



pennsylvania
OFFICE OF OPEN RECORDS

OPINION AND ORDER

IN THE MATTER OF	:	
	:	
WALLACE MCKELVEY AND	:	
<i>PENNLIVE AND THE PATRIOT-NEWS,</i>	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2017-1443
	:	
PENNSYLVANIA DEPARTMENT	:	
OF HEALTH,	:	
Respondent	:	

INTRODUCTION

Wallace McKelvey, a reporter for *PennLive* and *The Patriot-News* (collectively the “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 applications for medical marijuana grower/processor and dispensary permits. The Department partially denied the Request, directing the Requester to redacted copies of applications posted on the Department’s website. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Opinion and Order, the appeal is **stayed**, and the Department is required to take further action as directed.

FACTUAL BACKGROUND

On May 12, 2017, the Request was filed, seeking “[a]ll applications submitted for medical marijuana grower/processor and dispensary permits.” On May 18, 2017, the Department invoked a thirty-day extension of time. *See* 65 P.S. § 67.902(b). The Requester subsequently agreed to provide the Department additional time to respond to the Request on June 19, 2017.¹ *See* 65 P.S. § 67.902(b)(2).

On July 10, 2017, the Department partially denied the Request, referring the Requester to the Department’s website for redacted copies of “all the complete grower/processor (GP) applications, and the complete applications for the twenty-seven applicants who were awarded dispensary permits.” *See* 65 P.S. § 67.704. Regarding the redactions, the Department argued that:

Individual home addresses, direct phone numbers, driver’s license information, dates of birth, passport information, Social Security Numbers, Federal Employer Identification Numbers (FEINs), personal identification numbers (PIN), bank account information, tax information, credit card numbers, and email addresses were redacted pursuant to 65 P.S. §§ 67.708(b)(1)(ii) and (b)(6)(i).... This information is also exempt from access pursuant to the privacy protections of the 4th Amendment of the United States Constitution and Art. 1, § 8 of the Pennsylvania Constitution, and is therefore excluded from the definition of a “public record.” ...

To the extent that [the Request] identifies records that constitute or reveal a trade secret or confidential proprietary information, or financial records relating to the third party, [the Request] is denied. *See* 65 P.S. §§ 67.707(b); 67.708(b)(11); and 67.305(a)(2).

Records that, if disclosed, would create a reasonable risk of endangering the safety or security of a building; expose or create a vulnerability within critical systems, i.e. building plans or infrastructure records; or jeopardize computer security, have also been redacted. *See* 65 P.S. §§ 67.708(b)(3), (b)(3)(iii), and (b)(4).

Regarding the remaining dispensary applications, [the Request] is denied at this time. As we discussed, the applications are voluminous and the Department is in the process of posting the non-confidential portions of all applications on the Department’s website. The Department tried, unsuccessfully, to secure additional time to finish processing the documents you requested. The Department intends to post the remaining applications in the near future....

¹ The Department requested a further extension from the Requester, which was denied on July 6, 2017.

On July 26, 2017, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure.² In the appeal, the Requester limited the appeal “to the partial denials of grower/processor applications for Cresco Yeltrah, LLC and Terrapin Investment Fund 1, LLC, and dispensary applications for Cresco Yeltrah, LLC, KW Ventures Holdings, LLC, Mission Pennsylvania II, LLC and SMPB Retail, LLC.” Additionally, the Requester argued that the OOR should conduct an *in camera* review of the records and require the Department to submit a privileged log identifying the reasons why the redacted material is exempt from disclosure; further, the Requester argued that the OOR should conduct a hearing “to allow Requesters to confront any evidence submitted by [the Department] or third party participants.” The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c). On August 2, 2017, the Department notified the applicants implicated in the appeal.

On August 7, 2017, the Department submitted a position statement, explaining that it was unable to completely respond to the Request due to the volume of records involved; however, the Department further explained that it has since posted all responsive applications, with redactions, to the Department’s website. In addition, the Department provided corrected copies of certain applications that were “improperly redacted” by the Department. Regarding the redactions to the applications, the Department argued that it properly made these redactions. Specifically, the Department explained that it “started with applicant-redacted applications, added Department redactions if necessary, and posted the redacted applications on its public website because ‘agencies are not permitted to waive a third party’s interest in protecting their records.’” *See Pa.*

² The Requester subsequently provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

Dep't of Educ. v. Bagwell, 131 A.3d 638, 650 (Pa. Commw. Ct. 2015). However, the Department argued that “the applicant must defend any redaction not made by the Department.” In support of the redactions, the Department provided the affidavit, made under penalty of perjury, of John Collins, Director of the Office of Medical Marijuana.

On August 7, 2017, the Requester responded to the Department’s submission, challenging Director Collins’ affidavit and arguing that the Department has not met its burden of supporting the redactions. On August 25, 2017, the Requester made an additional submission, addressing redactions made by the applicants and referring to information regarding the applicants that is publicly available online.

On the same day, the Department objected to the Requester’s submission, noting that it was made after the record for submissions had closed. Later that date, the Requester responded to the Department’s objection. In order to fully develop the record in this matter, the Requester’s August 25, 2017 submission was accepted into the record before the OOR. *See* 65 P.S. § 67.1102(a)(2).

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.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, the Requester requested that the OOR conduct an *in camera* review and hold a hearing; however, for the reasons set forth in this Final Determination, those requests are denied at this time.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011)

(quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The permit applications are subject to the RTKL

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

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

(8) Other information regarding a ... medical marijuana organization not listed in subsection (a) that falls within an exception to the [RTKL], or is otherwise considered to be confidential proprietary information by other law.

(9) Information regarding the physical features or, and security measures installed in, a facility.

(10) Information maintained in the electronic tracking system of a grower/processor and a dispensary.”

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

Because the permit applications are “subject to the [RTKL],” rather than explicitly public, the records are not *unconditionally* public, and exemptions found in the RTKL and other statutes/regulations may be raised, as recognized by the Department’s regulations. *See Pa. Dep’t of Labor & Indus. v. Heltzel*, 90 A.3d 823 (Pa. Commw. Ct. 2014); *see also* 65 P.S. § 67.306; 65 P.S. § 67.3101.1; *cf. McCord v. Pennsylvanians for Union Reform*, 136 A.3d 1055 (involving Section 614 of The Administrative Code of 1929, which states that certain information “shall be public information”).

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

The Department’s position statement explains, in detail, its response to the Request. Specifically, the Department explains that:

Clearly, the applicant was in the best position to identify information considered confidential and proprietary regarding its process or facility. Therefore, the Department directed all applicants to submit an extra copy of the applicant, redacted in accordance with the temporary regulations and the RTKL.... Accordingly, applicants submitted applications, redacting what they deemed to be proprietary and confidential or otherwise subject to redaction under the RTKL. The Department started with applicant-redacted applications, added Department redactions if necessary, and posted the redacted applications on its public website....

Meanwhile, Director Collins attests, in relevant part:

2. The Office [of Medical Marijuana] anticipated that medical marijuana permit applications would become the subject of RTKL requests and promulgated temporary regulations that instructed applicants to mark on their applications any information deemed confidential or proprietary....
3. Additionally, applicants were instructed to provide extra copies of applications, redacted pursuant to the RTKL and the Act’s temporary regulations.
4. Redactions made by the Department are marked “DOH Redacted” or “DOH Redactions;” all other redactions were made by the applicant.

5. The Department redacted personal and financial information, as well as information pertaining to safety and security of building[s] and business infrastructure, as permitted under the RTKL and the Medical Marijuana Temporary Regulations....
7. The Department only redacted proprietary and confidential information contained on an application if the information was marked proprietary or confidential, but the applicant failed to redact the material.

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

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

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

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

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

129 A.3d 1246, 1254 (Pa. Commw. Ct. 2015). In comparison, an agency did not comply with Section 901 when its open-records officer failed to inquire with agency officials “whether [they

were] in the possession, custody, or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access....” *Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011).

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

Therefore, under Section 901 of the RTKL, an agency’s open-records officer must make a good faith effort to determine if a record is a public record. As part of this good faith effort, an agency must notify any third party that has alleged that the record contains trade secrets or confidential propriety information pursuant to Section 707. After conferring with the third party, the agency shall either deny the request or grant access to the record.

In situations involving trade secrets or confidential proprietary information, “agencies are not permitted to waive a third party’s interest in protecting the records” before the OOR. *Bagwell*, 131 A.3d at 650 (“[W]hen PSU had no opportunity to review records in the Department’s possession to which OOR’s disclosure order applied, PSU established a deprivation of due process that merits a remand”). However, Section 901 tasks agencies with making a good faith effort to determine whether a record is subject to access. While Section 707 requires an agency to consult

with third parties regarding their claims of trade secrets or confidential proprietary information, Section 707 also permits agencies to deny those claims when they are not made in good faith. *Compare* 65 P.S. § 67.901, *with* 65 P.S. § 67.707.

The Department acknowledges not reviewing the information redacted by the applicants. Additionally, there is no indication that the applicants informed the Department of the reasons for the redactions; instead, the Department accepted the applications as redacted by the applicants. Because the Department has not undertaken a review of this redacted material, it has not made a good faith effort to determine whether that information is not subject to public access, as claimed by the applicant.³ As a result, the Department has not complied with Section 901 of the RTKL.

In *Mollick*, the Court held that the OOR erred by not “directing the Township’s Open Records Officer to make such a good faith determination of the requested information”; as a result, the matter was remanded to the OOR “to direct the Township’s Open Records Officer to fulfill his duty under the RTKL by making a good faith determination....” 32 A.3d at 875; *see also Mollick v. Twp. of Worcester*, OOR Dkts. AP 2009-0042, AP 2009-0058, and AP 2009-0438 (Final Determination Upon Remand). The OOR has an obligation to sufficiently develop the record for judicial review, *see Twp. of Worcester v. Office of Open Records*, 129 A.3d 44, 57 (Pa. Commw. Ct. 2016) (“Under the RTKL, the OOR is charged with developing an evidentiary record before its appeals officers to ensure meaningful appellate review”) (citation omitted); *Pa. Dep’t of Educ.*

³ As noted by the Department, the redacted applications are posted on the Department’s website. While it is premature for the OOR to reach the merits regarding the redactions, a review of the redacted applications demonstrates that the applications have not been consistently redacted. For example, KW Ventures Holdings, LLC’s dispensary applications, found at D-1079-17 (available at http://www.health.state.pa.us/mmrtk/docs-dispensaries/D-1079-17_Redacted.pdf) and D-3025-17 (available at http://www.health.state.pa.us/mmrtk/docs-dispensaries/D-3025-17_Redacted.pdf), do not include any applicant-made redactions to Section 3 – Diversity Plan, while Mission Pennsylvania II, LLC’s dispensary application, found at D-2006-17 (available at http://www.health.state.pa.us/mmrtk/docs-dispensaries/D-2006-17_Redacted.pdf), has nearly the entirety of Section 3 – Diversity Plan redacted. Meanwhile, the grower/processor application for Terrapin Investment Fund 1, LLC, found at GP-4002-17 (available at http://www.health.state.pa.us/mmrtk/docs/GP-4002-17_Redacted.pdf), is almost entirely redacted.

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

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

If the request is so large that an agency does not have the ability to process the request in a timely manner given the enormous number of records requested, it would similarly undermine the specific legislative intent that every record be reviewed so that free and open discussions can take place within government when a decision is being deliberated, and that agencies should be afforded a sufficient opportunity to conduct investigations to protect the Commonwealth’s security interests and the public’s privacy rights.

Nonetheless, just because an agency claims it neither has the time nor resources to conduct a document-by-document review within the time-period required by the RTKL does not make it so. The agency making such a claim has to provide the OOR with a valid estimate of the number of documents being requested, the length

of time that people charged with reviewing the request require to conduct this review, and if the request involves documents in electronic format the agency must explain any difficulties it faces when attempting to deliver the documents in that format. *Based on the above information, the OOR can then grant any additional time warranted so that the agency can reasonably discern whether any exemptions apply.*

142 A.3d 1023, 1031-32 (Pa. Commw. Ct. 2016) (emphasis added). Here, the Department explains that the applications total approximately 300,000 pages; roughly 800 pages per grower/processor applications and 500 pages per dispensary applications. While roughly 3,600 pages of applications are currently at issue in this appeal, the Request originally implicated all 300,000 pages. The Department's position statement further explains that "the Department was simply unable to complete the review and redact process by the final deadline." While the Department has not provided an estimate of the length of time that it would require to review the unredacted applications at issue in this appeal, it is evident from the record before the OOR that there are a voluminous amount of records still at issue in this matter.

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

the Department shall issue a revised response to the Request and provide an exemption log explaining the legal support for each redaction and/or document withheld.⁴ Within fifteen (15) business days of the date of this final response, the Requester shall notify the OOR of any deficiencies with the Department's response. The OOR will then issue a final determination within thirty (30) days of its receipt of the Requester's submission, absent additional extensions of time to develop the record, if necessary. The Department shall notify all third parties implicated by this appeal of this Order.

ORDER

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

FINAL DETERMINATION ISSUED AND MAILED: September 11, 2017

/s/ Kyle Applegate

APPEALS OFFICER
KYLE APPLGATE, ESQ.

Sent to: Joshua Bonn, Esq. (via e-mail only);
Carol Mowery, Esq. (via e-mail only);
Lisa Keefer (via e-mail only)

⁴ The OOR notes that in its appeal, the Requester asks the OOR to "compel [the Department] to submit a detailed privilege log."