

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RECEIVED

**PENNSYLVANIA DEPARTMENT OF
HEALTH,**

Petitioner,

v.

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

SEP 30 2021

OFFICE OF OPEN RECORDS

No. 1066 C.D. 2021

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

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PETITION FOR REVIEW

AND NOW comes the Pennsylvania Department of Health (Department), by and through its undersigned counsel, and petitions this Honorable Court for review of the September 2, 2021 Final Determination (Final Determination) issued by the Office of Open Records (OOR) in Docket Number AP 2021-1296. In accordance with Pa.R.A.P. 1513, the Department provides the following:

Statement of Jurisdiction

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

Parties

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

3. Respondent is Ed Mahon, on behalf of Spotlight PA (Mahon), a private citizen who made the underlying records request pursuant to the RTKL.

Factual and Procedural Background

4. Mahon filed a request under the RTKL, seeking in pertinent part, data and policies related to medical marijuana certifications based on applicants' serious medical conditions.
5. The Department denied the request for data based on the confidentiality provision of the Medical Marijuana Act ("Act") and thus the RTKL.
6. The Department denied the request for policies based on the non-existence of certain records.
7. Mahon filed a timely appeal of the Department's denial, and both parties submitted position statements.
8. On September 2, 2021, the OOR issued the Final Determination, holding that the aggregate data requested in Item 1 is not confidential under Section 302 of the Act and that the Department failed to prove that the records responsive to Item 2 do not exist.

Determination Sought to be Reviewed

9. The OOR's September 2, 2021 Final Determination and accompanying Order, which directed the Department to provide information that is confidential

pursuant to the Act and which additionally directed the Department to provide records where no records exist.

Objections to the Determination

10. The OOR erred in determining that the confidentiality provision in the Act did not apply to the requested records.
11. The OOR erroneously disregarded competent evidence in determining that the Department failed to prove that the Department had no responsive records.

Relief Sought

The Department respectfully request this Honorable Court reverse the OOR's Final Determination issued September 2, 2021.

Respectfully submitted,

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*Attorneys for Petitioner
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Date: 9/30/2021

CERTIFICATE OF COMPLIANCE

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

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

EXHIBIT A



pennsylvania
OFFICE OF OPEN RECORDS
FINAL DETERMINATION

IN THE MATTER OF :
 :
ED MAHON AND SPOTLIGHT PA, :
Requester :
 :
v. : **Docket No: AP 2021-1296**
 :
PENNSYLVANIA DEPARTMENT OF :
HEALTH, :
Respondent :

INTRODUCTION

Ed Mahon, on behalf of 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 data and policies related to medical marijuana certifications. The Department denied the Request, arguing that the requested information is confidential under the Medical Marijuana Act and certain records do not exist. 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 additional action as directed.

FACTUAL BACKGROUND

On June 15, 2021, the Request was filed, seeking:

1. Aggregate data for the number of medical marijuana certification issues for each of the eligible qualifying conditions. As of June 15, 2021, the Department of Health describes the following:

Only patients suffering from one of the following medical conditions can participate in Pennsylvania's medical marijuana program:

- Amyotrophic lateral sclerosis.
- Anxiety disorder.
- Autism.
- Cancer, including remission therapy.
- Crohn's disease.
- Damage to the nervous tissue of the central nervous system (brain-spinal cord) with objective neurological indication of intractable spasticity and other associated neuropathies.
- Dyskinetic and spastic movement disorders.
- Epilepsy.
- Glaucoma.
- HIV/AIDS.
- Huntingdon's disease.
- Inflammatory bowel disease.
- Intractable seizures.
- Multiple sclerosis.
- Neurodegenerative diseases.
- Neuropathies.
- Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, or for which adjunctive therapy is indicated in combination with primary therapeutic interventions.
- Parkinson's disease.
- Post-traumatic stress disorder.
- Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain.
- Sickle cell anemia.
- Terminal illness.
- Tourette syndrome.

2. Any written policies or procedures describing how the Department of Health tracks the use of its medical marijuana program, including which qualifying conditions are certified. The Department of Health press office in a June 11 email indicated that it does track some of this information.

On June 23, 2021, the Department denied the Request, arguing that the records responsive to Item 1 are confidential under the Medical Marijuana Act (“Act”), 35 P.S. § 10231.302(a), and records do not exist that are responsive to Item 2.

On July 1, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. 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 July 21, 2021, the Requester submitted a statement in support of the appeal, along with and other information, including a news article, meeting minutes and an email from the Department.

On July 30, 2021, the Department submitted a position statement reiterating its grounds for denial.¹ Relying on *Feldman v. Pa. Comm’n on Crime and Delinquency*, 208 A.3d 167 (Pa. Commw. Ct. 2019), the Department also argues that the Act’s confidentiality provisions apply to aggregated data. In support of its position, the Department submitted the attestation made under penalty of perjury from Lisa Keefer, the Department’s Open Records Officer.

Also, on July 30, 2021, the Requester submitted two statements in support of the appeal and included several exhibits comprised of news articles, meeting minutes and presentations from the Department’s Medical Marijuana Advisory Board (“MMAB”), and an email from a

¹ On July 21, 2021, the OOR granted the Requester’s request to extend the record closing date until July 30, 2021. In addition, the Requester agreed to extend the Final Determination issuance date until September 2, 2021. Subsequently, the OOR granted the Requester’s request to submit a reply to the Department’s submission by setting a briefing schedule establishing deadlines for the Requester’s response submission and the opportunity for the Department to reply to any new issues raised in the submission. See 65 P.S. § 67.1101(b)(1); 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

Department employee that he argues underscore the fact that the Department regularly releases the type of information sought in Item 1. The Requester also submitted the recent OOR Final Determination issued in *John Finnerty and CNHI v. Pennsylvania Dep't of Health*, OOR Dkt. AP 2021-1061, 2021 PA O.O.R.D. LEXIS _____. The Requester further argues that the various documents containing statistical information related to the Act and the Medical Marijuana Program suggest that the policies and procedures sought in Item 2 should exist. In addition, the Requester submitted an attestation made under penalty of perjury attesting to the accuracy and correctness of the attachments provided with the submission.

On August 6, 2021, the Requester submitted a response to the Department's submission, arguing that the case of *Feldman* does not support the Department's argument that even aggregate data is confidential under the Act. The Department did not submit a reply to the Requester's supplemental response.

LEGAL ANALYSIS

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

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the request" and may consider testimony, evidence and documents that are reasonably probative and

relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, 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 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)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The requested aggregate data is not confidential under Section 302 of the Act

The Department argues that the information requested in Item 1 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. The Department reasons that because the information constitutes “information obtained by the [D]epartment relating to patients” under subsection (a) and because it is not included in subsection (b)’s list of public information, it is confidential. In addition, the Department notes that the information sought is “information relating to the patient’s serious

medical condition,” which is an example of a category of information the Act identifies as confidential. *See* 35 P.S. § 10231.302(a)(5). 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(a).

As noted by the Requester, in *Finnerty*, the OOR recently considered the application of the confidentiality provisions of the Act found in section 302, to a request seeking aggregate data. In *Finnerty*, the request sought “records detailing the number of medical marijuana patients in each county.” The Department denied the request, arguing that the information is confidential under the Medical Marijuana Act, 35 P.S. § 1023.302(a). By conducting an examination of the text of the confidentiality provisions and the underlying legislative intent, the OOR determined that when applying Section 302 of the Act to determine the confidentiality of a record, “[a]ny records not confidential under subsection (a), and not otherwise discussed under subsection (b), are still presumed to be public records, and subject to the RTKL. *See* 65 P.S. § 67.305(a).” *Finnerty*, OOR Dkt. AP 2021-1061, p.5. The OOR then applied this reasoning to conclude the following:

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.”² 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.³

² Headings “shall not be considered to control but may be used to aid in the construction thereof.” 1 Pa.C.S. § 1924.

³ Although no longer in effect, the Department’s temporary regulations that it previously enacted concerning the Medical Marijuana Act support this conclusion. Those temporary regulations, while expanding upon the examples of confidential records set forth in 35 P.S. § 10231.302(a), concern information regarding specific patients, caregivers, and applicants and did not cover any information in the aggregate. 28 Pa. Code § 1141.22 (expired May 12, 2020).

Finnerty, AP 2021-1061, pp. 5-6 (footnotes in original).

Turning to the instant matter, in Item 1, the Requester expressly seeks aggregate data namely, “*aggregate data* for the *number* of medical marijuana certification issue[d]” for the list of qualifying conditions found in the Act. The Department asserts that the requested data “falls plainly within the universe of “all information obtained by the department relating to patients, caregivers and other applicants” and is the type of “information relating to the patient’s serious medical condition.” However, as in *Finnerty*, Item 1 expressly seeks data of the medical marijuana certifications by category, not information that would be related to a specific patient, caregiver or applicant certification.

Nevertheless, relying on *Feldman*, the Department asserts that even aggregate data would be confidential under Section 302 of the Act, asking the OOR to compare the language of the respective confidentiality provisions. In *Feldman*, the Court concluded that, despite the fact that the Commission had already disclosed certain pieces of aggregated demographic data, all of the requested information was precluded from disclosure under 709 of the Crime Victims Act (“CVA”). Section 709 of CVA, 18 P.S. § 11.709(a)-(b), provides, in pertinent part:

(a) General rule.--All reports, records or other information obtained or produced by the bureau during the processing or investigation of a claim shall be confidential and privileged....

In *Feldman*, the Commonwealth Court concluded that, because section 709 of the CVA makes clear that **all reports, records or information obtained or produced during the processing or investigation of a claim shall be confidential and privileged**, the information requested is not a public record under the RTKL. 208 A.3d at 175 (emphasis in original). The Court reasoned that, “while most of the RTKL exceptions of 708(b) do not apply when data is aggregated, section 708(b) of the RTKL is inapplicable to records that are exempt from disclosure under another state

law” and because the requested demographic data is exempt from disclosure pursuant to a different state law, *i.e.*, section 709 of the Crime Victims Act” the information is not a public record and the aggregated data should not have been disclosed. *Id.*

However, a comparison of the language set forth in Section 709 of the CVA with the confidentiality language of Section 302 at issue here shows that the CVA is more encompassing in regards to what information must be kept confidential. In Section 709 of the CVA the legislature made clear that *all* reports, records or information obtained or produced for a crime victim’s claims investigation are protected from disclosure. Here, as discussed above, the information protected as confidential under Section 302, is that which “*relat[es] to patients, caregivers and other applicants,*” as compared to *all* information, as indicated in the CVA. The Department has not presented evidence to demonstrate how the requested numbers may be connected to an identifiable patient, caregiver or other applicant. Furthermore, the definitions of “patient” and “caregiver” in Section 102 of the Act both are defined in terms of “individuals,” leading to the reasonable inference that the confidentiality provisions in Section 302 were intended to apply to information relating to “individuals” not aggregated categorical data.⁴ Because of the distinctions in the confidentiality language provisions, the ruling in *Feldman*, is distinguishable and, therefore, not applicable to this matter. As determined in *Finnerty*, based upon the context set forth in Section 302 of the Act, the requested aggregated data sought in Item 1, is subject to public access.

2. The Department has failed to prove that records responsive to Item 2 do not exist

The Department argues that, based upon a search of records, the policies and procedures sought in Item 2 do not exist within its possession, custody or control. In support of the

⁴ We note that the RTKL defines aggregated data as, “[a] tabulation of data which relate to broad classes, groups or categories so that it is not possible to distinguish the properties of individuals within those classes, groups or categories.” *See* 65 P.S. § 67.102.

Department's position, Ms. Keefer attests that she is responsible for responding to RTKL request for the Department and is familiar with the Department's records. Ms. Keefer also attests that, upon receipt of the Request, she "performed a comprehensive search for responsive records in the Department's possession." Ms. Keefer further attests, the following:

As a result of that search, I have been advised that the records sought by [Item] 2 of the underlying [R]equest do not exist, as there are no 'written policies or procedures describing how the Department ... tracks the use of its medical marijuana program ...[.]'

The ... search of the Department's records reveals that the records requested do not exist and are therefore not within the Department's possession, custody or control.

Under the RTKL, a statement made under made under the penalty of perjury may serve as sufficient evidentiary support to sustain an agency's burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

The Requester has submitted examples of news articles, press releases and presentations of the Department's MMAB, which was established pursuant to Section 1201 of the Act, that contain various statistics related to the administration of the Medical Marijuana program. The Requester also submitted a link to the Department's website for an MMAB presentation that reported on survey responses gathered as part of the MMAB's duties to "accept and review comments from individuals and organization[s] about medical marijuana" and the report includes statistical information from the analysis of the data gleaned from the survey, including a statistical breakdown of serious medical condition categories.⁵ The Requester argues that the published

⁵See <https://www.health.pa.gov/topics/Documents/Programs/Medical%20Marijuana/Medical%20Marijuana%20Advisory%20Board%20Presentation%20Feb.%202013.%202020.pdf> (last accessed August 29, 2021).

information and statistics suggest that the Department must track the information sought in Item 2, in some manner.

In response to a request for records, “an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]” 65 P.S. § 67.901. While the RTKL does not define the term “good faith effort,” in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court concluded that:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession.... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors.... After obtaining potentially responsive records, an agency has the duty to review the record and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2013) (internal citations omitted); *see also Rowles v. Rice Twp.*, OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep’t of Homeland Sec.*, 857 F.Supp.2d 129, 138-39 (D.D.C. 2012)). Additionally, the Commonwealth Court has held that an open records officer’s inquiry of agency members may constitute a “good faith effort” to locate records, stating that open records officers have:

a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by [r]equest[e]r.

Mollick v. Twp. of Worcester, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open-records officer’s duty and responsibility” to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

Ms. Keefer attests that she “performed a comprehensive search” for the requested policies and procedures and determined that none exist. However, the Department’s evidence does not provide any details regarding the search, such as the types of records that were searched, what Department offices or bureaus were contacted, or if Ms. Keefer inquired with any Department officials or employees, regarding the existence of responsive records. *Cf. Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294 (finding that a good faith search has been conducted by an agency when it “contact[ed] the Bureau most likely to possess responsive records, ... explain[ing] why that Bureau is most likely to possess those records”); *see also Moore v. Pa. Dep’t of Corr.*, No. 1638 C.D. 2017, 2017 Pa. Commw. Unpub. LEXIS 704 (finding that the agency’s evidence lacked sufficient detail “[t]o support [its] conclusion that ‘no responsive records exist within the [agency’s] custody, possession or control...”). Accordingly, the Department’s evidence regarding the non-existence of the requested Medical Marijuana Program tracking policies or procedure is conclusory. Conclusory statements are not sufficient to demonstrate that the requested records do not exist. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”). Therefore, the Department has not met its burden of proving that records responsive to Item 2 of the Request do not exist. *See Hodges*, 29 A.3d at 1192; 65 P.S. § 67.708(a).

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Department is required to provide all responsive records 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 as per Section 1303 of the RTKL. 65 P.S. § 67.1303. 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.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 2, 2021

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Ed Mahon (via email only);
Christopher Gleeson, Esq. (via email only);
Lisa Keefer (via email only)

⁶ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

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PENNSYLVANIA DEPARTMENT OF
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ED MAHON AND SPOTLIGHT PA,
Respondent

No. ____ C.D. 2020

CERTIFICATE OF SERVICE

I, Kevin Hoffman, Assistant Chief Counsel, Pennsylvania Department of Health, Office of Legal Counsel, hereby certify that on this 30th day of September, 2021, I served a true and correct copy of the Department's Petition for Review upon the person(s) indicated below, which satisfies the requirements of Pa.R.A.P. 121-122 and 1514(c).

Service via First-Class Mail

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