pennsylvania
OFFICE OF OPEN RECORDS

# OPINION AND ORDER

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| **IN THE MATTER OF** | : | |
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| **CANNABIS SQUARE, LLC,** | : | |
| **Requester** | : | |
| | : | |
| **v.** | : | **Docket No.: AP 2017-1753** |
| | : | |
| **PENNSYLVANIA DEPARTMENT** | : | |
| **OF HEALTH,** | : | |
| **Respondent** | : | |

## INTRODUCTION

Cannabis Square, LLC ("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, among other records, applications for medical marijuana permits. The Department partially denied the Request, directing the Requester to redacted copies of applications posted on the Department's website. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Opinion and Order, the appeal is **stayed**, and the Department is required to take further action as directed.

## FACTUAL BACKGROUND

On July 24, 2017, the Request was filed, seeking, in relevant part:[1]

[1] The Request included nine (9) separate Items. However, for purposes of this Opinion and Order, the OOR refers only to Items 1 and 2.

1. All Applications the Department of Health, Office of Medical Marijuana and all persons acting for or on behalf of Department of Health, Office of Medical Marijuana received for Region 6, with only those redactions authorized by the Pennsylvania Medical Marijuana Act, 35 P.S. §§ 10231.101-10231.2110 ("Act").

2. All documents the Department of Health, Office of Medical Marijuana and all persons acting for or on behalf of Department of Health, Office of Medical Marijuana considered before approving a Permit for Region 6, except as restricted under the Act….

On August 30, 2017, after extending its time to respond by thirty days, *see* 65 P.S. § 67.902, the Department partially denied the Request. While granting access to certain records responsive to other Items, the Department denied Item 1 of the Request and explained that the applications are also responsive to Item 2. With regard to these Items, the Department denied access to unredacted copies of the applications, but referred the Requester to the Department's website for copies of "all redacted applications for medical marijuana grower/processor permits." *See* 65 P.S. § 67.704. The Department explained that it redacted certain information from the applications, and that "[a]ny other redactions were made by the applicant." Regarding the redactions, the Department argued that:

> Individual home addresses, direct phone numbers, driver's license information, dates of birth, passport information, Social Security Numbers, Federal Employer Identification Numbers (FEINs), personal identification numbers (PIN), bank account information, tax information, credit card numbers, and email addresses were redacted pursuant to 65 P.S. §§ 67.708(b)(1)(ii) and (b)(6)(i)…. This information is also exempt from access pursuant to the privacy protections of the 4th Amendment of the United States Constitution and Art. 1, § 8 of the Pennsylvania Constitution, and is therefore excluded from the definition of a "public record." …
>
> The Department may also have redacted records that an applicant marked as confidential proprietary information, but failed to redact the material. *See* 65 P.S. §§ 67.707(b); 67.708(b)(11); and 67.305(a)(1). Finally, records that, if disclosed, would create a reasonable risk of endangering the safety or security of a building; expose or create a vulnerability within critical systems, i.e. building plans or infrastructure records; or jeopardize computer security, were redacted. *See* 65 P.S. §§ 67.708(b)(3), (b)(3)(iii), and (b)(4).

> Regarding the applicant redactions, the Department cannot release information that has been redacted by applicants because "agencies are not permitted to waive a third party's interest in protecting the[ir] records." *Pennsylvania Dep't of Educ. v. Bagwell*, 131 A.3d 638, 650 (Pa. Cmwlth. 2015); *Dep't of Corr. v. Maulsby*, 121 A.3d 585 (Pa. Cmwlth. 2015).

On August 14, 2017, the Requester appealed to the OOR, challenging the Department's response to each of the nine Items of the Request 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 the appeal. *See* 65 P.S. § 67.1101(c). On September 25, 2017, the Department notified the applicants implicated in the Request.[2]

On October 2, 2017, the Department submitted a position statement, arguing, among other things, that the applicants are tasked with supporting any redactions made to the applications. Specifically, the Department explained that "the Department directed all applicants to submit an extra copy of the application, redacted in accordance with the temporary regulations and the RTKL" and that the applicants "redact[ed] what they deemed to be proprietary and confidential or otherwise subject to redaction under the RTKL." However, the Department stated that "the applicant must defend the redactions being challenged by [the Requester]." Along with its position statement, the Department submitted the affidavits, made under penalty of perjury, of John Collins, Director of the Office of Medical Marijuana.

The Requester did not make a submission on 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

[2] Numerous applicants have requested to participate in this appeal. However, as explained below, the participation of the applicants is not necessary at this juncture.

"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." 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*. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id*.

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). 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)).

**1. The permit applications are subject to the RTKL**

Under the Medical Marijuana Act ("Act"), medical marijuana organizations are "authorized to receive a permit to … grow, process or dispense medical marijuana." 35 P.S. § 67.10231.601; *see also* 35 P.S. § 10231.103 (defining "medical marijuana organization" as "[a] dispensary or a grower/processor"). Application for these permits "shall be in a form and manner prescribed by the [D]epartment and shall include" certain statutorily mandated information, along with "[a]ny other information the [D]epartment may require." *See* 35 P.S. § 10231.602; *see also* 28 Pa. Code § 1141.29(b).

Regarding public access to permit applications, the Act states that "[a]pplications for permits submitted by medical marijuana organizations" are "public records and shall be subject to the [RTKL]." 35 P.S. § 10231.302. The Department's regulations elaborate, explaining that applications are public records subject to disclosure under the RTKL, "except to the extent that the application contains any of the information listed in subsection (b)." 28 Pa. Code § 1141.22(a)(1). Subsection (b) states that "[t]he following information is considered confidential, is not subject to the [RTKL] and will not otherwise be released to a person pursuant to court order:

> (8) Other information regarding a … medical marijuana organization not listed in subsection (a) that falls within an exception to the [RTKL], or is otherwise considered to be confidential proprietary information by other law.
>
> (9) Information regarding the physical features or, and security measures installed in, a facility.
>
> (10) Information maintained in the electronic tracking system of a grower/processor and a dispensary."

28 Pa. Code § 1141.22(b). The Department's regulations further instruct that "[a]n applicant shall mark confidential proprietary information as confidential proprietary information prior to submission to the Department." 28 Pa. Code § 1141.22; *see also* 65 P.S. § 67.707(b).

Because the permit applications are "subject to the [RTKL]," rather than explicitly public, the records are not *unconditionally* public, and exemptions found in the RTKL and other statutes/regulations may be raised, as recognized by the Department's regulations. *See Pa. Dep't of Labor & Indust. v. Heltzel*, 90 A.3d 823 (Pa. Commw. Ct. 2014); *see also* 65 P.S. § 67.306; 65 P.S. § 67.3101.1.

**2. The Department did not conduct a good faith effort to determine if the redacted material is subject to access**

The Department's position statement explains that it granted access to redacted copies of applications that it obtained from the applicants. However, there is no indication that the Department reviewed any of the material actually redacted by the applicants.

Section 901 of the RTKL states that "[u]pon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record." 65 P.S. § 67.901. The Commonwealth Court has stated that:

> By its plain language, Section 901 describes the actions that an agency is obligated to take when it receives a request for a record; it does not define what records are subject to disclosure under the RTKL. Pursuant to Section 901, the agency must: first, make a good faith effort to ascertain if the requested record is a public, legislative or financial record; second, determine whether the agency has possession, custody, or control of the record; and third, respond promptly.

*Office of the Budget v. Office of Open Records*, 11 A.3d 618, 621-22 (Pa. Commw. Ct. 2011); *see also In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (noting that "[i]t is … the open-records officer's duty and responsibility to determine whether the record is public, whether the record is subject to disclosure, or whether the public record is exempt from disclosure").

The RTKL does not define "good faith effort." However, in *Pennsylvanians for Union Reform v. Pa. Office of Administration*, the Commonwealth Court found that the Office of Administration:

> … complied with Section 901 of the RTKL by timely making a substantive determination that record of only two specifically-named Commonwealth employees' PAC contributions were not accessible public records, and concluding that revealing whether OA had possession, custody or control of such records would disclose otherwise protected information.

129 A.3d 1246, 1254 (Pa. Commw. Ct. 2015). In comparison, an agency did not comply with Section 901 when its open-records officer failed to inquire with agency officials "whether [they were] 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…." *Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011).

In addition to Section 901, there are certain requirements imposed on agency open-records officers when dealing with requests for information that a third party has deemed a trade secret or confidential proprietary information. Section 707(b) of the RTKL states that "[a]n agency shall notify a third party of a request for a record if the third party provided the record and included a written statement signed by a representative of the third party that the record contains a trade secret or confidential proprietary information." 65 P.S. § 67.707(b). Based upon the third party's input, "[t]he agency shall deny the request for the record *or release the record within ten business days of the provision of notice to the third party* and shall notify the third party of the decision." 65 P.S. § 67.707 (emphasis added).

Therefore, under Section 901 of the RTKL, an agency's open-records officer must make a good faith effort to determine if a record is a public record. As part of this good faith effort, an agency must notify any third party that has alleged that the record contains trade secrets or

confidential propriety information pursuant to Section 707. After conferring with the third party, the agency shall either deny the request or grant access to the record.

In situations involving trade secrets or confidential proprietary information, "agencies are not permitted to waive a third party's interest in protecting the records" before the OOR. *Bagwell*, 131 A.3d at 650 ("[W]hen PSU had no opportunity to review records in the Department's possession to which OOR's disclosure order applied, PSU established a deprivation of due process that merits a remand"). However, Section 901 tasks agencies with making a good faith effort to determine whether a record is subject to access. While Section 707 requires an agency to consult with third parties regarding their claims of trade secrets or confidential proprietary information, Section 707 also permits agencies to deny those claims when they are not made in good faith. *Compare* 65 P.S. § 67.901, *with* 65 P.S. § 67.707.

As stated above, there is no indication that the Department reviewed the information redacted by the applicants. Likewise, there is no indication that the applicants informed the Department of the reasons for each redaction; instead, the Department accepted the applications as redacted by the applicants. Because the Department has not undertaken a review of this redacted material, it has not made a good faith effort to determine whether that information is subject to public access, as claimed by the applicant. As a result, the Department has not complied with Section 901 of the RTKL.

In *Mollick*, the Court held that the OOR erred by not "directing the Township's Open Records Officer to make such a good faith determination of the requested information"; as a result, the matter was remanded to the OOR "to direct the Township's Open Records Officer to fulfill his duty under the RTKL by making a good faith determination…." 32 A.3d at 875; *see also Mollick v. Twp. of Worcester*, OOR Dkts. AP 2009-0042, AP 2009-0058, and AP 2009-0438 (Final

Determination Upon Remand). The OOR has an obligation to sufficiently develop the record for judicial review, *see Twp. of Worcester v. Office of Open Records*, 129 A.3d 44, 57 (Pa. Commw. Ct. 2016) ("Under the RTKL, the OOR is charged with developing an evidentiary record before its appeals officers to ensure meaningful appellate review") (citation omitted); *Pa. Dep't of Educ. v. Bagwell*, 114 A.3d 1113, 1121 (Pa. Commw. Ct. 2015) (noting that "appeals officers are empowered to develop the record to ensure Chapter 13 courts may perform appellate review without the necessity of performing their own fact-finding") (citations omitted); however, in the past, the OOR has recognized that the OOR's strict timeframes have prohibited it from remanding an appeal to an agency for additional actions or staying the appeal to more sufficiently develop the record. *See, e.g., Rubinkam and the Associated Press v. Pa. Dep't of Envtl. Prot.*, OOR Dkt. AP 2011-1663, 2012 PA O.O.R.D. LEXIS 304 ("While the OOR has the authority to [hold a hearing or conduct *in camera* review] to further develop the record, given the OOR's statutory duty to issue a Final Determination within 30 days absent an extension, the OOR, in this case, could not utilize either tool in developing the record. Additionally, while the OOR has authority to remand and has done so pursuant to court order, a Final Determination finding the request was specific and then remanding to the Department would be ineffective due to the to the statutory timeframes and responsibilities under the RTKL").

The Commonwealth Court has since recognized that there are situations wherein an agency may not have enough time under the RTKL's deadlines to effectively review the records at issue. In *Pa. State System of Higher Education v. Ass'n of State College and University Facilities* ("APSCUF"), the Court noted:

> If the request is so large that an agency does not have the ability to process the request in a timely manner given the enormous number of records requested, it would similarly undermine the specific legislative intent that every record be reviewed so that free and open discussions can take place within government when

> a decision is being deliberated, and that agencies should be afforded a sufficient opportunity to conduct investigations to protect the Commonwealth's security interests and the public's privacy rights.
>
> Nonetheless, just because an agency claims it neither has the time nor resources to conduct a document-by-document review within the time-period required by the RTKL does not make it so. The agency making such a claim has to provide the OOR with a valid estimate of the number of documents being requested, the length of time that people charged with reviewing the request require to conduct this review, and if the request involves documents in electronic format the agency must explain any difficulties it faces when attempting to deliver the documents in that format. *Based on the above information, the OOR can then grant any additional time warranted so that the agency can reasonably discern whether any exemptions apply*.

142 A.3d 1023, 1031-32 (Pa. Commw. Ct. 2016) (emphasis added). Here, the Department does not explain how many pages of applications are at issue; however, based upon the record before the OOR, and similar appeals before the OOR, it is evident that there are a voluminous amount of records at issue in this matter. *See, e.g.*, *Parker v. Pa. Dep't of Health*, OOR Dkt. AP 2017-1548, 2017 PA O.O.R.D. LEXIS ____ (involving all grower/processor applications, with attachments).

Because the Department did not conduct a good faith effort under Section 901 of the RTKL to determine if the material redacted from the applications by the third parties is exempt from disclosure, it is premature for the OOR to determine the applicability of exemptions to this information. Likewise, the OOR has the responsibility to adequately develop the record for judicial review. Therefore, pursuant to *Mollick* and *APSCUF*, the matter is stayed, and the OOR will retain jurisdiction over the appeal. The Department is directed to conduct a good faith review of the unredacted applications and within seven (7) business days provide "a valid estimate of … the length of time that people charged with reviewing the [records] require to conduct this review," along with the basis for that estimate. After reviewing the estimate, the OOR will issue an order setting the time by which the Department must complete the review and determine whether the Department will be required to provide status updates during the review process. At the conclusion

of the time set by the OOR, the Department shall issue a revised response to the Request regarding the applications and provide an exemption log explaining the legal support for each redaction and/or application document withheld. Within fifteen (15) business days of the date of this final response, the Requester shall notify the OOR of any deficiencies with the Department's response. The OOR will then issue a final determination within thirty (30) days of its receipt of the Requester's submission, absent additional extensions of time to develop the record, if necessary. The Department shall notify all third parties implicated by this appeal of this Order.

Because the matter is stayed pending review of the applications, and in order to avoid a piecemeal review of the Request, the OOR will reach the merits of the appeal as to the other Items of the Request in its subsequent final determination.

**ORDER**

For the foregoing reasons, Requester's appeal is **stayed** for the Department to take the actions set forth above. This Opinion and Order shall not be deemed a Final Determination for purposes of Section 1101 of the Right-to-Know Law, 65 P.S. §§ 67.1101, 67.1102. This Opinion and Order shall be placed on the OOR website at: http://openrecords.pa.gov.

**OPINION AND ORDER ISSUED AND MAILED: November 22, 2017**

/s/ Kyle Applegate

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