IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT OF HEALTH,	:	
Petitioner,	:	**No. 1066 C.D. 2021**
v.	:	
ED MAHON and SPOTLIGHT PA,	:	
Respondents.	:	

BRIEF OF RESPONDENTS, ED MAHON and SPOTLIGHT PA

Appeal from the Final Determination of the Office of Open Records dated September 2, 2021 at Docket No. AP 2021-1296

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COUNTER STATEMENT OF THE CASE

Respondents Ed Mahon and Spotlight PA are an investigative reporter and an independent Pennsylvania news outlet, respectively. Spotlight PA is a nonpartisan, grant-funded newsroom supported by The Lenfest Institute for Journalism and more than a dozen other community foundations and individuals. Spotlight PA combines the strengths of The Philadelphia Inquirer in partnership with PennLive/The Patriot-News, TribLIVE/Pittsburgh Tribune-Review and WITF Public Media in a historic commitment to investigative and accountability reporting on state government and beyond. Its collaborative network allows the news outlet to share resources and maximize audience and reporting power. Spotlight PA provides its content free of charge to 79 newsrooms across the state to help bolster local media and better inform the public.

Ed Mahon has been an investigative reporter with Spotlight PA since August 2020. As part of his beat, Mr. Mahon covers Pennsylvania state government agencies, including the Department of Health ("DOH"). The DOH is the state agency responsible for administering the Medical Marijuana Act ("MMA"), a subject upon which Mr. Mahon reports.[1] The MMA was signed into law in April 2016, to allow the supervised use of medical marijuana. 35 P.S. § 10231.102.

[1] *See, e.g.*, Ed Mahon, *Delayed and Denied: The Wolf Administration's failure to clarify rules around addiction treatment and medical marijuana had far-reaching and serious consequences, new records show*, Spotlight PA (Sept. 29, 2021), https://perma.cc/KWY7-2XLZ;

As part of his continuing coverage of the medical marijuana industry in Pennsylvania, on June 15, 2021, Mr. Mahon submitted a Right to Know Law request to the DOH pursuant to 65 P.S. §§ 67.101–67.3104. R.006a. His request contained two parts: (1) the aggregate data for the number of medical marijuana certifications issued for each of the eligible qualifying conditions described on the Department of Health website; and (2) any written policies or procedures describing how the DOH tracks the use of its medical marijuana program, including which qualifying conditions are certified. Included within part two of his request, Mr. Mahon stated, "The Department of Health press office in a June 11 email indicated that it does track some of this information." R.008a. No individually identifiable patient information was requested.

The DOH denied Mr. Mahon's request on June 23, 2021. R.003a. For the first part of his request, the agency cited the confidentiality provisions of the MMA, 35 P.S. § 10231.302(a). For the second part of his request, the agency's open records officer responded, "the Department conducted a search for records, and I have been advised that no records exist within the Department responsive to your RTKL request, as there are no written policies or procedures describing how

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Ed Mahon, *Pa. patients swear by cannabis as a tool to fight opioid addiction. The research still isn't there*, Spotlight PA (Aug. 5, 2021), https://perma.cc/H584-BD2U; Ed Mahon, *How many people in Pa. use cannabis for addiction? The Wolf admin won't say*, Spotlight PA (Aug. 13, 2021), https://perma.cc/H59G-QZKC.

the Department tracks use of the Medical Marijuana program." R.004a.

Mr. Mahon appealed the denial to the Office of Open Records ("OOR") on July 1, 2021. R.001a. As part of its adjudicatory process, the OOR allows parties to submit evidence, legal argument, and general information to support their positions to the assigned Appeals Officer. R.012a. Mr. Mahon availed himself of the OOR's invitation to submit additional information in support of his position.

On July 30, 2021, Mr. Mahon submitted additional evidence to the OOR, including:

1) "[A] recent decision from the Office of Open Records that deals with substantially similar issues. That request sought aggregate data as does mine." R.088a. Mr. Mahon attached a copy of the OOR Final Determination in *John Finnerty & CNHI Newspapers v. Pennsylvania Department of Health*, OOR Dkt. No.: AP 2021-1061 (July 15, 2021). R.081.[2]

2) A news article in which a DOH official released aggregate data on patients with anxiety disorder certified for cannabis. *See* Sarah Anne Hughes, *In one month, 3,000 Pennsylvanians with anxiety certified for medical marijuana*, Pa. Capital-Star (Aug. 14, 2019), https://perma.cc/4CY7-J72J; R.077a.

[2] Later reporting by Mr. Finnerty uses aggregated data that appears to have been provided by the DOH as a result of the July 15, 2021 OOR Final Determination. *See* John Finnerty, *Medical marijuana sought by more than 50,000 people living in counties with no dispensaries*, New Castle News (Aug. 23, 2021), https://bit.ly/3nJDWeE.

3) Transcript pages from a meeting of the Medical Marijuana Advisory Board, a body within the DOH created under the MMA to oversee implementation of the statute. 35 P.S. § 10231.1201. The transcript pages were from an August 14, 2019 meeting and featured a state employee providing data on patients certified for anxiety disorders. The employee, John J. Collins, told the Advisory Board that "during the first certification period, which was just the first four days after approval, 212 patients were certified with anxiety as a primary certification," that the rate of certifications had been increasing to "about 1,000 per week," and that as of the date of the report, "around 3,000 patients" had been "certified with anxiety, which represents about 2.7 percent of the total." R.055a–056a.

4) An April 17, 2021 news release from Governor Tom Wolf's administration stating that "[c]lose to 553,000 patients and caregivers are registered for the program in order to obtain medical marijuana for one of 23 serious medical conditions. There are more than 327,400 active certifications as part of the program." R.027a.

5) A July 27, 2021 email in which a DOH employee provided the top conditions certified in the program: "As we have shared with you previously, the top three medical conditions being prescribed medical marijuana are chronic pain, anxiety disorders, and post-traumatic stress disorder." R.025a.

6) A link to a February 13, 2020 presentation at a Medical Marijuana Advisory Board meeting showing percentages of certifications broken down by condition and ranked by qualifying condition. R.108a. The presentation slides, which include detailed information, charts and demographic data, are included in the reproduced record. R.114a–137a.

The DOH also submitted evidence and argument on July 30, 2021, including a six-paragraph affidavit from the agency's open records officer stating that she "performed a comprehensive search for responsive records," but that the records did not exist. R.100a–101a. The affidavit did not provide any details about how the "comprehensive search" was performed.

After the DOH submitted its argument and affidavit on July 30, 2021, the OOR permitted Mr. Mahon an opportunity to respond.[3] R.102a. Mr. Mahon's supplemental response addressed the agency's arguments that responsive records were confidential under *Feldman v. Pennsylvania Commission on Crime & Delinquency*, 208 A.3d 167 (Pa. Commw. Ct. 2019).

After reviewing the parties' submissions and arguments, on September 2, 2021, the OOR senior appeals officer rejected the DOH's arguments. The OOR found that the requested aggregate data was not confidential under Section 302 of the Medical Marijuana Act. The OOR also determined that the DOH had failed to

[3] The DOH did not provide a supplemental response. R.149a.

prove the non-existence of records responsive to the second part of Mr. Mahon's request.

The DOH's appeal to this court followed the OOR's final determination in favor of Requesters.

SUMMARY OF ARGUMENT

Respondents urge this Court to affirm the OOR's finding that the DOH did not meet any RTKL exception that would allow the agency to withhold the requested public records. The records requested by Mr. Mahon are presumed to be public unless the DOH can prove by a preponderance of the evidence that an exception applies. The DOH has not overcome this presumption because it has failed to establish that the aggregate records are confidential under the MMA or RTKL. Furthermore, the DOH failed to demonstrate a satisfactory search for records related to how it administers the medical marijuana program.

The OOR correctly determined that the records requested were not confidential under Section 302 of the MMA. This conclusion is supported by the expansive language of the RTKL itself and the limited applicability of the MMA's patient information provision. To find otherwise would stretch the definition of "patient information" in a manner that would lead to the kind of lack of clarity in the DOH's operations that the RTKL was created to prevent. Even if the requested records included confidential information, the DOH failed to show why any records, including with redactions to remove any confidential information, could not be provided.

The OOR also correctly determined that the DOH failed to prove the nonexistence of responsive records about how it tracks the program given the lack

of explanation for the search that was conducted, and the public statements made by DOH officials indicating they were monitoring the program's scope and scale.

The record below at the OOR allowed the parties ample opportunity to develop both legal arguments and factual assertions. This Court should adopt the legal conclusions and factual findings of the OOR and affirm its final determination.

ARGUMENT

I. The OOR correctly concluded that the records requested are not confidential under Section 302 of the Medical Marijuana Act

A. Under the RTKL's text and purpose, the records sought should be presumed to be public records

Pennsylvania's Right to Know Law ("RTKL") "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." *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142, 155 (Pa. 2016). The current iteration of the law was enacted in 2008 to replace its predecessor, the Right to Know Act, with an "alternative paradigm that more strongly tilted in favor of maximizing transparency." *ACLU of Pa. v. Pa. State Police*, 232 A.3d 654, 656 (Pa. 2020).

Under the RTKL, "[a] record in the possession of a Commonwealth agency ... shall be *presumed* to be a public record" unless it is exempt under Section 708, protected by a privilege, or exempt from disclosure under other federal or state law or regulation or a judicial order. 65 P.S. § 67.305(a) (emphasis added). Because of this presumption of public access, the RTKL should be construed to maximize access to public records in an agency's possession, and exceptions to disclosure

must be narrowly construed to avoid contravening the RTKL's purpose. *ACLU of Pa.*, 232 A.3d at 656.

A government agency withholding records subject to the RTKL, like the DOH here, bears the burden of proving that a record is exempt from access by a preponderance of the evidence standard. 65 P.S. § 67.708(a)(1).

The records sought in this case are exactly the kind for which the RTKL was enacted. By granting access to aggregate data on the DOH's administration of the Medical Marijuana program, Mr. Mahon's reporting will enable the public to better understand the implementation of a new government policy in which the public has tremendous interest. *See Pa. State Educ. Ass'n*, 148 A.3d at 155. The burden is on the DOH to demonstrate that an exception in the RTKL or in other statute overcomes the presumption of disclosure. 65 P.S. § 67.708(a)(1).

B. Neither the exceptions under the RTKL nor under the Medical Marijuana Act apply to the aggregate data requested.

The DOH's argument that Section 302 of the MMA precludes disclosure of aggregate data rests on a mischaracterization of the law. The MMA exempts from disclosure ***individual patient records*** — not all records about the DOH's implementation of the law. In particular, sub-section (a), which the DOH cites as support for its argument, specifically addresses and pertains to "Patient Information," including, for example, "Individual identifying information about patients and caregivers," "Information on identification cards," and "Information

relating to the patient's serious medical condition." 35 P.S. § 10231.302(a). As each of the provided examples underscores, this section solely pertains to protecting individual patient information from disclosure. Moreover, the MMA similarly excludes from disclosure a "confidential list of patients and caregivers to whom it has issued identification cards." 35 P.S. § 10231.302(a). Neither this list, nor any other identifying information about patients, was part of Mr. Mahon's request which sought "aggregate data" and made no mention of seeking individually identifiable patient records. R.007a. The DOH, in interpreting the request, "should rely on the common meaning of words and phrases, as the RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012) (citing *Bowling*, 990 A.2d 813).

Mr. Mahon's request for "aggregate data" has special meaning under the RTKL. Section 102 of 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." 65 P.S. § 67.102 (emphasis added). In this manner, requests, like Mr. Mahon's, for aggregate data are by definition requests for information without individual identifying information. For this reason, the DOH's claim that

producing responsive records would violate patient confidentiality is unfounded and cannot be adopted to bar release of the records.

Mr. Mahon's request for aggregate data does not implicate "patient information" under either the MMA's definition of "patient" or the common understanding of the term. Section 103 of the MMA defines "patient" as: "An *individual* who: (1) has a serious medical condition; (2) has met the requirements for certification under this act; and (3) is a resident of this Commonwealth." 35 P.S. § 10231.103 (emphasis added). Under a plain reading of the statute's text, "patient information" refers to *individual* patient information rather than non-individual records such as those about policy implementation or aggregate data. Rules of statutory construction dictate that the legislature's intention should be carried out, if it is clear. In this case, it is clear that "patient" as defined in the MMA clearly refers to an individual person whose identity is known, not wide swaths of de-identified information. If "patient" is to be broadly expanded as endorsed by the DOH, the agency would be barred from publishing a chart demonstrating the percentage of serious medical conditions justifying use of medical marijuana, such as it did during a presentation in February 2020. R.137.

Such an expanded reading of "patient" would lead to significant voids in the public's understanding of state operations in the sphere of medical marijuana industry. Furthermore, such an interpretation is completely unnecessary, as the

RTKL itself already prohibits the disclosure of a person's patient records, individual medical history, individually identifiable health information, or personal identification information. 65 P.S. § 67.708(b)(5). Mirroring the MMA's language, this section of the RTKL refers to "an individual's" medical records and not aggregate records. And Section 708(d) of the RTKL spells out that its exceptions do not apply to aggregate data maintained by an agency. 65 P.S. § 67.708(d). The confidentiality provisions in the MMA and the RTKL serve the same purpose – to govern public access to information in the government's possession – and as such, they must be read in *pari materia*. Here, that result means the public does not have access to patient-specific records, but that aggregated data is public.

The legislature's clear demarcation of aggregated data as a special category of records highlights the critical nature of this information, which can show trends of illness, cancer clusters and the like. In the context of medical marijuana, the release of aggregated, de-identified data has allowed reporters to explain to the public how many Pennsylvania citizens have received their medical marijuana certificates, and for which conditions. *See* Hughes, *supra* ("In the month since the Pennsylvania Department of Health added anxiety as a qualifying medical marijuana condition, 3,000 people have been certified to receive product for that disorder."); *see also* Finnerty, *supra* note 2 (providing numbers of patients per

county). It has also put into context for the public how many Pennsylvanians overall have received their medical marijuana certifications for conditions ranging from cancer to epilepsy. Paul Guggenheimer, *Medical marijuana program in Pa. celebrates 5-year anniversary*, TribLIVE (Apr. 20, 2021), https://perma.cc/FDV9-CM2N ("Close to 553,000 patients and caregivers are registered for the program in order to obtain medical marijuana for one of 23 serious medical conditions.").

The RTKL only allows an agency to withhold aggregated data if its disclosure can clearly be shown to put at risk public safety, the loss of state funds, computer safety, or if its disclosure would release individually identifiable medical information. 65 P.S. § 67.708(d).

The MMA designates certain records about individuals participating in the Medical Marijuana program as "public information." This category primarily refers to applications for permits submitted by medical marijuana organizations, practitioner registration information, and disciplinary actions against medical marijuana applications. 35 P.S. § 10231.302(b). The DOH argues the division between "patient information" in Section 302(a), and "public information" in Section 302(b), implies that the legislature intended only for the information listed in "public information" to be disclosed in response to a RTKL request. This assessment is erroneous for two reasons. First, the records outlined as public under Section 302(b) pertain to public-facing medical marijuana companies or medical

marijuana doctors—indicating that the legislature sought to ensure that information about types of entities would be accessible. Second, to contend that the absence of a provision allowing for aggregate data in Section 302(b) implies that de-identified records about the Medical Marijuana program should be withheld flips the presumption of disclosure on its head. *See* 65 P.S. § 67.708(a)(1). If a type of record is not referenced in a statute, like those here, it should be treated like all other records under the RTKL—it should be publicly accessible unless an exception clearly applies. *Id.*

The DOH further argues that it cannot release the requested records because doing so implicates criminal liability for the agency's employees—but an exception embedded in the law belies that argument. The misdemeanor provision explicitly does "not apply where ***disclosure is permitted or required by law*** or by court order," as was the case here given that the disclosure of the records was authorized by the RTKL, and granted by the OOR. 35 P.S. § 10231.1307 (emphasis added). The criminal liability provision cited by the DOH is instead focused on employees who "knowingly and willfully" disclose confidential information without any authorization.[4]

[4] In addition to disclosures where permitted or required by law, the MMA provides an exception for disclosure to "authorized persons for official governmental or health care purposes." 35 P.S. § 10231.1307(a). A request made under the RTKL meets the criteria as "an official governmental" purpose, *i.e.*, fulfilling a separate state law's requirement of public access.

The OOR pointed out the fallacy of the DOH's argument in a similar case that was decided by the OOR and not appealed to this court. In the Final Determination in *John Finnerty & CNHI Newspapers v. Pennsylvania Department of Health*, the OOR appeals officer reasoned:

> 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.

Final Determination at 5, *John Finnerty & CNHI Newspapers v. Pa. Dep't of Health*, OOR Dkt. No.: AP 2021-1061 (July 15, 2021); R.085.

If the Court sanctions the DOH's broad reading of "patient information" here, such a precedent would have far-reaching implications for the application of the RTKL to the DOH. The DOH wields significant influence over the individual lives of Pennsylvania residents and by its own admission it "has touched every citizen in all parts of the Commonwealth." *About Us*, Pa. Dep't of Health, https://perma.cc/3B53-D93B (last visited Jan. 21, 2022). By its nature, much of the agency's work in administering health programs implicates patient information. If "patient information" is read to include any aggregate records related to DOH administration of health programs, such a ruling would apply to a host of the DOH's activities and undermine the intended purpose of the RTKL, which is to enable the public to "scrutinize the actions of public officials, and make public

officials accountable for their actions." *See Pa. State Educ. Ass'n*, 148 A.3d at 155. Instead of devising ways to limit access to government information, agencies should be "liberally construing" RTKL requests. (*See Levy v. Senate of Pa.* 65 A.3d 361, 361 (Pa. 2013) (quoting *Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 125, 1034 (Pa. Commw. Ct. 2011) "[C]ourts should liberally construe the RTKL to effectuate its purpose of promoting 'access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions.'").

C. Even if Mr. Mahon's request for aggregate data included confidential information, the DOH must release the requested information with redactions.

In its denial of Mr. Mahon's RTKL request, the DOH cited the patient information provision of the Act. 35 P.S. § 10231.302(a). As explained above, such individual patient information was never requested. To the extent that such information was contained in the requested records, the RTKL requires the DOH to redact any confidential information. 65 P.S. § 67.706. Generally, the law requires agencies to redact information, rather than withhold the entire record, when "a public record ... contains information which is subject to access as well as information which is not subject to access." *Id.* Further, "[t]he agency may not deny access to the record if the information which is not subject to access is able to

be redacted." *Id.* The DOH's brief failed to explain why identifying information could not simply be redacted from the requested records.

A previous RTKL request reviewed by the Commonwealth Court shows that even when records may contain some individualized medical information, such records should nevertheless be released with individual information redacted. In *Department of Corrections v. St. Hilaire*, 128 A.3d 859, 860 (Pa. Commw. Ct. 2015), an ABC news reporter sought all records of inmate and employee injury and death between 2009 and 2014. The court ruled in the reporter's favor, noting that the possibility that the documents sought may contain some medical information "does not transform the reports into exempt medical records." *Id.* at 866. Given the requester sought "non-identifiable injury information" rather than medical records, inmate identities, or identifiable health information, the information could be disclosed and records that did contain such information could be released with redactions. *Id.*

Here, as in *St. Hilaire*, the records sought are non-identifiable records. *See St. Hilaire*, 128 A.3d at 866. If some medical information may be implicated in the request, the records must be produced with such individual information redacted. *See id.*

D. The confidentiality requirements of other statutes, such as the Crime Victims Act, are not analogous to those of the Medical Marijuana Act.

The DOH's reliance on *Feldman v. Pennsylvania Commission on Crime & Delinquenc*y, 208 A.3d 167, 170 (Pa. Commw. Ct. 2019), a case interpreting the Crime Victims Act, is misplaced. In *Feldman*, the requester sought demographic records about applications to a victim compensation fund governed by the Pennsylvania Commission on Crime and Delinquency (the "Commission"). *Id.* at 169. The court concluded that the Commission could withhold the records from disclosure because "section 709 of the Crime Victims Act provides a clear prohibition from disclosing information obtained by the Commission during the processing of a claim, including demographic data, which are the records Requester seeks." *Id.* at 176. The relevant provision features a prohibition against disclosure that is much broader than that of Section 302 of the MMA. *Compare* 18 P.S. § 11.709, *with* 35 P.S. § 10231.302. Whereas the Crime Victims Act states that "***all reports, records or other information*** obtained or produced by the bureau during the processing or investigation of a claim shall be confidential," 18 P.S. § 11.709 (emphasis added), the MMA references only information related to individual patients, and makes no reference to aggregate data, reports, records or other information maintained and used by the DOH in its oversight of the program. 35 P.S. § 10231.302.

II. The OOR correctly concluded that the DOH did not meet its burden to prove that records responsive to Item 2 of the request do not exist.

A. The Court should adopt the findings of fact and conclusions of the OOR.

After reviewing the evidence, the OOR senior appeals officer concluded that the DOH failed to meet its burden of proving the non-existence of records responsive to Item 2. This Court should affirm the determination of the OOR. While the Court has the option of applying a *de novo* standard of review, it also has the ability to simply adopt "the findings of fact and conclusions of law of an appeals officer," *Bowling v. Office of Open Records*, 75 A.3d 453, 473 (Pa. 2013), particularly when—as here—the agency was provided ample opportunity to present its case.

In another case involving the RTKL and the MMA, the Supreme Court of Pennsylvania affirmed the Commonwealth Court's refusal to allow the DOH to supplement the record on appeal. *McKelvey v. Pa. Dep't of Health*, 255 A.3d 385, 405 (Pa. 2021). The Commonwealth Court opinion described the appellate court's preference to have the OOR engage in fact-finding:

> Generally, this Court declines to serve as fact-finder, a "role ... best reserved for unique occasions." *Dep't of Labor & Indus. v. Heltzel*, 90 A.3d 823, 834 (Pa. Cmwlth. 2014) (en banc). Where OOR's "record contains no information on [records'] nature and content," we may supplement the record. *Pa. State Police v. Grove*, 119 A.3d 1102, 1105-06 (Pa. Cmwlth. 2015), *aff'd*, 640 Pa. 1, 161 A.3d 877 (2017).
>
> An appeals officer has discretion in developing the record, and may request evidence or explanation from the parties. *See Dep't of Educ. v. Bagwell*, 114 A.3d 1113 (Pa. Cmwlth. 2015). Nevertheless, "it is not incumbent upon OOR to request additional evidence when developing

> the record. Rather, it is the parties' burden to submit sufficient evidence to establish material facts." *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Cmwlth. 2017) (en banc).

Mission Pa., LLC v. McKelvey, 212 A.3d 119, 129 (Pa. Commw. Ct. 2019), *aff'd in part, vacated in part sub nom.*, *McKelvey v. Pa. Dep't of Health*, 255 A.3d 385 (Pa. 2021).

The DOH had ample opportunity to present evidence to support its claims but ultimately failed to produce sufficient evidence to convince the OOR. This Court should accept the OOR's findings and conclusions. *See Bowling*, 75 A.3d at 473.

B. The DOH's affidavit alone is insufficient to prove that responsive records do not exist especially given the evidence provided by Mr. Mahon.

The RTKL places the burden on a Commonwealth agency in possession of a responsive record to show by a preponderance of evidence that the responsive record is exempt from public access. The agency may provide affidavits to detail the search it conducted for responsive documents and what exemption it relied upon in withholding those documents. *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013). The testimonial affidavits must be relevant and credible in order to provide sufficient evidence in support of a claimed exemption. *Heavens v. Pa. Dep't of Env't Prot.*, 65 A.3d 1069, 1074 (Pa. Commw. Ct. 2013). In addition, "the affidavit must be detailed, nonconclusory,

and submitted in good faith; an affidavit which merely tracks the language of the exception it presupposes is insufficient to demonstrate that the responsive records are exempt from disclosure." *Pa. State Police v. Muller*, 124 A.3d 761, 765 (Pa. Commw. Ct. 2015) (citing *Scolforo*, 65 A.3d at 1103–04). A "generic determination or conclusory statements" are "not sufficient to justify the exemption of public records." *Scolforo*, 65 A.3d at 1103. In *Scolforo*, the court concluded that an affidavit from the Office of the Governor failed to demonstrate that a RTKL exception applied to a request for calendar entries. *Id*. The Office's affidavit was insufficient because it contained no specifics, merely tracked the language of the exception it argued applied, and was conclusory. *Id.* at 1104.

Here, the affidavit submitted by the DOH contained in relevant part only a single sentence: "[T]he Department conducted a search for records, and I have been advised that no records exist within the Department responsive to your RTKL request, as there are no written policies or procedures describing how the Department tracks use of the Medical Marijuana program." R.004a. Conspicuously absent from the affiant's statement are any details regarding how the search was conducted, whether any third-party contractors were contacted, or whether a search of key terms or records was made. The boilerplate statement here amounts to "a generic determination or conclusory statement[]" that lacks the specificity the law requires. *See Scolforo*, 65 A.3d at 1103.

The examples provided by the requester, which include several instances illustrating the DOH's knowledge of the statistics it was tracking, demonstrate that the DOH did not make a sufficiently detailed search for responsive records. Mr. Mahon submitted evidence showing that the DOH previously publicly released aggregate data on the number of anxiety patients certified to receive medical marijuana. *See* R.007a. Statements made by state employees at the Medical Marijuana Advisory Board (MMAB) meeting indicate that the agency has data tracking the rates of new certifications for anxiety. *See* R.055a–056a. A news release from Governor Wolf confirmed that the program had "553,000 patients and caregivers" and "327,400 active certifications." *See* R.027a. Emails from the DOH indicated the agency tracked the top three medical conditions for which medical marijuana was being prescribed. *See* R.025a. Lastly, the DOH website published a presentation made by its MMAB featuring various statistics regarding the program's administration thus far. *See* R.108a. It is thus highly unlikely that the DOH could publish and report the performance of the medical marijuana program under its command and still conclude that it possesses no documented information about how it monitors that program. *See* R.004a. Given the details provided by Mr. Mahon, this Court should affirm the OOR's conclusion that the DOH has failed to demonstrate that records responsive to Item 2 of the request do not exist.

CONCLUSION

For the foregoing reasons, Respondents respectfully ask this Honorable Court to affirm the OOR's Final Determination.

Respectfully submitted,

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Dated: January 21, 2022

CERTIFICATE OF WORD COUNT COMPLIANCE

I hereby certify that this filing complies with the word count limit set forth in Pennsylvania Rule of Appellate Procedure 2135(a)(1). Based on the Microsoft Word program word count function, the brief contains 5,046 words.

/s/Paula Knudsen Burke
Paula Knudsen Burke (No. 87607)

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I hereby certify that Respondents' Brief 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.

____*/s/Paula Knudsen Burke*____
Paula Knudsen Burke (No. 87607)