

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT :

OF HEALTH :

Petitioner :

No. 1066 C.D. 2021

v. :

ED MAHON and :

SPOTLIGHT PA, :

Respondents. :

SUPPLEMENTAL REPRODUCED RECORD

Pursuant to Pennsylvania R.A.P. 2156, appellees designate and submit the following Supplemental Reproduced Record.

Respectfully submitted:

/s/Paula Knudsen Burke

Paula Knudsen Burke
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

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Date: January 21, 2022

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1. Respondent Ed Mahon August 6, 2021 attachment to email to Office of Open Records. This document corresponds to Department of Health Reproduced Record 142-154. The Reproduced Record contains the email thread between the parties but omitted the attachment to the email (shown in the email caption as “Attachments: RTK_response_aug_6.pdf”).....001b

Docket No. AP 2021-1296

Ed Mahon of Spotlight PA (requester) vs. Pennsylvania Department of Health

August 6, 2021

Thank you for the time to review the case, Feldman v. Pa. Comm'n on Crime and Delinquency.

I'm asking the Office of Open Records to please consider the following in making its decision.

1.) Section 709 of the Crime Victims Act:

Section 709. Confidentiality of records.

[The record of a proceeding before the bureau or a hearing examiner shall be a public record; however, a record or report obtained by the bureau or a hearing examiner, the confidentiality of which is protected by any other law or regulation, shall remain confidential subject to that law or regulation.]

(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, 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.

(b) Disclosure restricted.--Except as otherwise provided by law, no person who has had access to a report, record or any other information under this subsection shall disclose the content of such a report, record or other information or testify in a judicial or administrative proceeding without the written consent of the direct victim or intervenor or, if the direct victim or intervenor is deceased, the claimant.

(c) Construction.--This section shall not be construed to preclude or limit introduction of the contents of a report, record or other information in an appeal hearing before the Office of Victims' Services or in an investigation, prosecution or judicial proceeding enforcing section 1303 or in communicating with the prosecutor's office regarding restitution.

The restrictions in Section 709 of the Pennsylvania Crime Victims Act are more specific and provide, arguably, greater protection from disclosure. Section 709, for example, states that the information isn't subject to disclosure through the "subpoena or discovery" process. Whether the correct interpretation is that Section 709 prohibits aggregate data from being released is a different issue. But my point is Section 709 is more prohibitive than Act 16 of 2016.

2.) Also, regarding the Feldman case, I'll again draw your attention to the recent Office of Open Records ruling in Finnerty vs. the Pennsylvania Department of Health (Docket No. AP 2021-1061.) In that ruling, the office provided a thorough analysis of the confidentiality provisions of Act 16 of 2016 on pages 5 and 6.

The Department is correct that the requested information is not included in subsection (b), as set forth above. However, subsection (b) is not an exhaustive list of public records under the Medical Marijuana Act. If the General Assembly intended the list to be exhaustive, it could have done so, by noting that only three categories of records regarding the medical marijuana program may be disclosed. Without such language, subsection (b) appears to be strictly illustrative, in that the General Assembly intended to highlight specific records that may be disclosed. Any 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).

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 Thus, this is the reason why Section 1307 of the Medical Marijuana Act criminalizes the disclosure of “any information related to the use of medical marijuana” (emphasis added) – the General Assembly was concerned about the disclosure of information regarding patients and caregivers, rather than all information concerning the program.

The office made the point well in its decision. And I'll echo the argument that Section 1307 of the Medical Marijuana Act contains non-exhaustive lists of examples. Section 709 of Feldman doesn't contain similar non-exhaustive lists.

PROOF OF SERVICE

I hereby certify that I have served the foregoing document, Supplemental Reproduced Record, upon the persons listed on the date and in the manner indicated below, which satisfies the requirements of Pa.R.A.P. 121:

Notification by PACFile as follows:

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Dated: January 21, 2022

*/s/ Paula Knudsen Burke
Counsel for Respondents*

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Paula Knudsen Burke

Signature: /s/*Paula Knudsen Burke*

Attorney No.: 87607

Date: January 21, 2022