week extension for all parties to submit arguments, so that the record would remain open until Nov. 16. I agree to related extensions for a final determination from the Office of Open Records. Thank you.

OOR Exhibit 4

pennsylvania
OFFICE OF OPEN RECORDS

November 7, 2022

Via Email Only:

Ed Mahon
Spotlight PA
228 Walnut St.
#11728
Harrisburg, PA 17108
emahon@spotlightpa.org

Via Email Only:

Danica Hoppes
Agency Open Records Officer
Pennsylvania Department of Health
625 Forster Street
825 Health and Welfare Building
Harrisburg, PA 17120
PADOHRTK@pa.gov

RE: Submission Period Extended - Mahon and Spotlight PA v. Pennsylvania Department of Health OOR Dkt. AP 2022-2503

Dear Parties:

I write in regard to the above appeal. TheRequester requests additional time to supplement the record and grants the OOR addtional time to issue the final determination. The extension request is GRANTED. Both parties may make submissions until the end of the day **(11:59:59 p.m.)** on November 16, 2022. The final determination issuance date is now December 5, 2022.

Thank you for your attention to this matter.

Sincerely,

/s/ Erin Burlew

Erin Burlew
Senior Appeals Officer

OOR Exhibit 5

Good morning: Due to some professional and personal obligations, I am requesting an additional extension and for the submission period to remain open to all parties until the end of the day on Monday, Nov. 21. Thank you.

OOR Exhibit 6

pennsylvania
OFFICE OF OPEN RECORDS

November 16, 2022

Via Email Only:

Ed Mahon
Spotlight PA
228 Walnut St.
#11728
Harrisburg, PA 17108
emahon@spotlightpa.org

Via Email Only:

Danica Hoppes
Agency Open Records Officer
Pennsylvania Department of Health
625 Forster Street
825 Health and Welfare Building
Harrisburg, PA 17120
PADOHRTK@pa.gov

RE: Submission Period Extended - Mahon and Spotlight PA v. Pennsylvania Department of Health OOR Dkt. AP 2022-2503

Dear Parties:

I write in regard to the above appeal. TheRequester requests additional time to supplement the record. The extension request is GRANTED. Both parties may submit supplemental information, if desired, until the end of the day (**11:59:59 p.m.**) on November 21, 2022. The Final Determination issuance date is likewise extended to December 12, 2022.

Thank you for your attention to this matter.

Sincerely,

/s/ Erin Burlew

Erin Burlew

OOR Exhibit 7

Position Statement Docket Sheet (2022-2503)

Question: Should the Office of Open Records require the Department of Health to release data on certifications approved by an individual physician or individual physicians?

Suggested Answer: Yes

The Office of Open Records should consider the following information as it makes a decision.

1. The Office of Open Records ordered the Department of Health to release similar information. In Finnerty and CNHI Newspapers v. Pennsylvania Department of Health, Docket No: AP 2021-1833, the Office of Open Records stated the following in a November 9, 2021 final decision:

> In the instant matter, the Requester seeks "the number of certifications issued this year provided by each physician that certifies medical marijuana patients." While the Department correctly argues that the Medical Marijuana Act prohibits disclosure of "certifications," here, the Requester seeks "the number of certifications" rather than actual certifications. Additionally, while "practitioner registration information," other than public information that includes "names, business address, and medical credentials of practitioners" is made confidential under Section 302(b), Section 302(a) does not expressly apply to practitioners. 35 P.S. § 10231.302. Therefore, as the number of medical marijuana certifications issued by each physician is not information related to specific "patients, caregivers, and other applicants," the Request seeks aggregate data which is subject to public disclosure under the RTKL. See Finnerty, supra; see also Mahon v. Pa. Dep't of Health, OOR Dkt. AP 2021-1296, 2021 PA O.O.R.D. LEXIS 1542 (finding that the number of medical marijuana certifications issued for each eligible qualifying condition constitutes aggregate data). Accordingly, the Department has not met its burden of proving that the requested number of certifications is confidential pursuant to the Medical Marijuana Act.

   The Department of Health appealed the decision to Commonwealth Court, where the case was pending as of 2:35 p.m. on Nov. 21, 2022, according to records from the Unified Judicial System of Pennsylvania.

2. In a separate case, with precedential value, Commonwealth Court has ruled against a broad interpretation of the medical marijuana's law confidentiality provisions. In

Department of Health v. Mahon and Spotlight PA (No. 1066 C.D. 2021), Commonwealth Court stated the following:

> The Department also argues that releasing the requested data would subject its employees to criminal liability. (Dep't Br. at 15.) However, the misdemeanor provision in Section 1307 of the Act does not apply where "disclosure is permitted. . .by law or by court order." 35 P.S. § 10231.1307.
>
> The Department also argues in a footnote that several other confidentiality provisions in Pennsylvania Law would be "rendered useless by the OOR's wholesale provision of aggregate information." (Dep't Br. at 15 n.4). This argument misses the point. It is not the aggregation of the data that makes it subject to disclosure, but rather the narrow limitation of the confidentiality provision to patient information,which we have found not to apply to the requested data. Thus, we do not believe that our holding gives wholesale provision of aggregate information in every context. See Feldman and Wagaman.Furthermore, this argument is undeveloped and therefore waived.

Commonwealth Court issued that opinion in August 2019 and it changed the status in October 2022 to make it a reported opinion.

3. The Department of Health itself has released similar information. In an Aug. 30, 2022 Order to Show Cause, the Department of Health stated the following regarding physician Walter Stein: "Since Stein's inclusion in the approved physician registry, Stein has issued 26 certifications in two and a half years." (See attached photos.)

4. In a disciplinary case against Theodore Colterelli, an attorney for the Department of Health made the case for why disclosing this aggregate data is in the public interest. During a disciplinary hearing, attorney Justin Wayne stated the following: "I think the total number of patients versus his time and ability to certify patients is relevant to show that this is not a one-time occurrence, and when you're dealing with regulatory infraction, the number matters." (See attachment Colterelli_5. The relevant information is on page 11-12 of the actual document, labeled as pages 140 and 141 of the transcript.)

   In the case, the hearing examiner ruled Dr. Colterelli didn't have to answer the question because the department's order to show case didn't make any allegations beyond one patient. But, in the context of the Right-to-Know Law, the point still stands — the number of patients versus a practitioner's time and ability to certify patients is relevant.

   Ultimately, in the Colterelli case, a hearing examiner proposed a three-month suspension, which a senior Department of Health official did accept. I'll provide proof of the outcome of the Colterelli case as subsequent attachments.

pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JOHN FINNERTY AND CNHI NEWSPAPERS,	:	
Requester	:	
	:	**Docket No: AP 2021-1833**
v.	:	
	:	
PENNSYLVANIA DEPARTMENT OF HEALTH,	:	
Respondent	:	

INTRODUCTION

John Finnerty, on behalf of CNHI Newspapers (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 the number of medical marijuana certifications issued by physicians this year. The Department denied the Request, arguing that this information is confidential under the Medical Marijuana Act. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted**, and the Department is required to take further action as directed.

FACTUAL BACKGROUND

On August 16, 2021, the Request was filed, seeking: "records showing the number of certifications issued this year provided by each physician that certifies medical marijuana

patients." On August 23, 2021, the Department denied the Request, arguing that the requested information is confidential under the Medical Marijuana Act, 35 P.S. § 1023.302.[1]

On September 1, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.[2] The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On September 28, 2021, the Department submitted a position statement, reiterating its reason for denial. The Requester did not submit any additional information during the course of the appeal.

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

[1] The Department also denied the Request under 28 Pa. Code § 1141.22(b)(4); however, the Department's temporary regulations are no longer in effect as they expired on May 12, 2020. Additionally, as the Department does not cite to or argue on appeal that the requested information is confidential pursuant to the temporary regulations, the OOR will not address this reason for denial.

[2] The Requester provided the OOR with additional time to issue a Final Determination in this matter.

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, neither party requested a hearing.

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 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 respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *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)(1). 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)).

The Department argues that the requested information is confidential under Section 302 of the Medical Marijuana Act, titled "Confidentiality and public disclosure," which provides:

> (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… [RTKL], 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 [RTKL]:

(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 [RTKL].

(3) Information relating to penalties or other disciplinary actions taken against a medical marijuana organization or practitioner by the [D]epartment for violation of this act.

35 P.S. § 10231.302. Specifically, the Department argues that the requested information constitutes "information obtained by the [D]epartment relating to patients, caregivers and other applicants….including: [c]ertifications issued by practitioners" under subsection (a). Additionally, the Department argues that because the requested information is not included in subsection (b) as public information, it is confidential. Further, the Department notes that disclosure of "any information related to the use of medical marijuana" by Department employees is a misdemeanor of the third degree under the Medical Marijuana Act. 35 P.S. § 10231.1307.

Recently, in *Finnerty v. Pa. Dep't of Health*, the OOR addressed aggregate data consisting of the number of patients certified by county, concluding as follows:

> The overarching question before the OOR is whether the requested information -- aggregate data consisting of the number of patients broken down by county -- is "information ... relating to patients, caregivers, and other applicants...." 35 P.S. § 10231.302(a). It is difficult to believe that the General Assembly intended the release of aggregate data concerning the medical marijuana program to be a crime, and the context of Section 302 does not support the Department's broad interpretation. Subsection (a) begins with discussing "a confidential list of patients and caregivers," and concludes by providing a non-exhaustive list of examples of records that are subject to confidentiality, all of which concern the identification of specific patients and caregivers. The heading of subsection (a) is "Patient information." Based upon this context, the OOR can only conclude that subsection (a) concerns information and records relating to specific patients and caregivers, rather than information in the aggregate about the program. Thus, this is the reason why Section 1307 of the Medical Marijuana Act criminalizes the disclosure of "any information *related to the use of* medical marijuana" (emphasis added) – the General Assembly was concerned about the disclosure of information regarding patients and caregivers, rather than all information concerning the program.

OOR Dkt. 2021-1061, 2021 PA O.O.R.D. LEXIS __.

In the instant matter, the Requester seeks "the number of certifications issued this year provided by each physician that certifies medical marijuana patients." While the Department correctly argues that the Medical Marijuana Act prohibits disclosure of "certifications," here, the Requester seeks "the *number* of certifications" rather than actual certifications. Additionally, while "practitioner registration information," other than public information that includes "names, business address, and medical credentials of practitioners" is made confidential under Section 302(b), Section 302(a) does not expressly apply to practitioners. 35 P.S. § 10231.302. Therefore, as the number of medical marijuana certifications issued by each physician is not information related to specific "patients, caregivers, and other applicants," the Request seeks aggregate data which is subject to public disclosure under the RTKL. *See Finnerty, supra*; *see also Mahon v. Pa. Dep't of Health*, OOR Dkt. AP 2021-1296, 2021 PA O.O.R.D. LEXIS 1542 (finding that the

number of medical marijuana certifications issued for each eligible qualifying condition constitutes aggregate data). Accordingly, the Department has not met its burden of proving that the requested number of certifications is confidential pursuant to the Medical Marijuana Act.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Department is required to provide the requested information to the Requester 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.[3] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: November 9, 2021

/s/ Kathleen A. Higgins

KATHLEEN A. HIGGINS
DEPUTY CHIEF COUNSEL

Sent to: John Finnerty (via email only);
Lisa M. Keefer (via email only);
Anna LaMano, Esq. (via email only)

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

Commonwealth Docket Sheet | **Commonwealth Court of Pennsylvania**

Docket Number: 1356 CD 2021

February 16, 2023

CAPTION

Pennsylvania Department of Health,
Petitioner

v.

John Finnerty and CNHI Newspapers
(Office of Open Records),
Respondents

CASE INFORMATION

Initiating Document:	Petition for Review		
Case Status:	Active		
Case Processing Status:	July 6, 2022	Awaiting Decision	
Journal Number:	SP-262-2022		
Case Category:	Administrative Agency	Case Type(s):	Office of Open Records

CONSOLIDATED CASES

RELATED CASES

Docket No / Reason	Type
84 CD 2023 Similar Issue(s)	Related

COUNSEL INFORMATION

Petitioner **Pennsylvania Department of Health**
Pro Se: No
IFP Status:

Attorney:	Kostelac, Yvette Marie		
Law Firm:	Department of Health		
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Attorney:	Hoffman, Kevin Joseph		
Law Firm:	Department of Health		
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Phone No:	(717) 783-2500	Fax No:	

Attorney:	Skinner, Shea Michael		
Law Firm:	Department of Health		
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Commonwealth Docket Sheet | **Commonwealth Court of Pennsylvania**

Docket Number: 1356 CD 2021

February 16, 2023

COUNSEL INFORMATION

Petitioner **Pennsylvania Department of Health**
Pro Se: No
IFP Status:
Attorney: Lamano, Anna Ferguson
Address: 625 Forster St.
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Harrisburg, PA 17120
Phone No: (610) 603-6803 Fax No:

Respondent **Finnerty, John**
Pro Se: Yes
IFP Status:
Pro Se: John Finnerty
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Selinsgrove, PA 17870

Respondent **CNHI Newspapers**
Pro Se: Yes
IFP Status:
Pro Se: CNHI Newspapers
Address: 636 Pine Brook Road
Selinsgrove, PA 17870

FEE INFORMATION

Fee Dt	Fee Name	Fee Amt	Receipt Dt	Receipt No	Receipt Amt
12/08/2021	Petition for Review - Appellate	90.25	12/08/2021	2021-CMW-H-002176	90.25

AGENCY/TRIAL COURT INFORMATION

Order Appealed From: November 9, 2021
Order Type: Decision
Documents Received: December 8, 2021
Notice of Appeal Filed:

Court Below: Office of Open Records
County:
Judge:
Docket Number: AP 2021-1833
Division: Office of Open Records
OTN:
Judicial District:

ORIGINAL RECORD CONTENT

Original Record Item	Filed Date	Content Description
Agency Record	December 29, 2021	

Date of Remand of Record:

BRIEFING SCHEDULE

Petitioner
Pennsylvania Department of Health
Brief
Due: February 7, 2022 Filed: February 7, 2022

Reproduced Record

Respondent
CNHI Newspapers
Brief

Finnerty, John
Brief

Commonwealth Docket Sheet **Commonwealth Court of Pennsylvania**

Docket Number: 1356 CD 2021

February 16, 2023

BRIEFING SCHEDULE

Petitioner
Pennsylvania Department of Health
Reproduced Record
Due: February 7, 2022 Filed: February 7, 2022

DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
December 8, 2021	Petition for Review Filed Pennsylvania Department of Health		Petitioner	
December 9, 2021	Notice Exited Commonwealth Court Filing Office			12/09/2021
December 29, 2021	Agency Record Received Office of Open Records			
December 29, 2021	Docketing Statement Filed Lamano, Anna Ferguson	Pennsylvania Department of Health	Petitioner	
December 29, 2021	Briefing Schedule Issued Commonwealth Court Filing Office			
February 7, 2022	Entry of Appearance Skinner, Shea Michael	Pennsylvania Department of Health	Petitioner	
Document Name:	Shea M. Skinner, Esq. on behalf of Respondent, the Pennsylvania Department of Health			
February 7, 2022	Petitioner's Brief Filed Hoffman, Kevin Joseph Pennsylvania Department of Health	Pennsylvania Department of Health	Petitioner Petitioner	
February 7, 2022	Petitioner's Reproduced Record Filed Hoffman, Kevin Joseph	Pennsylvania Department of Health	Petitioner	
March 31, 2022	Dormant Order for Failure to File Respondent Brief Issued Per Curiam			04/01/2022
Document Name:	Respondents brief are due within 14 days of the exit date of this Order			
Comment:	It appearing that Respondents CNHI Newspapers and John Finnerty's briefs were due March 14, 2022, and that to date the same have not been filed, Respondents CNHI Newspapers and John Finnerty's briefs (4 copies) shall be filed and served within 14 days of the exit date of this Order or Respondents CNHI Newspapers and John Finnerty shall be precluded from oral argument, if oral argument is scheduled, and from filing briefs, unless otherwise ordered.			
May 3, 2022	Respondent Precluded Krimmel, Michael			05/04/2022
Document Name:	Respondents are hereby precluded from filing briefs and participating in oral argument			
Comment:	Respondents having failed to file briefs pursuant to this Court's order of March 31, 2022, Respondents are hereby precluded from filing briefs and participating in oral argument, if oral argument is scheduled.			

Commonwealth Docket Sheet

Commonwealth Court of Pennsylvania

Docket Number: 1356 CD 2021

February 16, 2023

DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
July 6, 2022	Submitted on Brief Per Curiam			07/07/2022
Document Name:	Without oral argument, unless otherwise ordered			
Comment:	the above Petition for Review shall be submitted on briefs, without oral argument, unless otherwise ordered.			

SESSION INFORMATION

Journal Number: SP-262-2022
Consideration Type: Submitted on Briefs
Listed/Submitted Date: July 1, 2022

Commonwealth Docket Sheet | **Commonwealth Court of Pennsylvania**

Docket Number: 1066 CD 2021

February 16, 2023

CAPTION

Pennsylvania Department
of Health,
Petitioner
v.
Ed Mahon and Spotlight PA
(Office of Open Records),
Respondents

CASE INFORMATION

Initiating Document:	Petition for Review		
Case Status:	Closed		
Case Processing Status:	August 19, 2022	Completed	
Journal Number:	23-05-2022		
Case Category:	Administrative Agency	Case Type(s):	Office of Open Records Right to Know Act

CONSOLIDATED CASES

RELATED CASES

Docket No / Reason	Type
212 CD 2022 Same Party	Related

COUNSEL INFORMATION

Petitioner **Pennsylvania Department of Health**
Pro Se: No
IFP Status:

Attorney:	Hoffman, Kevin Joseph		
Law Firm:	Department of Health		
Address:	Pa Dept Of Health 625 Forester St RM 825 Harrisburg, PA 17120		
Phone No:	(717) 783-2500	Fax No:	

Attorney:	Kostelac, Yvette Marie		
Law Firm:	Department of Health		
Address:	Pa Dept Of Health H& W Building Room 825 Forster St Harrisburg, PA 17120		
Phone No:	(717) 783-2500	Fax No:	

Attorney:	Lamano, Anna Ferguson		
Address:	625 Forster St. Rm. 825, Health & Welfare Bldg. Harrisburg, PA 17120		
Phone No:	(717) 783-2500	Fax No:	

Commonwealth Docket Sheet | **Commonwealth Court of Pennsylvania**

Docket Number: 1066 CD 2021

February 16, 2023

COUNSEL INFORMATION

Respondent **Spotlight PA**
Pro Se: No
IFP Status:
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Respondent **Mahon, Ed**
Pro Se: No
IFP Status:
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Law Firm: Reporters Committee for Freedom of the Press
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Lancaster, PA 17608
Phone No: (717) 370-6884 Fax No:

FEE INFORMATION

Fee Dt	Fee Name	Fee Amt	Receipt Dt	Receipt No	Receipt Amt
09/30/2021	Petition for Review - Appellate	90.25	09/30/2021	2021-CMW-H-001737	90.25
05/12/2022	Copy Work (Per Page)	51.50	05/12/2022	2022-CMW-H-000931	51.50

AGENCY/TRIAL COURT INFORMATION

Order Appealed From: September 2, 2021 Notice of Appeal Filed:
Order Type: Decision
Documents Received: September 30, 2021

Court Below: Office of Open Records
County: Division: Office of Open Records
Judge: OTN:
Docket Number: AP 2021-1296 Judicial District:

ORIGINAL RECORD CONTENT

Original Record Item	Filed Date	Content Description
Agency Record	November 12, 2021	

Date of Remand of Record: October 19, 2022

BRIEFING SCHEDULE

Petitioner
Pennsylvania Department of Health
Brief
Due: December 22, 2021 Filed: December 22, 2021

Reply Brief
Due: Filed: February 4, 2022

Reproduced Record

Respondent
Mahon, Ed
Brief
Due: January 24, 2022 Filed: January 21, 2022

Supplemental Reproduced Record
Due: January 24, 2022 Filed: January 21, 2022

Spotlight PA

Commonwealth Docket Sheet | **Commonwealth Court of Pennsylvania**

Docket Number: 1066 CD 2021

February 16, 2023

BRIEFING SCHEDULE

Petitioner
Pennsylvania Department of Health
Reproduced Record
Due: December 22, 2021 Filed: December 22, 2021

Respondent
Spotlight PA
Brief
Due: January 24, 2022 Filed: January 21, 2022

Supplemental Reproduced Record
Due: January 24, 2022 Filed: January 21, 2022

DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
September 30, 2021	Petition for Review Filed			
	Pennsylvania Department of Health		Petitioner	
October 5, 2021	Notice Exited			10/05/2021
	Commonwealth Court Filing Office			
October 12, 2021	Entry of Appearance			
	Knudsen Burke, Paula	Spotlight PA	Respondent	
	Knudsen Burke, Paula	Mahon, Ed	Respondent	
Document Name:	of Paula Knudsen Burke, Esquire on behalf of Respondents			
October 15, 2021	Docketing Statement Filed			
	Lamano, Anna Ferguson	Pennsylvania Department of Health	Petitioner	
November 12, 2021	Agency Record Received			
	Office of Open Records			
November 12, 2021	Briefing Schedule Issued			
	Commonwealth Court Filing Office			
December 22, 2021	Petitioner's Brief Filed			
	Lamano, Anna Ferguson	Pennsylvania Department of Health	Petitioner	
	Pennsylvania Department of Health		Petitioner	
December 22, 2021	Petitioner's Reproduced Record Filed			
	Lamano, Anna Ferguson	Pennsylvania Department of Health	Petitioner	
January 21, 2022	Respondent's Supplemental Reproduced Record Filed			
	Knudsen Burke, Paula	Spotlight PA	Respondent	
	Knudsen Burke, Paula	Mahon, Ed	Respondent	
	Mahon, Ed		Respondent	
	Spotlight PA		Respondent	
January 21, 2022	Respondent's Brief Filed			
	Knudsen Burke, Paula	Spotlight PA	Respondent	
	Knudsen Burke, Paula	Mahon, Ed	Respondent	
	Mahon, Ed		Respondent	
	Spotlight PA		Respondent	

Commonwealth Docket Sheet | **Commonwealth Court of Pennsylvania**

Docket Number: 1066 CD 2021

February 16, 2023

DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
January 27, 2022	Tentative Session Date			
	Krimmel, Michael			
Document Name:	April 2022			
February 4, 2022	Petitioner's Reply Brief Filed			
	Pennsylvania Department of Health		Petitioner	
February 25, 2022	Notice			
	Commonwealth Court of Pennsylvania			
Document Name:	Notice to Counsel Regarding April 2022 Argument Session			
March 21, 2022	Tentative Session Date			
	Krimmel, Michael			
Document Name:	May 2022			
April 13, 2022	Argument Scheduled			
	Krimmel, Michael			
Document Name:	Tuesday, May 17, 2022, 1:00 p.m. (Panel), Supreme Court Courtroom, Eighth Floor, 414 Grant Street,			
Comment:	City-County Building, Pittsburgh, PA (No. 23)			
August 19, 2022	Affirmed/Reversed			08/19/2022
	Leadbetter, Bonnie Brigance			
Document Name:	Memorandum Opinion : OOR's decision is Affirmed in part and Reversed in part.			
Comment:	AND NOW, this 19th day of August, 2022, the determination of the Office of open Records is AFFIRMED IN PART and REVERSED IN PART in accordance with the foregoing opinion.			
September 14, 2022	Application to Publish Opinion			
	Hoffman, Kevin Joseph	Pennsylvania Department of Health	Petitioner	
Document Name:	Motion to Report Unreported Opinion			
September 20, 2022	Answer Filed			
	Knudsen Burke, Paula	Spotlight PA	Respondent	
	Knudsen Burke, Paula	Mahon, Ed	Respondent	
Document Name:	Answer to App for Relief - Motion to Report Unreported Opinion			
October 18, 2022	Order Granting Application to Publish Opinion			10/18/2022
	Leadbetter, Bonnie Brigance			
Document Name:	Mem. Op. shall now be Reported			
Comment:	AND NOW, this 18th day of October, 2022, it is ordered that the above captioned Memorandum Opinion, filed August 19, 2022, shall be designated OPINION and shall be REPORTED.			
October 19, 2022	Remitted			
	Commonwealth Court Filing Office			
Document Name:	PACFiled Record. No Acknowledgement needed			

Commonwealth Docket Sheet

Commonwealth Court of Pennsylvania

Docket Number: 1066 CD 2021

February 16, 2023

SESSION INFORMATION

Journal Number:	23-05-2022
Consideration Type:	Oral Argument - Panel
Listed/Submitted Date:	May 17, 2022

Panel Composition:

The Honorable Patricia A. McCullough	Judge
The Honorable Lori A. Dumas	Judge
The Honorable Bonnie Brigance Leadbetter	Senior Judge

DISPOSITION INFORMATION

Final Disposition:	Yes		
Related Journal No:		Judgment Date:	
Category:	Decided	Disposition Author:	Leadbetter, Bonnie Brigance
Disposition:	Affirmed/Reversed	Disposition Date:	August 19, 2022
Disposition Comment:	AND NOW, this 19th day of August, 2022, the determination of the Office of open Records is AFFIRMED IN PART and REVERSED IN PART in accordance with the foregoing opinion.		
Dispositional Filing:	**Memorandum Opinion**	Filing Author:	Leadbetter, Bonnie Brigance
Filed Date:	8/19/2022 12:00:00AM		

The quote I referenced regarding Dr. Stein can be seen in Stein_4.jpg.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,
OFFICE OF MEDICAL MARIJUANA,
Petitioner,

v.

WALTER STEIN, MD,
Respondent.

Docket No. MM-23-016 M

NOTICE TO DEFEND

THE ACCOMPANYING ORDER TO SHOW CAUSE HAS BEEN ISSUED TO YOU, DIRECTING YOU TO ANSWER FULLY THE AVERMENTS CONTAINED IN THAT ORDER PURSUANT TO WHICH THE OFFICE OF MEDICAL MARIJUANA IS PURSUING THE IMPOSITION OF DISCIPLINARY OR CORRECTIVE SANCTIONS AGAINST YOUR MEDICAL MARIJUANA PRACTITIONER REGISTRATION. THE ORDER TO SHOW CAUSE INSTITUTES A FORMAL ADMINISTRATIVE ACTION PURSUANT TO 35 P.S. SECTION 10231.403, IN WHICH SANCTIONS SET FORTH IN 28 PA. CODE SECTION 1181.26 MAY BE IMPOSED AGAINST YOU IF THE ALLEGATIONS IN THE ORDER TO SHOW CAUSE ARE PROVEN.

IF YOU ELECT TO DEFEND AGAINST THE ALLEGATIONS SET FORTH IN THE ORDER TO SHOW CAUSE, YOU ARE DIRECTED, IN ACCORDANCE WITH 28 PA. CODE SECTION 1230.44, TO FILE A WRITTEN RESPONSE TO THE AVERMENTS IN THE ORDER WITH TAMMY MORRISON, DOCKET CLERK, ROOM 825, HEALTH AND WELFARE BUILDING, 625 FORSTER STREET, HARRISBURG, PA 17120-0701, WITHIN THIRTY (30) DAYS AFTER SERVICE OF THE ORDER UPON YOU. AN ORIGINAL AND TWO COPIES MUST BE SUBMITTED. MERE GENERAL DENIALS UNSUPPORTED BY SPECIFIC FACTS WILL NOT CONSTITUTE AN ANSWER. FAILURE TO FILE AN ANSWER WITHIN THE TIME ALLOWED SHALL BE DEEMED A DEFAULT, AND RELEVANT FACTS AVERRED IN THE ORDER TO SHOW CAUSE MAY BE DEEMED ADMITTED. IF YOU FAIL TO RESPOND, YOUR MEDICAL MARIJUANA PRACTITIONER REGISTRATION MAY BE REVOKED, SUSPENDED, OR SUBJECTED TO OTHER SANCTIONS. MATTERS IN DEFENSE OR MITIGATION OF THE CHARGES, WHICH ARE NOT AVERRED IN THE ANSWER, ARE TO BE AVERRED IN NEW MATTER. YOU MAY BE PRECLUDED FROM PRESENTING EVIDENCE OR RAISING DEFENSES AT THE HEARING WHICH YOU HAVE NOT BEEN PLED AS NEW MATTER.

ANY DOCUMENT YOU FILE WITH THE HEARING OFFICER, YOU MUST ALSO SERVE ON THE OTHER PARTIES TO THIS MATTER, INCLUDING THE ATTORNEY FOR THE

OFFICE OF MEDICAL MARIJUANA. A DOCUMENT FILED WITH THE HEARING OFFICER MUST INCLUDE THE ABOVE CAPTION AND DOCKET NUMBER AND BE ACCOMPANIED BY A CERTIFICATE OF SERVICE.

UNLESS YOU WAIVE THE RIGHT TO A FORMAL HEARING, A FORMAL HEARING WILL BE HELD IN ACCORDANCE WITH THE PROVISIONS OF THE ADMINISTRATIVE AGENCY LAW, THE ACT OF APRIL 28, 1978, P.L. 202, NO. 53, 2 PA. C.S. SECTIONS 501-508, AND THE GENERAL RULES OF ADMINISTRATIVE PRACTICE & PROCEDURE, 1 PA. CODE SECTION 31.1 *ET SEQ.* YOU WILL BE GIVEN AN OPPORTUNITY TO APPEAR AND BE HEARD IN PERSON OR THROUGH COUNSEL, TO QUESTION AND CROSS-EXAMINE WITNESSES, TO OFFER EVIDENCE AND ADVOCATE YOUR POSITION, AND TO OBJECT TO ANY EVIDENCE ANOTHER PARTY TO THE PROCEEDING ATTEMPTS TO PRESENT.

CONTINUANCES WILL BE GRANTED FOR GOOD CAUSE ONLY. REQUESTS FOR CONTINUANCES MUST BE FILED IN WRITING AT LEAST TEN (10) DAYS PRIOR TO THE DATE OF THE HEARING. THIS REQUIREMENT WILL BE WAIVED ONLY UPON THE SHOWING OF GOOD CAUSE. IF YOU HAVE NOT RETAINED OR HAVE DISENGAGED COUNSEL, A REQUEST FOR A CONTINUANCE TO RETAIN COUNSEL MAY NOT BE CONSIDERED AS A VALID REASON FOR THE GRANTING OF A CONTINUANCE ON THE DAY OF THE HEARING.

IF AN INTERPRETER IS REQUIRED, A REQUEST FOR AN INTERPRETER MUST BE FILED IN WRITING AT LEAST TWENTY (20) DAYS PRIOR TO THE DATE OF THE HEARING.

POSTHEARING BRIEFS MAY BE FILED PROVIDED THAT A REQUEST TO DO SO IS RESERVED ON THE RECORD AT THE HEARING.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH, OFFICE OF MEDICAL MARIJUANA
Petitioner,

v.

WALTER STEIN, MD,
Respondent.

Docket No. MM-22-016 M

ORDER TO SHOW CAUSE

AND NOW, this 30th day of August 2022, this Order to Show Cause (OSC) is hereby issued directing Walter Stein, MD (Stein), to answer the following averments and show cause why the Pennsylvania Department of Health (Department), Office of Medical Marijuana (Office) should not revoke their practitioner registration, as authorized by law.

1. Stein is a Medical Physician and Surgeon currently licensed under License Number MD040726E[1] by the Pennsylvania Department of State, which was last renewed November 2, 2020. (Exhibit A).

2. Under the Medical Marijuana Act (Act), practitioners who complete the statutory training requirement, including state-specific medical marijuana training, may apply to the Department to register for the approved physician registry so that they may issue patient certifications. 35 P.S. § 10231.401.

[1] This action is not against Stein's Medical and Surgeon license.

3. The Regulations require that the training include provisions of the Act and Regulations applicable to the role and responsibilities of a certifying practitioner. 28 Pa. Code § 1181.32(b)(1).

4. The Act and the Regulations specifically prohibit a practitioner from issuing a certification for the practitioner's own use or for the use of a family or household member. 35 P.S. § 10231.403(e); 28 Pa. Code § 1181.31(d).

5. On January 29, 2019, Stein's registration in the physician registry was approved by the Department after completing the required four-hour training course on December 13, 2018 administered by the Pennsylvania State Nurses Association. (Exhibit B).

6. Shortly thereafter, the Department sent a welcome letter packet reiterating some important points and directing newly certifying physicians to resources to guide their experience certifying patients in the program. (Exhibit C).

7. Since Stein's inclusion in the approved physician registry, Stein has issued 26 certifications in two and a half years.

8. On December 12, 2021, Stein issued a certification [redacted]. (Exhibit D).

9. Under the Act, certification of oneself or family member is a violation of 35 P.S. § 10231.403(e) and is deemed "unprofessional conduct" for which the practitioner "shall [be] subject to discipline by the State Board of Medicine or the State Board of Osteopathic Medicine, as appropriate." 35 P.S. § 10231.402(c).

10. The Regulations permit the Department to revoke the registration of a practitioner for violating the Act or the regulations. 28 Pa. Code § 1181.26(e).

11. Stein violated the Act and the Regulations by issuing a certification [redacted].

WHEREFORE, unless Stein shows cause why the Department should not take action, the Office requests, based on the foregoing reasons, that the Secretary order revocation of Stein's practitioner registration. Alternatively, the Secretary may impose any other remedy deemed appropriate under the Act or Regulations.

Peter Blank
Executive Deputy Secretary
Department of Health

pennsylvania
DEPARTMENT OF HEALTH

March 14, 2022

Richard Hark, Esquire
Hark & Hark
1835 Market Street, Suite 2626
Philadelphia, PA 191093-2931

Re: Department of Health, Office of Medical Marijuana v. Theodore Colterelli, D.O.
Docket No. MM 21-003 AA

Dear Mr. Hark:

Enclosed please find the Hearing Examiner's Proposed Report in the above-referenced matters. Either party has 30-days from the mailing date of this letter to file a Brief on Exceptions. 1 Pa. Code § 35.211. A Brief Opposing Exceptions may be filed within 20-days after the filing of a Brief on Exceptions. 1 Pa. Code § 35.211. All parties must file five copies of any brief. The required contents and maximum length of briefs is specified at 1 Pa. Code § 35.212. The rules concerning your appeal rights and filing Exceptions to the Proposed Report can be found in the General Rules of Administrative Practice and Procedures ("GRAPP"), 1 Pa. Code Chs. 31-35.

In order to be timely, documents must be received at the address listed below on or before the close of business on the due date.

Tammy Morrison, Docket Clerk
Room 825 Health and Welfare Building
625 Forster Street
Harrisburg, PA 17120-0701

If the due date falls on a weekend or holiday, briefs must be filed before the close of business on the next business day. Any filing must also be served on the opposing party, or its counsel of record. Failure to timely file a brief on exceptions that complies with all requirements of GRAPP will constitute a waiver of any objection to the proposed report.

After receipt and consideration of timely filed briefs, the Secretary of Health or her designee will rule on any outstanding matters and issue a final order.

Sincerely,

Laura Foreman on behalf of
Tammy E. Morrison
Docket Clerk

Enclosure

cc: Carol Mowery, Assistant Chief Counsel, Office of Legal Counsel
Justin E. Wayne, Assistant Counsel, Office of Legal Counsel

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH

Department of Health,	:	
Office of Medical Marijuana,	:	
	:	
Petitioner,	:	
	:	
v.	:	**Docket No. MM 21-003 AA**
	:	
Theodore Colterelli, D.O.,	:	
	:	

PROPOSED REPORT

Debra Sue Rand
Chief Hearing Examiner

HISTORY

This matter concerns the Medical Marijuana Act, Act of April 17, 2016, P.L. 84, No. 16, 35 P.S. §§10231.101-10231.2110 ("Act"), and its attendant regulations.

The case began as an Order to Show Cause ("OSC") filed by Petitioner, Department of Health, Office of Medical Marijuana and concerns allegations that Respondent, Theodore Colterelli, D.O., wrote a certificate for medical marijuana without first consulting the health records of the patient. Respondent filed an Answer to the OSC, which, in turn, generated the two motions --- a Motion to Deem Facts Admitted, which was granted and a Motion for Judgment on the Pleadings, which was denied, both in a memorandum and order of August 11, 2021. The Judgment on the Pleadings Motion was denied on the basis that under the Department regulations, Department officials have discretion what sanction, if any, to impose for a violation of the regulations and, accordingly, material facts possibly remained in dispute regarding what sanction, if any, should be imposed.

On September 14, 2021 an Order issued scheduling the matter to be heard on November 18, 2021 and establishing prehearing deadlines. Respondent's unopposed October 4, 2021 Motion for Continuance was granted and the matter was rescheduled for December 10, 2021 and was held as scheduled.[1]

Respondent was represented by Justin E. Wayne, Esquire. Respondent was represented by Richard Q. Hark, Esquire. At the close of the hearing the parties elected to file briefs. The Notes of Testimony ("NT") were received on January 14, 2022. A briefing schedule was issued on January 24, 2022. The Department filed its brief February 18, 2022. On February 23, 2022

[1] Respondent also filed a Motion to Dismiss Order to Show Cause as a Matter of Law, to which the Department responded. That motion was denied on October 7, 2021 on the basis that such a filing was procedurally improper at that juncture.

Respondent filed his brief. The Department filed a reply brief on March 9, 2022. The matter is now ready to be adjudicated.

FINDINGS OF FACT

1. Respondent is a Doctor of Osteopathic Medicine who applied for registration to participate as a practitioner under Section 401 of the Medical Marijuana Act, ("Act"), 35 P.S. §10231.401, and was approved to do so. OSC ¶¶1-2; Answer ¶¶1-2; (Deemed admitted).
2. Respondent was approved as a practitioner who could issue a patient certification to use medical marijuana and obtained his certification on or about May 18, 2019. NT 85; OSC ¶¶1-2; Answer ¶¶1-2.
3. An approved practitioner, such as Respondent, may issue a certification to a patient to use medical marijuana only after determining based on a "patient consultation" that the patient has a serious medical condition and is under the practitioner's care for the serious medical condition. OSC ¶2; Answer ¶2; (Deemed admitted). *See also* 28 Pa. Code § 1181.27.
4. "Patient consultation" is defined as a "complete in-person examination of a patient and the patient's health care records at the time a patient certification is issued by the practitioner." OSC ¶3; Answer ¶3; (Deemed admitted). *See also* 28 Pa. Code § 1181.21.
5. Due to the COVID-19 pandemic, the requirement in 28 Pa. Code § 1181.21to conduct in-person examinations has been temporarily suspended; however, the requirement to review the patient's health care records prior to issuing a certification has not. OSC ¶6; Answer ¶6; NT 85-86.
6. The Department Regulation at 28 Pa. Code §1181.27 pertinently provides that:

> (a) A practitioner may issue a patient certification to a patient if the following conditions are met…
>
> > (2) The practitioner has determined the patient is likely to receive therapeutic or palliative medical benefit from the use of medical marijuana based upon the practitioner's professional opinion and review of the following:

(i) The patient's prior medical history as documented in the patient's health care records ***if the records are available for review.***

(Emphasis added.)

7. On [redacted] Respondent conducted a remote consultation with patient [redacted] OSC ¶8; Answer ¶8; (Deemed admitted).

8. [redacted] has a significant number of medical issues, including [redacted] NT 55.

9. Respondent did not ask to examine [redacted] health care records. OSC ¶9; Answer ¶9; (Deemed admitted).

10. In the course of the consultation, [redacted] offered to provide her health care records for review, but Respondent declined and advised her to "upload when you can." OSC ¶10; Answer ¶10; (Deemed admitted).

11. During the online consultation, [redacted] gave details about her medication history and conditions to Respondent. *Passim.*

12. Respondent described [redacted] as an exceptional medical historian. NT 114.

13. After conducting the consultation, Respondent immediately issued [redacted] a certification for medical marijuana without having reviewed her health care records. OSC ¶11; Answer ¶11; (Deemed admitted).

14. [redacted] had health care records in her filing cabinet at her residence and online at [redacted] NT 25.

15. [redacted] offered during the consultation to "bring up on my screen [redacted] to provide proof of her medical conditions. NT 26.

16. [redacted] did not otherwise provide her online health care records to Respondent because she did not know where to upload them. OSC ¶12; Answer ¶12; (Deemed admitted); NT 53-54.

17. [redacted] had not uploaded the records as of the date of the hearing. NT 66.

18. [redacted] is still Respondent's patient. NT 128-129.

19. Respondent cannot access [redacted] online health care records from [redacted]. NT 149-151.

20. Respondent was given notice of the charges and an opportunity to be heard. NT 1-161; Case file.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter. Findings of Fact Nos. 1-3.
2. Respondent was given notice of the charges and an opportunity to be heard in accordance with Section 504 of the Administrative Agency Law 2 Pa. C.S. §504. Finding of Fact No. 21.
3. Respondent violated 28 Pa. Code §1181.26. Findings of Fact Nos. 1-20.

DISCUSSION

Admitted Facts

As referenced above, certain facts were previously deemed admitted: On [redacted] Respondent conducted a remote medical consultation with [redacted] OSC and Answer, ¶8. Respondent did not ask to examine her health records before providing her with a certification for medical marijuana. OSC and Answer, ¶9. During the consultation [redacted] offered to provide her health care records for review, but Respondent declined and advised her to "upload when you can." OSC and Answer, ¶10 Respondent issued her a certification for medical marijuana immediately after the consultation on [redacted] without reviewing her health care records. OSC and Answer, ¶11. To date [redacted] has not provided health care records to Respondent. OSC and Answer, ¶12.

Respondent's Motion to Dismiss

At the hearing Respondent moved to dismiss the case because the Commonwealth, which has the burden of proof, did not intend to present any factual evidence. NT 7. However, the Commonwealth had already prevailed in having certain facts deemed admitted and the purpose of the hearing was to determine what sanctions, if any, are appropriate. This is a matter that could be addressed either by the Department presenting factual evidence in its case in chief with regard to sanctions, or by allowing the Respondent to present mitigating evidence and then cross examining his witnesses. The latter option was employed. Therefore, Respondent's motion to dismiss will be denied.

Merits

Initially, it is noted that while certain averments were erroneously deemed by Respondent as conclusions of law, comments following those "denials" were not deemed denied but were

viewed as mitigating factors (*i.e.*, were legal defenses or additional factual allegations) that could be and were brought up at the hearing. Appropriate factual findings are made regarding those allegations.

The authority for the Department to take the action at issue here is found in 28 Pa. Code §1181.26, which states:

> **Denial, revocation or suspension of a practitioner registration.**
>
> ...
>
> (e) The Department ***may*** revoke or suspend the registration of a practitioner for any of the following:
>
> (1) A violation of the act or this part.
>
> (2) A violation of an order issued under the act or this part.
>
> (3) **A violation of a regulation promulgated under the act.**
>
> (4) For conduct or activity that would have disqualified the practitioner from receiving a registration.
>
> (5) Pending the outcome of a hearing in a case which the practitioner's registration could be suspended or revoked.

(Emphasis added).

The regulation Respondent is alleged to have violated is 28 Pa. Code §1181.27, which pertinently provides:

> **Issuing patient certifications.**
>
> (a) A practitioner may issue a patient certification to a patient if the following conditions are met:
>
> (1) The practitioner has determined, based upon a patient consultation and any other factor deemed relevant by the practitioner, that the patient has a serious medical condition and has included that condition in the patient's health care record.
>
> (2) The practitioner has determined the patient is likely to receive therapeutic or palliative medical benefit from the use of medical marijuana based upon the practitioner's professional opinion and review of the following:

> **(i) The patient's prior medical history as documented in the patient's health care records *if the records are available for review.***
>
> (ii) The patient's-controlled substance history if the records are available in the Prescription Drug Monitoring Program.

(Emphasis added).

It seems clear to the undersigned that the purpose of requiring a provider to review a patient's health care records before issuing a certificate for medical marijuana is twofold: to be certain that a person is not obtaining controlled substances from numerous providers simultaneously and to be certain that the patient is not taking other medication or suffering from other medical conditions for which the prescribing of medical marijuana would be contraindicated. As such, patients who need this medication are tasked with providing this information and those issuing certifications are tasked with reviewing it.

The precise legal question here is whether the patient's health care records were ***"available for review"*** as that phrase is used in the regulation.

Respondent contends that they were not. He also asserts that there are other avenues through which substance abuse could have been confirmed, one of which is through Prescription Drug Monitoring Program computer access, as recognized in Section (a)(2)(ii) of 28 Pa. Code §1181.27. He argues that the "legislature, by allowing MMA card issuance upon discretionary review of patient's PDMP—if available but not mandatory—allows physicians to use their expertise and not solely rely on old government computers or incomplete and inaccurate medical records." Brief p. 20. First, the cite is to a ***regulation***, not a statute and, therefore, this source does not represent the intent of the General Assembly, but the Department. Second, this assertion assumes facts not in evidence. Third, merely because there is another way to confirm some patient information, it does not mean that consulting more than one source is undesirable or prohibited.

The Department admits that the word "available" is undefined in the regulations but asserts that when turning to a common dictionary definition it means "present or ready for immediate use" and "accessible" or "obtainable." It is not in dispute that [redacted] *had* medical records and that they existed in paper and electronic format. Specifically, she admitted that they were in her filing cabinet at her residence and on her patient portal with her provider. NT 25, 113. It is also not disputed that they had not been uploaded at the time of the consultation. Finally, there is no dispute that ***Respondent*** could not upload them. Only the patient can do so. NT 150.[2]

Normally the question of whether health care records are available under such circumstances might be thorny one. *However*, the undisputed facts here show that [redacted] ***offered to share her computer screen with Respondent during their video consultation so he could see the records and he declined the offer***. OSC ¶10 and Answer ¶10; NT 26. Thus, the records were proffered to him and, therefore, were "available" to him; he simply declined to view them. Accordingly, Respondent violated the regulation, as charged.

Sanctions

As noted earlier, Regulation 1181.26 provides that the Department "***may*** revoke or suspend the registration of a practitioner…." (Emphasis added.) The term "may" ordinarily means that an action is discretionary, not mandatory. *MFW Wine Co., LLC v. Pa. Liquor Control Bd.*, 231 A.3d 50, 55 n.8 (Pa. Cmwlth. 2020). Hence, in determining the issue of sanctions, it is appropriate to consider any mitigating evidence that exists in the record.

---

[2] [redacted] testified that she did not know where to upload them. NT 54. She further stated that Respondent did not instruct her to do so. NT 66-67. Respondent stated he told her to upload them "when you can." NT 112. It is not disputed that he issued the certification without looking at them.

Respondent testified that he did obtain a detailed oral medical history from Respondent and that he was impressed with the depth of her knowledge regarding the particulars of her medical conditions. This is borne out by the record, which establishes [redacted]horough knowledge of her various conditions and medications. In addition, Respondent was charged with only the one violation in the Order to Show Cause and there was no allegation there that he routinely did not check patient health care records before issuing certificates. There is also nothing that would indicate that he has had other issues with the certificates he may have issued. It is also not disputed that the certification was a proper one for someone with [redacted] medical condition.

Another consideration is that the regulation does not advise a practitioner what to do if existing medical records are not provided by the patient. Given that a patient may be suffering[3] and that the medical marijuana could alleviate that, there is some basis for a medical practitioner to want to provide appropriate relief expeditiously.

What will ***not*** be considered as mitigating, however, is that nothing untoward happened to [redacted] when she took the medical marijuana. Such a postmortem analysis is extremely unwise.

The Department seeks to revoke Respondent's certification. It argues that there are instances where revocation is *required, i.e.*, where the certificate holder accepts money other than for the usual fee for certification service, has a financial interest in a medical marijuana organization or advertises his or her services. *See* Sections 402(a) and (b) of the Act. 35 P.S. §10231.402(a), (b). It asserts that these prohibitions have nothing to do with patient safety but are, nonetheless, situations where revocation is mandated and that in this case, where patient safety could be directly in issue, the sanction should not be less harsh.

---

[3] [redacted]poke of [redacted] NT 34-35.

It is true that the cited prohibitions do not focus specifically on patient safety, but instead on personal gain. However, these prohibitions are geared toward curtailing broad practices undertaken for gain, and that could, if permitted to exist, encourage unscrupulous practices overall, affecting patient safety for large numbers of persons. Here, there no evidence that Respondent gained financially other than perhaps to obtain his regular fee, a point on which the record is silent. Further, there was no allegation in the Order to Show Cause that Respondent engaged in a longstanding or repeated practice of not reviewing patient health care records before issuing certifications. In short, this matter involves one case, one patient and a question of first impression. Therefore, on balance, considering all these factors, a suspension of Respondent's registration for a period of three months seems a more appropriate sanction than a revocation.

Accordingly, the following proposed order will be issued:

COMMONWEALTH OF PENSYLVANIA
DEPARTMENT OF HEALTH

Department of Health,	:	
Office of Medical Marijuana,	:	
	:	
Petitioner,	:	
	:	
v.	:	**Docket No. MM 21-003 AA**
	:	
Theodore Colterelli, D.O.,	:	
	:	

PROPOSED ORDER

NOW, March 11, 2022, upon consideration of the foregoing Findings of Fact, Conclusions of Law and Discussion, it is **ORDERED** that Respondent's practitioner registration shall be **SUSPENDED FOR THREE MONTHS.**

Respondent shall, relinquish his certification and any other documents authorizing him to issue certifications for medical marijuana in Pennsylvania within ten days of the entry date of the final order in this matter, by forwarding it to the following address:

Attention: Justine E. Wayne, Esq.
Room 825 Health & Welfare Bldg.
625 Forster St.
Harrisburg, PA 17120

At any time after the passage of three months from the entry date of the final order, Respondent may write to the Department and ask for the return of his certificate and other documents he surrendered, and his certification shall be reinstated under the administrative terms and conditions the Department has established for reinstatement of a suspended certificate.

/s/ Debra Sue Rand
Debra Sue Rand
Chief Hearing Examiner

For the Department

Justin E. Wayne, Esq.
Carol J. Mowery, Esq.
Room 825 Health & Welfare Bldg.
625 Forster St.
Harrisburg, PA 17120

For Appellant

Richard Q. Hark, Esq.
Hark & Hark
1835 Market Street, Suite 2626
Philadelphia, PA 19103

Docket Clerk

Louise Foreman
Room 825 Health & Welfare Bldg.
625 Forster St.
Harrisburg, PA 17120

DATE OF MAILING: March 14, 2022

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,
OFFICE OF MEDICAL MARIJUANA,
Petitioner

v.

THEODORE COLTERELLI, D.O.,
Respondent

Docket No. MM 21-003 AA

ORDER

AND NOW, this 21st day of October, 2022, after careful review and consideration, it is hereby ordered that the attached Proposed Report and Order is adopted in its entirety. It is further ORDERED that the Department of Health, Office of Medical Marijuana's Motion to File Under Seal is GRANTED. The docketing clerk is directed to file the redacted public version of the record to the docket in this case.

Any aggrieved party has fifteen (15) calendar days from the mailing date of this order to request reconsideration or rehearing in accordance with the requirements of 1 Pa. Code § 35.241, available at http://www.pacode.com/secure/data/001/chapter35/s35.241.html . Any party filing a request for reconsideration or rehearing must also serve a copy on the other parties to the case. Any request for reconsideration or rehearing must be received within fifteen (15) calendar days from the mailing date of this order by Docketing Clerk, Pennsylvania Department of Health, Office of Legal Counsel, Room 825 Health and Welfare Building, 625 Forster Street, Harrisburg, PA. 17120-0701.

Any aggrieved party may also file an appeal to the Commonwealth Court of Pennsylvania within thirty (30) days of the mailing date of this order. The appeal must be filed with the Clerk of the Commonwealth Court of Pennsylvania, 601 Commonwealth Avenue Suite 2100, P.O. Box

69185, Harrisburg, PA 17106-9185. It may also be filed electronically. Instructions for filing an appeal to Commonwealth Court are available at http://www.pacourts.us/courts/commonwealth-court/. Any appeal to Commonwealth Court must be served on all parties to this case, as well as the Docketing Clerk at the address listed above.

The filing of a request for reconsideration does not stop the time frame to file an appeal to Commonwealth Court. If a request for reconsideration is denied, an aggrieved party will lose its ability to file an appeal to Commonwealth Court after the expiration of thirty (30) days from the mailing date of this order.

October 21, 2022
Mailing Date

Cindy Findley,
Deputy Secretary for Health Promotion
and Disease Prevention

cc: Joanna Waldron, Esq., Assistant Counsel, Pennsylvania Department of Health
Mariah Turner, Esq., Assistant Counsel, Pennsylvania Department of Health
Richard Q. Hark, Esq., on behalf of the Respondent

OOR Exhibit 8

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

ED MAHON, **Requester,** **v.** **PENNSYLVANIA DEPARTMENT OF HEALTH,** **Respondent.**	**Docket No. AP 2022-2503**

DEPARTMENT OF HEALTH'S RESPONSE AND LEGAL ARGUMENT IN SUPPORT OF ITS DENIAL OF ED MAHON'S RIGHT-TO-KNOW LAW REQUEST

Pursuant to the Office of Open Records' (OOR) October 31, 2022 letter, sections 1101 and 1102 of the Right-to-Know Law (RTKL), 65 P.S. §§ 67.1101-67.1102, and OOR's *Appeal Process – Interim Guidelines*, the Department of Health (Department) files this Brief in Support of its Final Response to the RTKL Request of Ed Mahon (Mahon).

Procedural and Factual History

This appeal arises from the Department's denial of a written request for records under the RTKL, 65 P.S. § 67.101, *et seq.*, filed by Mahon. The Department received request number DOH-RTKL-MM-092-2022 on October 11, 2022, Mahon requested:

1. Aggregate data of the number of medical marijuana certifications issued by Theodore Colterelli from April 28, 2021 to the present.

2. Aggregate data of the number of medical marijuana certifications issued by Theodore Colterelli from April 1, 2022 to the present.

3. Aggregate data of the number of medical marijuana certifications issued by Theodore Colterelli from Jan. 1, 2017 to the present.

4. I am requesting a database of all medical marijuana certifications issued by Theodore Colterelli, including the date the certification was issued. I am requesting this information with the identity of patients removed or redacted. I am requesting this information from Jan. 1, 2017 to the present.[1]

On October 17, 2022, the Department's Agency Open Records Officer (AORO) mailed Mahon the Department's Final Response (Final Response) denying the request on the basis that the records sought are confidential under the Medical Marijuana Act, 35 P.S. § 10231.101 *et seq.* ("The Medical Marijuana Act" or "The Act"). On October 28, 2022, Mahon appealed the Department's denial.

As set forth more fully below, the requested records are not public records and the OOR should affirm the Department's denial of Mahon's request.

[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.

Argument

Disclosure of the requested records is prohibited by the Medical Marijuana Act

The RTKL compels the disclosure of public records (65 P.S. §67.301) and presumes that records in the possession of Commonwealth agencies are public records, unless the records in question are, *inter alia*, "exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree." 65 P.S. §§ 67.102, 67.305. "[T]he presumption that a Commonwealth agency's record is a public record subject to public access depends, in relevant part, on whether the record 'is exempt from disclosure under any other state law.'" *Advancement Project v. Pa. Dep't of Transp.*, 60 A.3d 891 (Pa. Comwlth. 2013) (OOR cannot order the disclosure of records confidential under the Motor Vehicle Code).

In this instance, the records sought are exempt from disclosure under the RTKL because they are confidential under another State law: the Medical Marijuana Act, 35 P.S. § 10231.101, *et seq.* Section 302 of the Medical Marijuana Act distinguishes between confidential and public information as follows:

> **(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.

(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 (emphasis added).

Our Supreme Court recently affirmed the supremacy of laws governing the confidentiality of records over the RTKL in *Energy Transfer v. Friedman & Pa. Public Utility Comm'n v. Friedman*, 265 A.3d 421 (Pa. 2021), by upholding the denial of a request for records designated as confidential pursuant to the Public Utility Confidential Security Information Disclosure Protection Act, 35 P.S. §§

2141.1-2141.6 ("CSI Act"). The nature of the records in *Energy Transfer* was conclusively established by the CSI Act, which superseded the RTK and rendered the records confidential. [2] Likewise, here, the legislature has specifically deemed "certifications issued by practitioners" confidential and therefore not subject to disclosure under the RTKL. *See* 35 P.S. § 10231.302(a)(2). Under the Rules of Statutory Construction, "[w]hen 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(c). A court may not "order the disclosure of materials that the legislature has explicitly directed be kept confidential" no matter how compelling the interests favoring disclosure. *Commonwealth v. Moore, 584 A.2d 936, 940 (Pa. 1991)*; *See also Hannis ex rel Hannis v. Sacred Heart Hosp.*, 789 A.2d 368, 371-72 (Pa. Cmwlth. 2001) (information made confidential by statute, *i.e.*, the DPCL, may not be released "for use outside the scope of that statutory mandate.")

Section 302 of the Medical Marijuana Act unambiguously precludes disclosure of "[c]ertifications issued by practitioners" by including such records among the very list of examples of confidential materials. *35 P.S. § 10231.302(a).* Section 302 also identifies records that are public under the Medical Marijuana Act. *See* 35 P.S. § 10231.302(b). Notably, this list does not include the records subject to

[2] The Court declined to rule that the OOR lacked authority or jurisdiction in the matter but nonetheless held that the applicable confidentiality analysis was to be conducted under the CSI Act.

the instant appeal, *i.e.*, patient certifications, and does not make any exception or provision for the release of an "aggregated" version of such information, as discussed more fully below. *See id.* As such, the records sought by Mahon fall squarely within the definition of confidential information in the Act and do not constitute records deemed public, regardless of form. *See id.*

Because the RTKL requires only the disclosure by agencies of public records (65 P.S. §§ 67.102, 67.301.) and yields to state and federal laws relating to the public or non-public nature of the record requested (65 P.S. §67.306), the RTKL cannot compel the release of the requested records. *See, e.g., Reese v. Pennsylvania Union Reform*, 173 A.3d 1143 (Pa. 2017) (the RTKL cannot change the nature of records, and even records that are public are subject to Constitutional privacy considerations). The RTKL does not "supersede or modify the public or non-public nature or a record or document established in Federal or State law"; the RTKL cannot transform an otherwise-protected document into a public record. 65 P.S. §67.306. Where the RTKL conflicts with any state or federal law, it simply does not apply. *See* 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"); *see also Pennsylvanians For Union Reform*, 138 A.3d 727, supra, (RTKL yields to the Voter Registration Act in determination of public or non-public nature of voter records); *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 151 A.3d 1196, 1206 (Pa.

Cmwlth. 2016); *Sherry v. Radnor Twp. School. Dist*, 20 A.3d 575 (Pa. Cmwlth. 2011) (Family Educational Rights and Privacy Act supersedes the RTKL); *Dep't of Labor and Indus. v. Heltzel,* 90 A.3d 823 (Pa. Cmwlth. 2014) (Emergency Planning and Community Right-to-Know Act supersede the RTKL).

If disclosure of a record is prohibited by law, such as in this case by the Medical Marijuana Act, the Department may not disclose the record regardless of any provision in the RTKL. *See, e.g., Heavens v. Pa, Dep't of Env. Prot.*, 65 A.3d 1069, 1077 (Pa. Cmwlth, 2013) ("The RTKL does not give agencies the discretion to disclose privileged records."). Because the Medical Marijuana Act prohibits the disclosure of "[c]ertifications issued by practitioners" and even imposes criminal penalties for such disclosures, the Department is constrained by the Act to deny the request and defend the within appeal. *See* 35 P.S. § 10231.302.

The RTKL Exception for Aggregated Data is Inapplicable

Unlike the RTKL, the Medical Marijuana Act does not permit the disclosure of otherwise confidential information merely because it is in an aggregated form. *See id.; cf.* 65 P.S. 67.708(d) [3]. As the Commonwealth Court recently clarified, the RTKL "aggregated data" exception cannot be grafted onto other, more narrowly

[3] Although the RTKL allows for the disclosures of aggregated versions of many otherwise exempt records, not all aggregated data is public even under the RTKL; the aggregated versions of records exempt under 708(b)(1), (2), (3), (4), and (5) remain exempt from public disclosure regardless of aggregation. *See id.*

tailored laws specifically governing relevant records. *See Pa. Dep't of Health v. Ed Mahon and Spotlight PA (Office of Open Records),* 1066 C.D. 2021 at *8, *fn 10* [4] ("we reject the contention of Respondents that the provision relating to aggregate data in the RTKL…must be read in *pari materia*…[t]he RTKL is clear; state statutes that designate the 'public or nonpublic nature of a record' *supersede the RTKL and its disclosure mandate.*")(emphasis added). Where the legislature has addressed the confidentiality of records, it is not appropriate to consider whether such records should be released or withheld under any provision of the RTKL; the analysis should be conducted solely under the applicable statute. *See id.* The Medical Marijuana Act does not contain an applicable exception for aggregated records and none can be inferred or created.

Conclusion

For the reasons stated above, the OOR should affirm the Department's denial of Mahon's request and deny the instant appeal.

Respectfully submitted,

/s/ Anna LaMano

Anna LaMano
Assistant Counsel

[4] Per order of October 18, 2022, upon motion of the Department, this Memorandum Opinion filed August 19, 2022, has been ordered reported.

Attorney I.D. 90308

Office of Legal Counsel
Department of Health
825 Health and Welfare Building
625 Forster Street
Harrisburg, PA 17120
Phone: (717) 783-2500

Date: November 21, 2022

OOR Exhibit 9

I am requesting an extension to respond to argument's raised by the agency in its position statement, filed today. I am requesting until COB on Monday, Nov. 28.

OOR Exhibit 10

pennsylvania
OFFICE OF OPEN RECORDS

November 22, 2022

Via Email Only:

Ed Mahon
Spotlight PA
228 Walnut St.
#11728
Harrisburg, PA 17108
emahon@spotlightpa.org

Via Email Only:

Danica Hoppes
Agency Open Records Officer
Pennsylvania Department of Health
625 Forster Street
825 Health and Welfare Building
Harrisburg, PA 17120
PADOHRTK@pa.gov

RE: Submission Period Extended - Mahon and Spotlight PA v. Pennsylvania Department of Health OOR Dkt. AP 2022-2503

Dear Parties:

I write in regard to the above appeal. TheRequester requests additional time to supplement the record to respond to arguments raised in the Department's submission. The extension request is GRANTED. Both parties may submit supplemental information, if desired, until the end of the day (**11:59:59 p.m.**) on November 28, 2022. Because the Department bears the burden of proof in RTKL appeals, I will do my best to accomodate if the Department needs additional time. Further, in order to accommodate this request, the Final Determination issuance date will likewise be extended by one week to December 19, 2022.

Thank you for your attention to this matter.

Sincerely,

/s/ Erin Burlew

Erin Burlew

OOR Exhibit 11

Good morning: I was sick yesterday and am still sick today. Could I get an extension until end of the day Dec. 5? Thank you.

OOR Exhibit 12

pennsylvania
OFFICE OF OPEN RECORDS

November 29, 2022

Via Email Only:

Ed Mahon
Spotlight PA
228 Walnut St.
#11728
Harrisburg, PA 17108
emahon@spotlightpa.org

Via Email Only:

Danica Hoppes
Agency Open Records Officer
Pennsylvania Department of Health
625 Forster Street
825 Health and Welfare Building
Harrisburg, PA 17120
PADOHRTK@pa.gov

RE: Submission Period Extended - Mahon and Spotlight PA v. Pennsylvania Department of Health OOR Dkt. AP 2022-2503

Dear Parties:

I write in regard to the above appeal. TheRequester requests additional time to supplement the record. The extension request is GRANTED. Both parties may submit supplemental information, if desired, until the end of the day (**11:59:59 p.m.**) on December 5, 2022. The final determination issuance date will be likewise extended. As I am scheduled to be out of the office the week of December 27, 2022, absent the Requester objecting, the issuance date will be January 4, 2023.

Thank you for your attention to this matter.

Sincerely,

/s/ Erin Burlew

Erin Burlew

OOR Exhibit 13

1. *The department's Energy Transfer v. Friedman argument is not relevant to this case.*

Regarding the department's citation of *Energy Transfer v. Friedman,* the department relies on a false interpretation of my argument. My argument is not that the Right-to-Know Law supersedes confidentiality provisions of another law. My argument is that the department has failed to prove these records are in fact confidential.

In Department of Health v. Ed Mahon and Spotlight PA, Commonwealth Court wrote the following:

> *"The Department also argues in a footnote that several other confidentiality provisions in Pennsylvania Law would be 'rendered useless by the OOR's wholesale provision of aggregate information' …This argument misses the point. It is not the aggregation of the data that makes it subject to disclosure, but rather the narrow limitation of the confidentiality provision to patient information, which we have found not to apply to the requested data."*
> (PA Department of Health v. Ed Mahon and Spotlight PA, No. 1066 C.D. 2021)

2. *The department falsely claims it is prohibited from disclosing the information.*

In my exhibits, I included evidence demonstrating that the Department of Health has in fact released this very information in at least once case — specifically the department publicly stated that Walter M. Stein had issued 26 certifications in two-and-a-half years. So the true question before the Office of Open Records is not whether the department can release the information — it can. But the question is whether the medical marijuana law allows the agency to deny access to this information. It's my position that the medical marijuana law does not deny access to this information.

3.

OOR Exhibit 14

pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
ED MAHON AND SPOTLIGHT PA, **Requester**	:	
v.	:	**Docket No.: AP 2022-2503**
PENNSYLVANIA DEPARTMENT OF HEALTH, **Respondent**	:	

FACTUAL BACKGROUND

On October 11, 2022, 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:

> 1. Aggregate data of the number of medical marijuana certifications issued by Theodore Colterelli from April 28, 2021 to the present.
>
> 2. Aggregate data of the number of medical marijuana certifications issued by Theodore Colterelli from April 1, 2022 to the present.
>
> 3. Aggregate data of the number of medical marijuana certifications issued by Theodore Colterelli from Jan. 1, 2017 to the present.
>
> 4. I am requesting a database of all medical marijuana certifications issued by Thomas Colterelli, including the date the certification was issued. I am requesting this information with the identity of patients removed or redacted. I am requesting this information from Jan. 1, 2017 to the present.

On October 17, 2022, the Department denied the Request pursuant to the Medical Marijuana Act ("Act"). 35 P.S. § 10231.302.

On October 28, 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 November 21, 2022, following several extensions for the Requester, 65 P.S. § 67.902(b), the Requester submitted a position statement, arguing that the OOR has previously ordered the Department to release this type of information and that the Department has provided this information before in public testimony. In support of this argument, the Requester also 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 November 21, 2022, the Department submitted a position statement, arguing that the records are made confidential by the Act as certifications issued by practitioners and that the aggregated data exception of the RTKL is not applicable because the exception "cannot be grafted onto other, more narrowly tailored laws," and citing to *Mahon v. Pa. Dep't of Health v. Mahon and Spotlight PA*, 1066 C.D. 2021 at *8, *fn 10* ("we reject the contention of Respondents that the provision relating to aggregate data in the RTKL…must be read *in pari materia*…[t]he RTKL is clear; state statutes that designate the 'public or nonpublic nature of a record' supersede the RTKL and its disclosure mandate."").

On December 5, 2022, the Requester submitted a follow up statement reiterating his arguments.

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 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)).

Items 1-3 of the Request seeks the number of medical marijuana certifications issued by Thomas Colterelli for specific time periods; Item 4 of the Request seeks records showing de-identified patient information for his 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 (emphasis added). The issue on appeal is whether or not the responsive records fall within the Act's prohibition on release of "[c]certifications issued by practitioners" or "[a]ll other practitioner registration information[.]" The Department argues that the data sought by the Request implicates 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, 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).[1] 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.").

Items 1-3 of the Request seeks a count of certifications issued by a particular practitioner. In this case, aggregating data by provider is sufficient to satisfy the section of the Act's

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

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 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 a particular 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.[2] Therefore, the records sought in Items 1-3 of the Request are not confidential under the Act, and the Department must provide them to the extent that such records exist.

Meanwhile, Item 4 of the Request seeks a spreadsheet of individual certifications, including "the date the certification was issued." Item 4 of the Request explicitly asks the Department to de-identify the certification data, but Item 4 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 Items 1-3 of the instant Request are seeking aggregate numbers relating only to a practitioner; Item 4 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 4 of the Request seeks records rendered confidential by the Act, and the Department was not required to provide them.

[2] 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*.

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 Items 1-3 of the Request 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.[3] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: January 3, 2023

/s/ Erin Burlew

Erin Burlew, Esq.
Senior Appeals Officer

Sent via portal to: Ed Mahon; Anna LaMano, Esq.

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