



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
YASHA KAHN,	:
Requester	:
	:
v.	:
	:
	:
	:
PENNSYLVANIA DEPARTMENT OF HEALTH,	:
Respondent	:
	:
And	:
	:
	:
TERRAPIN INVESTMENT FUND I, LLC,	:
ORGANIC REMEDIES, INC., PENNALT	:
ORGANICS, INC., GREEN LEAF	:
MEDICALS, LLC, PUREPENN, LLC,	:
PRIME WELLNESS OF PENNSYLVANIA,	:
LLC, PENNSYLVANIA MEDICAL	:
SOLUTIONS, LLC, GREEN ANALYTICS	:
NORTH, LLC, FRANKLIN LABS, LLC,	:
AGRONOMET BIOLOGICS, LLC,	:
AGRIMED INDUSTRIES OF PA, LLC,	:
AGRI-KIND, LLC, STANDARD FARMS,	:
LLC, Direct Interest Participants	:

Docket No: AP 2023-1423

FACTUAL BACKGROUND

On June 5, 2023, Yasha Kahn (“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 “[a]ll testing data submitted by cannabis testing labs

to the [Department]. The data is stored in a database hosted by MJ freeway, accessible to the [D]epartment.”

On June 12, 2023, the Department denied the Request in part, arguing that “information maintained in electronic tracking systems under 35 P.S. § 10231.70(a) are withheld from disclosure, pursuant to 65 P.S. § 67.708(b)(11) and 35 P.S. § 10231.701(c), respectively. *See also* 28 Pa. Code Section 1141.22(b)(10); 65 P.S. § 67.305.”

On June 23, 2023, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. The Requester also submitted a “PA FOIA request denial” arguing, among other things, that the “data [requested] is data stored by the [Department], and not a grower/processor or dispensary” and that the “data [requested] would not reveal a trade secret and is not confidential, proprietary information.” 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 August 3, 2023, the Department indicated that it “provided notice pursuant to 65 P.S. § 67.1101(c) to all thirty (30) of these potential DIPs” as identified by the Department.¹

On August 2, 2023, the Department submitted a position statement reiterating its argument that “the requested records constitute information maintained in the electronic tracking system which is expressly confidential under the Medical Marijuana Act.” The Department further argues, among other things, that the withheld records also contain confidential proprietary information of third parties. In support of its argument, the Department submits the attestation of Danica Hoppes (“Hoppes Attestation”), the Legal Administrative Officer and Open Records Officer (“ORO”) for

¹ On August 3, 2023, the OOR asked the Requester whether he had any objections to third party direct interest participants’ requests to participate in the instant appeal. On August 6, 2023, the Requester indicated that he had no objections.

the Department, and Tabitha Bosack (“Bosack Attestation”), Chief Compliance Officer and Facility Compliance Manager, Medical Marijuana Office for the Department.

On August 2, 2023, Terrapin Investment Fund, LLC (“Terrapin”) requested to participate and on August 25, 2023, submitted a position statement and the attestation of Troy Conzelmann (“Conzelmann Attestation”). On August 3, 2023, Organic Remedies, Inc. (“Organic Remedies”) requested to participate and made a submission in support of its position. On August 10, 2023, PennAlt Organics, Inc. (“PennAlt”) requested to participate and made a submission in support of its position. On August 11, 2023, Standard Farms, LLC, Agri-Kind, LLC, Agronomed Biologics, LLC, Green Leaf Medicals, LLC, Prime Wellness of Pennsylvania, LLC, Agrimed Industries of PA, LLC, Pure Penn, LLC, Franklin Labs, LLC, Pennsylvania Medical Solutions, LLC, and Green Analytics North, LLC (collectively referred to as “Intervenors”) requested to participate² and made a submission in support of its position.

On August 16, 2023, the Requester submitted a position statement. The Requester argues, among other things, that “the data is not marked as confidential [...] and shouldn’t have the complete confidentiality protections as the original data.” The Requester further maintains that the “data requested is not placed by growers/processors and dispensaries into the [Department’s] system. The data requested is transferred from labs to the [Department].” In sum, the Requester argues that “[o]nce the data leaves the controlled environment of the lab’s confidential ETS and is transmitted to the [Department’s] ETS, it no longer enjoys the same confidentiality protections.”

On August 17, 2023, the OOR contacted the parties asking for clarification on what issue(s) remain outstanding for the OOR to adjudicate. The OOR further provided all parties the

² These ten direct interest participants are represented by Hawke McKeon & Sniscak.

opportunity to submit any additional argument/evidence addressing the Requester's August 16, 2023 position statement that he is "seeking information from the [ETS]...."

On August 21, 2023, the Requester submitted a supplemental position statement. The Requester argues that the Department's ETS is not listed in 35 Pa. Code § 10231.701(c) and should be subject to disclosure.

On August 24, 2023, Organic Remedies submitted a supplemental position statement arguing that the responsive records are protected under the Medical Marijuana Act.

On August 25, 2023, the Intervenors submitted a supplemental position statement arguing that the "information does not become public upon transfer to [the Department]" and that the "information transferred to [the Department] does not get anonymized prior to sending."

On August 25, 2023, the Department submitted a supplemental position statement arguing that the Requester cannot modify a request on appeal and that there is only one ETS. The Department also submitted the supplemental attestation of Tabbitha Black ("Black Supplemental Attestation").

LEGAL ANALYSIS

The Department is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Department is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as "such proof as leads the factfinder ... 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 Request was not modified on appeal

As a threshold matter, the Department argues that the Requester impermissibly attempts to modify the Request on appeal. The OOR has repeatedly held that a request may not modify or expand a request on appeal, and that the OOR’s review on appeal is confined to the Request as written. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010); *Michak v. Pa. Dep’t of Pub. Welfare*, 56 A.3d 925 (Pa. Commw. Ct. 2012) (holding that “where a requestor requests a specific type of record ... the requestor may not, on appeal argue that an agency must instead disclose a different record in response to the request”).

Here, the Request seeks “[a]ll testing data submitted by cannabis testing labs to the [Department].” The Department argues that the Requester “tried to modify his [R]equest by offering unsubstantiated information about he believes data is entered into the ETS.” This, however, is not modifying or expanding the Request. This information is offered by the Requester in an attempt to argue that the information contained in the ETS should be subject to disclosure. Accordingly, based on the totality of the record, the Request was not modified on appeal.

2. The testing data is confidential under the Medical Marijuana Act

The Department argues that “the requested records constitute information maintained in the electronic tracking system which is expressly confidential under the Medical Marijuana Act.” In support of its position, the Hoppes Attestation states, in relevant part, as follows:

1. In response to my inquiry, I was advised by counsel for the medical marijuana program that all responsive records are maintained in the electronic tracking system (ETS), the contents of which are confidential pursuant to Section 701 of the Medical Marijuana Act (Act). *See* 35 P.S. § 10231.701(c).
2. I was further advised that the Department does not maintain or operate a separate electronic tracking system for such information, that the records would be accessed from the ETS which is described as confidential under the Act.³

Additionally, the Bosack Attestation states, in relevant part, as follows:

1. Approved medical marijuana laboratories enter and upload testing data directly into the electronic tracking system hosted by MJ Freeway (ETS).
2. The Department does not maintain or operate a separate electronic tracking system for such information.
3. To conduct its statutorily mandated oversight of the medical marijuana program, the Department routinely accesses information directly from the ETS, which includes information such as all testing results related to harvested material, any retesting, and testing results from all final medical marijuana products that have been approved for sale to patients in the Commonwealth, required safety information including current Certificates of Analysis (COAs) [...].
4. The requested laboratory test results and other proprietary information required by the Department are entered and uploaded into the ETS by permitted medical marijuana grower/processors and approved laboratories.
5. All uploaded information can be and is accessed directly by the Department for purposes of conducting routine audits, specific investigations, and the like.
6. The Department is statutorily required to ensure that medical marijuana organizations are complying with their obligations under the Act; grower processors and dispensaries must accurately track all inventory, dispensaries must verify patient and caregiver identification cards, “defective” or contaminated products must be returned for disposal by grower processors. The ETS is a critical component of the Department’s regulation of medical marijuana organizations because the Department can directly access relevant information directly from the ETS.

³ Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Department has acted in bad faith, “the averments in the [attestations] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382- 83 (Pa. Commw. Ct. 2014) (citing *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Under the Act, 35 P.S. § 10231.701 states, in relevant part, as follows:

(a). Requirement – A grower/processor or dispensary must implement an electronic inventory tracking system which shall be directly accessible to the department through its electronic database that electronically tracks all medical marijuana on a daily basis. The system shall include tracking of all of the following:

- 1) For a grower/processor, a seed-to-sale tracking system that tracks the medical marijuana from seed to plant until the medical marijuana is sold to a dispensary.
- 2) For a dispensary, medical marijuana from purchase from the grower/processor to sale to a patient or caregiver and that includes information that verifies the validity of an identification card presented by the patient or caregiver.
- 3) For a grower/processor and a dispensary, a daily log of each day's beginning inventory, acquisitions, amounts purchased and sold, disbursements, disposals and ending inventory. The tracking system shall include prices paid and amounts collected from patients and caregivers.
- 4) For a grower/processor and a dispensary, a system for recall of defective medical marijuana
- 5) For a grower/process and a dispensary, a system to track the plant waste resulting from the growth of medical marijuana or other disposal, including the name and address of any disposal service.

(c). Access. – Information maintained in electronic tracking systems under subsection (a) shall be confidential and not subject to the act of February 14, 2008 (P.L.6, No. 3), known as the Right-to-Know Law.

35 P.S. § 10231.701(a),(c).

Further, 28 Pa. Code § 1171a.31 – Test results and reporting – states, in relevant part, as follows:

(b). The tests results for each sample collected under § 1171a.28(c)(1) and (2) relating to selection protocols for samples) shall be entered into the electronic tracking system and shall only be accessible to the grower/processor submitting the sample to the Department.

28 Pa. Code § 1171a.31(b).

Here, the Request seeks “testing data submitted by cannabis testing labs to the [Department].” While the Requester maintains his argument that the “data [requested] is data stored by the [Department], and not a grower/processor or dispensary” and that the “data

[requested] would not reveal a trade secret and is not confidential, proprietary information,” the Department’s regulations specifically state that “test results for each sample collected under § 1171a.28(c)(1) and (2) relating to selection protocols for samples) shall be entered into the electronic tracking system and shall only be accessible to the grower/processor submitting the sample to the Department.” Thus, testing results conducted by a grower/processor or dispensary is uploaded to the ETS and “only be accessible to the grower/processor submitting the same to the Department.” *See also* 28 Pa. Code § 1171a.35 (information entered by an approved laboratory into the ETS). Accordingly, a review of the evidence submitted demonstrates that the responsive records as identified by the Department constitute information contained in an electronic tracking system and are thus exempt from disclosure. *Id.*; 28 Pa. Code §§ 1171a.28-35.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Department is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal or petition for review to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. 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.⁴ This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: September 15, 2023

/s/ Lyle Hartranft

LYLE HARTRANFT, ESQ.
APPEALS OFFICER

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