

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT OF
HEALTH,

Petitioner,

v.

JOHN FINNERTY AND
CNHI NEWSPAPERS,

Respondents

No. ___ 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 November 9, 2021 Final Determination (Final Determination) issued by the Office of Open Records (OOR) in Docket Number AP 2021-1833, attached hereto as Exhibit “A”. 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. Respondents are John Finnerty a Commonwealth citizen, and/on behalf of CNHI Newspapers (collectively, “Finnerty”), who made the underlying records request pursuant to the RTKL.

Factual and Procedural Background

4. On August 16, 2021, Finnerty filed a request under the RTKL, seeking records reflecting the number of certifications issued in 2021 by individual physicians who certifies medical marijuana patients pursuant to the Pennsylvania Medical Marijuana Act, 35 P.S. § 10231.101, *et seq.* (“Act”).
5. On August 23, 2021 the Department denied the request on the grounds that the requested records are confidential under the Section 302 of the Act, and therefore exempt from disclosure under the RTKL. *See* 35 P.S. § 10231.302; 65 P.S. §§ 67.102, 67.305, 67.306.
6. Finnerty filed a timely appeal to the OOR of the Department’s denial, and on September 28, 2021 the Department submitted a position statement in support of its denial.
7. On November 9, 2021, the OOR issued a Final Determination, concluding that the requested records are not confidential under the Act and directing the

Department to provide the requested records.

Determination Sought to be Reviewed

8. The OOR's November 9, 2021 Final Determination and accompanying Order issued in Docket Number AP 2021-1833, which directed the Department to provide Finnerty with the responsive records within thirty days.

Objections to the Determination

9. The OOR erroneously disregarded competent evidence, controlling authority, and the plain language of the statute, in determining that the requested records were not confidential under Section 302 of the Act and not exempt under the RTKL.

Relief Sought

The Department respectfully requests this Honorable Court to reverse the OOR's Final Determination issued November 9, 2021.

Respectfully submitted,

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I.D. 51275

By: */s/ Kevin J. Hoffman*
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*Attorneys for Petitioner
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Date: December 8, 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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EXHIBIT A

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 Requester 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).

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No. ____ C.D. 2021

CERTIFICATE OF SERVICE

I, Kevin Hoffman, Assistant Chief Counsel, Pennsylvania Department of Health, Office of Legal Counsel, hereby certify that on this 8th day of December, 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

Liz Wagenseller, Executive Director
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17126

Office of Attorney General
16th Floor Strawberry Square
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John Finnerty
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By: /s/ Kevin J. Hoffman
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*Attorney for Petitioner,
Department of Health*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PA Department of Health, Petitioner v. CNHI : 2021-1833
Newspapers (John Finnerty) :
:

PROOF OF SERVICE

I hereby certify that this 8th day of December, 2021, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served: Attorney General
Service Method: eService
Service Date: 12/8/2021
Address: Strawberry Square
16th Floor
Harrisburg, PA 17120
Phone: (71-7) -787-3391

Served: CNHI Newspapers (John Finnerty)
Service Method: First Class Mail
Service Date: 12/8/2021
Address: 636 Pine Brook Road
Selinsgrove, PA 17870
Phone: --
Representing: Respondent CNHI Newspapers (John Finnerty)

Served: Office of Open Records
Service Method: eService
Service Date: 12/8/2021
Address: 333 Market St.
16th Floor
Harrisburg, PA 17101-2234
Phone: 717--42-5-5991

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

/s/ Anna Ferguson Lamano

(Signature of Person Serving)

Person Serving: Lamano, Anna Ferguson
Attorney Registration No: 090308
Law Firm: City of Reading
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