IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT OF HEALTH, **Petitioners** **v.** **ED MAHON, et al.,** **Respondents**	**No. 1066 C.D. 2021**

BRIEF OF PENNSYLVANIA DEPARTMENT OF HEALTH

YVETTE M. KOSTELAC
Chief Counsel
Attorney I.D. 51275

KEVIN J. HOFFMAN
Assistant Chief Counsel
Attorney I.D. 209575

ANNA LAMANO
Assistant Counsel
Attorney I.D. 90308

Commonwealth of Pennsylvania
Department of Health
Office of Legal Counsel
825 Health and Welfare Building
625 Forster Street
Harrisburg, PA 17120
Phone: (717) 783-2500
Fax: (717) 705-6042

Attorneys for Petitioner Department of Health

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the instant Petition for Review pursuant to Section 763(a) of the Judicial Code, 42 Pa.C.S. § 763(a).

ORDER IN QUESTION

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. 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.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

When reviewing a final determination of the Office of Open Records (OOR), this Court exercises a *de novo* standard of review and a plenary scope of review. *Bowling v. Off. of Open Recs.*, 75 A.3d 453 (Pa. 2013). Thus, this Court reviews the OOR's orders independently and may substitute its own findings of fact. *Id*.

STATEMENT OF THE QUESTIONS INVOLVED

I. Did the OOR err as a matter of law in concluding that the records requested were not confidential under Section 302 of the Medical Marijuana Act (Act)?

Suggested answer: Yes.

II. Did the OOR erroneously disregard competent evidence in determining that the Department failed to prove that no responsive records existed.

Suggested answer: Yes

STATEMENT OF THE CASE

Procedural History

On June 15, 2021, Ed Mahon (Mahon) forwarded a Right-to-Know Law (RTKL)[1] request to the Pennsylvania Department of Health (Department). (Reproduced Record (R.) at R.006a). The request sought two different categories of records. R.007a-R.008a. The first request sought aggregate data for the number of medical marijuana certifications issued for each of the eligible qualifying conditions. *Id.* The Department considered this a request for patient records. The second request sought the following:

> 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.

(R.008a)(emphasis added).

The request was denied on June 23, 2021. R.003a. In the denial, the Department clarified it could not provide the requested patient records because the Act prohibited release of all information obtained by the Department relating to patients pursuant to 35 P.S. § 10231.302(a). R.003a-R.005a. Additionally, the

[1] Act of Feb. 14, 2008, P.L. 6, 65 P.S. §§ 67.101 – 67.3104.

Department clarified that there were no records of policies or procedures which would describe how the Department tracks the use of its medical marijuana program. *Id.*

Mahon subsequently appealed to the OOR on July 1, 2021. R.001a. On appeal before the OOR, the Department provided legal support justifying the withholding of patient information and provided an affidavit verifying that there were no records of policies and procedures. R.155a-R.167a.

OOR's Final Determination

In reviewing the matter, the OOR determined that the confidentiality provision of the Act did not apply to the total number of patient certifications broken-down by medical condition, not because of any statutory language of the Act, but because there was a "reasonable inference" that the confidentiality provisions were not intended to apply to aggregate information. R.163a. Put another way, the OOR created an aggregate information exemption to the Act's confidentiality provision where none exists.

In reviewing the request for policies and procedures, the OOR disregarded the Department's affidavit which stated that no responsive records existed. R.155a-

R.167a. In rejecting the affidavit, the OOR made no finding of bad faith and merely claimed the affidavit was conclusory. *Id*.

The Department now appeals the Final Determination to this Court.

SUMMARY OF ARGUMENT

The OOR disregarded the plain and unambiguous language of the Act when finding that patient records could be released in an aggregate form. The Act clearly states that "[a]ll information obtained by the department relating to patients, caregivers and other applicants shall be confidential and not subject to public disclosure." 35 P.S. § 10231.302(a). While this broad protection is more than sufficient to cover the information sought under this request, the Act goes further to specifically state "certifications issued by practitioners" are confidential. 35 P.S. § 10231.302(a)(2). In issuing its decision in this matter, the OOR did not interpret and apply the statutory provisions of the Act, but instead, chose to act as a legislative body and add an aggregate information exemption into the clearly drafted confidentiality provisions.

Additionally, the OOR disregarded competent evidence that the Department possessed no responsive records for policies or procedures detailing how the Department tracks medical marijuana use. The Department provided an affidavit which unequivocally stated that there were no responsive records. The OOR's refusal to accept this affidavit has no basis in law.

ARGUMENT

I. THE OOR ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE RECORDS REQUESTED WERE NOT CONFIDENTIAL UNDER SECTION 302 OF THE ACT.

The RTKL requires a Commonwealth agency to provide "public records" in response to a RTKL request. *See* 65 P.S. § 67.301. Records which are in the possession of Department are presumed public unless they are exempt under the RTKL or other law, or protected by privilege, judicial order, or decree. 65 P.S. § 67.305. The Department has the burden of proof to demonstrate that a particular record is exempt from disclosure. 65 P.S. § 67.708(b). The Department can establish that a particular record is exempt from disclosure by the preponderance of the evidence. 65 P.S. § 67.708(a)(1). Affidavits supporting such exemptions may be used to meet this burden. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515 (Pa. Cmwlth. 2011); *Moore v. Office of Open Records*, 992 A.2d 907 (Pa. Cmwlth. 2010).

Importantly, Section 102 of RTKL excludes from the definition of "public records" those records that are exempt from disclosure under "State law or regulation." *See* 65 P.S. § 67.102. Additionally, the presumption that agency records

are "public" does not apply if the records are exempt from disclosure under state law or regulation. 65 P.S. § 67.305(a)(3).

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." 35 P.S. § 10231.302(a) (emphasis added). Importantly, the Act further provides a non-exhaustive list of examples of confidential materials, which specifically includes the records requested here: "certifications issued by practitioners." 35 P.S. § 10231.302(a)(2). The Act additionally makes confidential "information related to the patient's serious medical condition," which would also encompass the patient certification. 35 P.S. § 10231.302(a)(5). These confidentiality provisions make no exceptions, nor do they provide for the disclosure of de-identified or aggregate information. To the contrary, the Act expressly precludes the release of *any* information relating to practitioners' certifications.

While the Act broadly demonstrates what material is confidential, Section 302(b) goes on to expressly identify an exhaustive list of what records are considered public. 35 P.S. § 10231.302(b). Section 302(b) makes public only the following information:

> (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(b).

Notably, section 302(b) does not enumerate aggregate information as "public information," nor does it provide or even imply that the number of medical marijuana certifications issued for eligible qualifying conditions should be considered public. *Id*.

Indeed, the legislature criminalized the release of any of this information to the public. 35 P.S. § 10231.1307(a)-(b) (establishing that Departmental officials or employees who knowingly release confidential information are guilty of a misdemeanor).[2]

[2] 18 Pa.C.S.A. § 1104

Feldman v. Pa Comm'n on Crime and Delinquency, 208 A.3d 167 (Pa. Cmwlth. 2019) directly supports the confidentiality of this information. In *Feldman*, the requester sought a list of individuals who were denied victim compensation benefits specifically including race/ethnicity, gender, age, ZIP code, and county of residence. *Id*. at 169. The requester received aggregated data but appealed the denial of demographic information. *Id*.

The agency withheld demographic data because it was exempt from disclosure pursuant to Section 709 of the Crime Victims Act (CVA), 18 P.S. § 11.709. *Id*. at 170. The language of the CVA clearly and unambiguously stated that "all reports, records or other information obtained or produced by the bureau during the processing or investigation of a claim shall be confidential." *Id*.

The requester in *Feldman* argued that section 708(d) of the RTKL provided for the release of aggregated data. 65 P.S. § 67.708(d). This Court, however, held that section 708(d) of the RTKL did not apply where a state law expressly prohibited disclosure. *Id*. at 175. Specifically, this Court stated, "[i] n other words, while most of the RTKL exceptions of 708(b) do not apply when data is aggregated, section 708(d) of the RTKL is **inapplicable to records that are exempt from disclosure under another state law**." *Id*. at 175 (emphasis added).

Similarly, here, Section 302 of the Act provides that "all information obtained by the department relating to patients, caregivers and other applicants shall be confidential…, including…[c]ertifications issued by practitioners." 35 P.S. § 10231.302(a)(2). As in *Feldman*, the aggregate nature of the request at issue here does not overcome the statutory requirement of confidentiality.

In fact, in *Feldman*, this Court questioned the agency's decision to even *voluntarily* release merely aggregate demographic data, noting "[a]lthough the Commission believed that, pursuant to section 708(d) of the RTKL, it was required to provide aggregated data on claimants … it was not required to do so. Section 709 makes clear that **all reports, records or information obtained or produced during the processing or investigation of a claim shall be confidential and privileged**. *Id.* at 175 (emphasis in original).

Just as in *Feldman*, here the Medical Marijuana Act prohibits release of "all information," including aggregate information, unless it is enumerated under subsection (b) as public information. Both the CVA, at issue in *Feldman*, and the MMA here make "all information" confidential. Neither the CVA nor the MMA contain an exemption allowing or requiring the release of aggregate information. Both the CVA and MMA clearly and unambiguously state that "all information" is

confidential and not subject to disclosure. In short, *Feldman* controls the analysis and outcome here, and the OOR erred in rejecting this binding precedent.[3]

In fact, the OOR's determination places members of the Department in an untenable position. To comply with the OOR appears to require such Officials and employees to risk criminal liability. *Id.* at 175 ("Because demographic data is exempt

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[3] Compare the CVA to the Act:

> 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, shall not be subject to subpoena or discovery, shall be used for no purpose other than the processing of a claim and, except as otherwise provided by law or as provided in this section, shall not be introduced into evidence in any judicial or administrative proceeding.

18 P.S. § 11.709(a) (emphasis added).

> 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.**

35 P.S. § 10231.302 (emphasis added).

from disclosure pursuant to a different state law, *i.e.*, section 709 of the Crime Victims Act, the Commission **misconstrued** the RTKL by providing some of the requested data to Requester, even if only produced in aggregate form.") The OOR's rewriting of the statute to match its desired result is thus inappropriate and should be reversed.[4]

Because the OOR's decision erroneously disregards this Court's own precedent set forth in *Feldman*, the determination of the OOR should be reversed.

[4] Pennsylvania law is replete with statutory confidentiality provisions that would be rendered useless by the OOR's wholesale provision of aggregate information. *See, e.g.,* Section 2349 of the Domestic Animal Law, 3 Pa.C.S. § 2349 (records of dealer, agents and haulers of living or dead domestic animals); Sections 112 and 2 of the Banking Code of 1965, Act of November 30, 1965, P.L. 847, *as amended,* 7 P.S. §§ 112 and 6223 (records related to banks and banking); Section 2 of the County Code, Act of April 8, 1868, *as added* by the Act of December 19, 1975, P.L. 51, 16 P.S. § 9759.1 (records related to discharge of officers and persons in armed forces or women's organizations); Section 1409 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, *as amended,* 24 P.S. § 14–1409 (**public school health records**); Section 806.1 of the Health Care Facilities Act, Act of July 19, 1979, P.L. 130, *as amended,* 35 P.S. § 448.806(a) (records relating to incidents of professional misconduct in health care facilities); Section 15 of the Disease Prevention and Control Law of 1955, Act of April 23, 1956, P.L. 1510, *as amended,* 35 P.S. § 521.15 (records relating to reports of diseases); Section 6 of the Pennsylvania Cancer Control, Prevention and Research Act, Act of December 18, 1980, P.L. 1241, *as amended,* 35 P.S. § 5636 (**records related to cases of cancer**); Section 111 of the Mental Health Procedures Act, Act of July 9, 1976, P.L. 817, *as amended,* 50 P.S. § 7111 (**records of mental health**); Section 14 of the First Class City Code, Act of June 25, 1919, P.L. 581, *as amended,* 53 P.S. § 12634 (records concerning examinations and credits for military or naval service); and Section 404 of the Public Welfare Code, Act of June 13, 1967, P.L. 31, *as amended,* 62 P.S. § 404 (records concerning public assistance) (emphasis added).

II. THE OOR ERRONEOUSLY DISREGARDED COMPETENT EVIDENCE IN DETERMINING THAT THE DEPARTMENT FAILED TO PROVE THAT NO RESPONSIVE RECORDS EXISTED.

In RTKL matters, an affidavit or statement made under the penalty of perjury typically serves as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Cmwlth. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Cmwlth. 2010). Indeed, in the absence of any evidence that the Department has acted in bad faith, "the averments in [the verification] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. Prot*, 103 A.3d 374, 382-83 (Pa. Cmwlth. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. Ct. 2013)).

Additionally, the Department can establish that a particular record is exempt from disclosure by the preponderance of the evidence. 65 P.S. § 67.708(a)(1). Preponderance of the evidence merely requires that the Department present a fact to the OOR such that the OOR can find that its existence is more probable than its nonexistence. *See A.B. v. Slippery Rock Area Sch. Dist.,* 906 A.2d 674 (Pa.Cmwlth. 2006).

Here, the Department filed an affidavit affirming, under penalty of perjury, that no responsive records existed in regard to policies and procedures for tracking medical marijuana use. R.100a. The OOR rejected this affidavit without discrediting the affiant, finding that the Department acted in bad faith, or even noting any contradictory or countervailing evidence. R.166a. Instead, in rejecting the affidavit, the OOR found that the language of the affidavit was conclusory. *Id.* However, it is axiomatic that if a record does not exist then an acknowledgment that it does not exist is sufficient proof. In essence, the OOR made a credibility determination, *sub silencio*, without holding a hearing or even identifying any evidence that might establish or imply that the affiant was incorrect or incompetent.

The Department's AORO, under penalty of perjury, signed an affidavit that carefully identified three important facts. First, she is familiar with the records of the agency. R.100a. Second, in conjunction with other staff, she performed a comprehensive search for the records in question. R.101a. Third, upon conclusion of that search, and upon advisement of other staff who assisted her, she learned that there were no records. *Id.*

The affidavit, while concise and free from excess verbiage, did establish that a search was performed. To the extent that the OOR was unsatisfied with how the

search was performed the remainder of the affidavit clarifies the salient points. The AORO was already familiar with the records of the agency and she learned that the records do not exist. The only inference that can be made between these facts is that she was already aware the records did not exist and confirmed that fact with the appropriate Department staff. The fact that she did not specifically identify the name of the individual she checked with or the exact time and date of the communication does not make the affidavit conclusory. The facts set forth in the affidavit establish that the records do not exist in the control of the Department and she attested to such under penalty of perjury.

There is no additional information that would change the affidavit. The OOR's finding that the affidavit is conclusory is not based on a finding of bad faith, it is based on the OOR's belief that the affidavit simply cannot be true. The Department has proven, through the affidavit and by a preponderance of the evidence, that the records do not exist.

Ultimately, the OOR appears to have made a credibility determination of the affiant's testimony by affidavit. To the extent that the OOR must make credibility determinations regarding witness testimony, then the Department welcomes participating in evidentiary hearings; however, here, the OOR did not hold a hearing.

In the absence of such hearing, the Department's affidavit sufficiently identified that there were no responsive records. The OOR's finding to the contrary is inappropriate and not based upon evidence of record.

CONCLUSION

The OOR's Final Determination erroneously: rejects this Court's binding precedent; attempts to legislate an aggregate information exception where none exists in the Act; and baselessly rejects a sworn affidavit authored under penalty of perjury.

For the forgoing reasons, the Pennsylvania Department of Health respectfully requests this Honorable Court reverse the final determination of the Office of Open Records.

Respectfully submitted,

/s/ Kevin Hoffman
KEVIN J. HOFFMAN
Assistant Chief Counsel
Attorney I.D. 209575

Pennsylvania Department of Health
Office of Legal Counsel
625 Forster Street
Room 825
Harrisburg, PA 17120
Telephone: 717-787-2500

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APPENDIX

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 date 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

[5] *See* https://www.health.pa.gov/topics/Documents/Programs/Medical%20Marijuana/Medical%20Marijuana%20Advisory%20Board%20Presentation%20Feb.%2013,%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).

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies 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 Hoffman*
KEVIN HOFFMAN
Assistant Chief Counsel
Attorney I.D. No. 209575

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing brief upon the person(s) and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

SERVICE BY FIRST CLASS MAIL AND PACFILE

PAULA KNUDSEN BURKE, ESQ.
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
101 NORTH QUEEN STREET
PO BOX 1328
LANCASTER, PA 17608

/s/ Kevin Hoffman
KEVIN J. HOFFMAN
Assistant Chief Counsel
Attorney I.D. 209575

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

Counsel for Petitioner

Date: 12/22/2021