

December 29, 2021

FILED VIA PACFILE

Michael Krimmel, Esq.
Prothonotary
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. John Finnerty and CNHI Newspapers,
No. 1356 CD 2021

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 2021-1833:

1. The appeal filed by John Finnerty and CNHI Newspapers (“Requester”) to the Office of Open Records (“OOR”), received September 1, 2021.
2. Official Notice of Appeal dated September 8, 2021, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.
3. The Department of Health’s (“Department”) submission dated September 28, 2021.
4. The Final Determination dated November 9, 2021, issued by the OOR.

Prothonotary
Commonwealth Court of Pennsylvania

December 29, 2021
Page Two

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,

A handwritten signature in black ink that reads "Kyle Applegate". The signature is written in a cursive, flowing style.

Kyle Applegate
Chief Counsel

Attachments

cc: See certificate of service

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT
OF HEALTH,

Petitioner,

v.

JOHN FINNERTY and
CNHI NEWSPAPERS

Respondents.

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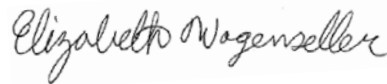
CERTIFICATION OF RECORD

I hereby certify the contents of the record transmitted with this Certification of Record pursuant to Pa.R.A.P. 1952 in *John Finnerty and CNHI Newspapers v. Pennsylvania Department of Health*, OOR Dkt. AP 2021-1833, 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 certify 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 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
Email: OpenRecords@pa.gov

Dated: December 29, 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT
OF HEALTH,

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v.

JOHN FINNERTY and
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CERTIFIED RECORD

Kyle Applegate
Chief Counsel
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
Email: Kyapplegat@pa.gov

December 29, 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT
OF HEALTH,

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JOHN FINNERTY and
CNHI NEWSPAPERS
Respondents.

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: No. 1356 CD 2021
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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the Certified Record upon the following persons via email only:

Yvette M. Kostelac, Esquire
Anna LaMano, Esquire
Kevin J. Hoffman, Esquire
Pennsylvania Department of Health
825 Health & Welfare Building
625 Forster Street
Harrisburg, PA 17120
ykostelac@pa.gov
alamano@pa.gov
kjhoffman@pa.gov

John Finnerty
CNHI Newspapers
636 Pine Brook Road
Selinsgrove, PA 17870
Finnerty1971@gmail.com



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: December 29, 2021

**PENNSYLVANIA DEPARTMENT
OF HEALTH,**

Petitioner,

V.

**JOHN FINNERTY and
CNHI NEWSPAPERS
Respondents.**

No. 1356 CD 2021

TABLE OF CONTENTS - RECORD

John Finnerty and CNHI Newspapers v. Pennsylvania Department of Health,
OOR Dkt. AP 2021-1833

1. The appeal filed by John Finnerty and CNHI Newspapers (“Requester”) to the Office of Open Records (“OOR”), received September 1, 2021.
2. Official Notice of Appeal dated September 8, 2021, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.
3. The Department of Health’s (“Department”) submission dated September 28, 2021.
4. The Final Determination dated November 9, 2021, issued by the OOR.

OOB Exhibit 1

Devenyi, Dylan

From: no-reply@openrecordspennsylvania.com
Sent: Wednesday, September 1, 2021 11:39 AM
To: finnerty1971@gmail.com
Subject: [External] PA Office of Open Records - Appeal Confirmation

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.



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

Name:	John Finnerty
Company:	CNHI Newspapers
Address 1:	636 Pine Brook Rd.
Address 2:	
City:	Selinsgrove
State:	Pennsylvania
Zip:	17870
Phone:	570-246-3463
Email:	finnerty1971@gmail.com
Agency (list):	Pennsylvania Department of Health
Agency Address 1:	625 Forster Street
Agency Address 2:	
Agency City:	Harrisburg
Agency State:	Pennsylvania
Agency Zip:	17120-0701
Agency Phone:	
Agency Email:	PADOHRTK@pa.gov

Records at Issue in this Appeal:	The number of certifications issued this year provided by each physician that certifies medical marijuana patients.
Request Submitted to Agency Via:	e-mail
Request Date:	08/16/2021
Response Date:	08/26/2021
Deemed Denied:	No
Agency Open Records Officer:	Lisa Keefer
Attached a copy of my request for records:	Yes
Attached a copy of all responses from the Agency regarding my request:	Yes
Attached any letters or notices extending the Agency's time to respond to my request:	No
Agree to permit the OOR additional time to issue a final determination:	30 Days
Interested in resolving this issue through OOR mediation:	Yes
Attachments:	<ul style="list-style-type: none"> • DOH-RTKL-MM-035-2021 Finnerty Final Response.pdf • RTKRequestForm816c.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.

August 23, 2021

John Finnerty
CNHI Newspapers
636 Pine Brook Road
Selinsgrove, PA 178770

jfinnerty@cnhi.com

**RE: Right to Know Law Request
DOH-RTKL-MM-035-2021**

Dear Mr. Finnerty:

This letter acknowledges receipt by the Pennsylvania Department of Health (Department) of your written requests for records under the Pennsylvania Right-to-Know Law (RTKL), 65 P.S. §§ 67.101-67.3104. The Department received your request on August 16, 2021. You requested:

The number of certifications issued this year provided by each physician that certifies medical marijuana patients.

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,

A handwritten signature in black ink that reads "Lisa M. Keefer". The signature is written in a cursive, flowing style.

Lisa M. Keefer
Agency Open Records Officer
Pennsylvania Department of Health
625 Forster Street
825 Health and Welfare Building
Harrisburg, PA 17120-0701

Date of Mailing: 08/23/2021



Standard Right-to-Know Law Request Form

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

SUBMITTED TO AGENCY NAME: _____ (Attn: AORO)

Date of Request: _____ Submitted via: ☐ Email ☐ U.S. Mail ☐ Fax ☐ In Person

PERSON MAKING REQUEST:

Name: _____ Company (if applicable): _____

Mailing Address: _____

City: _____ State: _____ Zip: _____ Email: _____

Telephone: _____ Fax: _____

How do you prefer to be contacted if the agency has questions? ☐ Telephone ☐ Email ☐ U.S. Mail

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. 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. Use additional pages if necessary.*

DO YOU WANT COPIES? ☐ Yes, printed copies (*default if none are checked*)

☐ Yes, electronic copies preferred if available

☐ No, in-person inspection of records preferred (*may request copies later*)

Do you want certified copies? ☐ Yes (*may be subject to additional costs*) ☐ 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 ☐ \$100 (or) ☐ \$_____.

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.

*NOTE: In most cases, a completed RTKL request form is a public record.
More information about the RTKL is available at <https://www.openrecords.pa.gov>*

Form updated Feb. 3, 2020

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 12, 2021**.

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 **September 28, 2021**.

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.

September 8, 2021

Via Email Only:

Mr. John Finnerty
CNHI Newspapers
636 Pine Brook Rd
Selinsgrove, PA 17870
finnerty1971@gmail.com

Via Email Only:

Lisa M. Keefer
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 - Finnerty and CNHI Newspapers v. Pennsylvania
Department of Health OOR Dkt. AP 2021-1833**

Dear Parties:

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

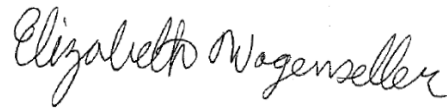
The Office of Open Records (“OOR”) received this appeal under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, et seq. on September 1, 2021. A binding Final Determination (“FD”) will be issued pursuant to the timeline required by the RTKL, **please see the attached information for more information 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
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)).

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 assigned to this case (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.



MEDIATION NOTICE

Appeals before the Office of Open Records (OOR) are stayed for seven business days pending the parties' decision to participate in the OOR's Informal Mediation Program.

The Parties may agree to mediation. To participate in mediation, the Parties must submit a completed copy of the attached Mediation Agreement. If both Parties agree to mediation, the appeal will be further stayed, and the Parties will be contacted by an OOR Mediator to begin the mediation process.

The Parties may decline mediation. If either Party declines to participate in mediation or fails to submit a signed Mediation Agreement within seven business days:

- The record will remain open for seven additional business days for the parties to submit evidence and argument in support of their positions; and
- The OOR will decide the appeal and issue a Final Determination by the date set forth in the attached Official Notice of Appeal.

Even if mediation is declined at this time, the Parties may agree to mediate the dispute at any time prior to a Final Determination being issued, and the appeal will be stayed pending mediation.

Questions. If the Parties have questions about mediation or what to expect during the mediation process, please email the assigned Appeals Officer or visit the OOR's website at <https://www.openrecords.pa.gov/Appeals/Mediation.cfm>.



OOB MEDIATION AGREEMENT

OOB Dkt. No. 2021-1833

Requester Name: Finnerty, John

Agency Name: Pennsylvania Department of Health

The Requester and Agency (collectively, the "Parties") agree to participate in the OOR's Informal Mediation Program to resolve the matters at issue in this appeal.

The Parties agree to participate in the mediation process in good faith. If the Parties agree, there may be more than one session if the Mediator determines that the appeal could be resolved. The Parties acknowledge that mediation sessions are not open to the public and the content of discussions during mediation is confidential and not admissible as evidence in this appeal.

The Parties agree to extend the Final Determination deadline in this appeal for 30 calendar days beyond the conclusion of the mediation process or, if the Requester agreed to grant the OOR a 30-day extension on the appeal form initiating this appeal, the Final Determination deadline will include that extension. If the Requester does not withdraw the appeal, the Mediator will indicate the conclusion of the mediation process in writing if further mediation sessions are not likely to result in a resolution of the dispute. The Parties acknowledge that this Mediation Agreement, the Requester's withdrawal, and the OOR's withdrawal acknowledgement will be included in the OOR's administrative appeal file and subject to public access.

Upon receipt of this completed Mediation Agreement, a Mediator will contact the Parties to establish a mutually convenient date, time and location to conduct a joint mediation session.

Requester Signature: _____ Date: _____

Agency Representative Signature: _____ Date: _____



APPEALS OFFICER:

Kathleen Higgins, Esq.

CONTACT INFORMATION:

Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

FACSIMILE:

(717) 425-5343

EMAIL:

kahiggins@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.



IN THE MATTER OF

**JOHN FINNERTY,
Requester**

v.

**PENNSYLVANIA DEPARTMENT OF
HEALTH,
Respondent**

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Docket No.: AP 2021-1833

This correspondence confirms the above-referenced Requester's agreement to an additional thirty (30) day extension of time to issue a Final Determination in this matter as indicated in the Requester's appeal form. Accordingly, pursuant to 65 P.S. § 67.1101(b)(1), the Office of Open Records will now issue a Final Determination in the above-captioned matter on or before November 12, 2021.

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.

OOR Exhibit 3

From: [LaMano, Anna](#)
To: [Higgins, Kathleen](#)
Cc: finnerty1971@gmail.com; [Skinner, Shea](#)
Subject: Finnerty v DOH, AP 2021-1833
Date: Tuesday, September 28, 2021 12:02:23 PM
Attachments: [OOR Response .pdf](#)

Good afternoon,

Attached please find the Department's response in above referenced appeal.

Respectfully,

Anna LaMano | Assistant Counsel
Pennsylvania Department of Health
Office of Legal Counsel
Room 825 | Health and Welfare Building
625 Forster Street | Harrisburg, PA 17120

www.health.pa.gov

PRIVILEGED AND CONFIDENTIAL COMMUNICATION

The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any use of this information other than by the intended recipient is prohibited. If you receive this message in error, please send a reply e-mail to the sender and delete the material from any and all computers. Unintended transmissions shall not constitute waiver of the attorney-client or any other privilege.

**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS**

**JOHN FINNERTY,
Requester,**

v.

**PENNSYLVANIA DEPARTMENT
OF HEALTH,
Respondent.**

Docket No. AP 2021-1833

**DEPARTMENT OF HEALTH’S RESPONSE AND LEGAL ARGUMENT
IN SUPPORT OF ITS DENIAL OF JOHN FINNERTY’S RIGHT-TO-
KNOW LAW REQUEST**

Pursuant to the Office of Open Records’ (OOR) September 8, 2021 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 John Finnerty (Finnerty).

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 Finnerty. The Department received request number DOH-RTKL-MM-035-2021 on August 13, 2021. Finnerty requested:

[R]ecords showing the number of certifications issued this year provided by each physician that certifies medical marijuana patients.

On August 23, 2021, the Department's Agency Open Records Officer mailed Finnerty 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. § 10231.302. As set forth more fully below, the withheld records are not public records and the OOR should affirm the Department's denial of Finnerty's request.

1. 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.

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

Section 302 of the Medical Marijuana Act expressly and unambiguously precludes disclosure of “[a]ll information obtained by the [D]epartment relating to

patients, caregivers and other applicants,” while providing a non-exhaustive list of examples of confidential materials which includes certifications issued by practitioners. *Id.* Section 302 also identifies what *is* deemed public under the Medical Marijuana Act. Notably, this list of public information does not include the records subject to the instant appeal.

Finnerty seeks “records showing the number of certifications issued this year provided by each physician that certifies medical marijuana patients.” Not only is this information absent from the finite list of public records under the Medical Marijuana Act, but it falls squarely within the definition of confidential information insofar as it is “information obtained by the department relating to patients, caregivers and other applicants.” *Id.*

The Medical Marijuana Act provides that the unlawful disclosure of this information constitutes a third-degree misdemeanor:

(a) Offense defined.--In addition to any other penalty provided by law, an employee, financial backer, operator or principal of any of the following commits a misdemeanor of the third degree if the person discloses, except to authorized persons for official governmental or health care purposes, *any information related to the use of medical marijuana*:

- (1) A medical marijuana organization.
- (2) A health care medical marijuana organization or university participating in a research study under Chapter 19.[1](#)
- (3) A clinical registrant or academic clinical research center under Chapter 20.[2](#)

(4) *An employee of the department.*

(b) Exception.--Subsection (a) shall not apply where disclosure is permitted or required by law or by court order.

35 P.S. § 10231.1307 (emphasis added).

By its express terms, 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); *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 of 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 v. Pennsylvania Dept. of State*, 138 A.3d 727 (Pa. Cmwlth. 2016) (RTKL yields to the Voter Registration Act in determination of public or non-public nature of voter records).

If disclosure of a record is prohibited by law, in this case by the Medical Marijuana Act, the Department may not disclose the record. *See Heavens v.*

Pennsylvania Department of Environmental Protection, 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 “(a) *All* information obtained by the department relating to patients, caregivers and other applicants”, specifically to include “(2) certifications issued by practitioners”, and imposes criminal penalties for such disclosures, the Department is constrained by the Medical Marijuana Act to deny the request and defend the within appeal. *See* 35 P.S. § 10231.302 (emphasis added). Under the Medical Marijuana Act the records at issue do not meet the definition of a public record and the Department cannot release them pursuant to a RTK request.

Conclusion

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

Respectfully submitted,

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Date: September 28, 2021

OOR Exhibit 4



IN THE MATTER OF

**JOHN FINNERTY AND CNHI
NEWSPAPERS,
Requester**

V.

**PENNSYLVANIA DEPARTMENT OF
HEALTH,
Respondent**

Docket No: AP 2021-1833

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.

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).