THE SUPREME COURT OF MISSOURI

No. SC99205

STATE OF MISSOURI, *ex rel.* DEPARTMENT OF HEALTH AND SENIOR SERVICES,

Appellant/Relator,

v.

RENEE T. SLUSHER, COMMISSIONER, ADMINISTRATIVE HEARING COMMISSION, AND KINGS GARDEN MIDWEST, LLC

Respondents.

Appeal from the Circuit Court of Cole County, Missouri
19th[th] Judicial Circuit

The Honorable Jon Edward Beetem, Circuit Judge

RESPONDENT KINGS GARDEN MIDWEST, LLC's SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

The Appellant correctly sets forth the Jurisdictional Statement.

STATEMENT OF FACTS

The Department of Health and Senior Services promulgated regulations that set an arbitrary cap on the licenses to be issued (the number chosen was the constitutionally mandated minimum) and created a scoring system that put applicants in direct competition with other like applicants for a limited number of licenses.

Kings Garden Midwest, LLC, (hereinafter "Kings Garden") applied for two (2) marijuana cultivation licenses with the Department of Health and Senior Services (hereinafter "the Department"), both of which were denied. Doc. 2, p. 2; Respondent's Appendix R-4. Kings Garden appealed the denial of its applications for marijuana cultivation licenses. Doc. 2, p. 2; Respondent's Appendix R-4. As part of its appeal, Kings Garden alleged that the scoring process used by the Department was arbitrary and capricious in that other applicants were awarded more points for the same and/or similar answers provided by Kings Garden. Doc. 2, p. 2; Respondent's Appendix R-4. The points awarded per question are relevant and important because the applicants were in competition as to which applicant would receive the most points and thereby receive a license. Doc. 2, p. 6; Respondent's Appendix R-8. Kings Garden ultimately received fewer points than other applicants and was denied a license. Doc. 2, p. 2; Respondent's Appendix R-4.

During its appeal at the Administrative Hearing Commission (hereinafter "AHC"), Kings Garden requested complete, unredacted copies of applications of successful applicants so that it could prove the allegations of arbitrary and capricious scoring. The AHC found it was entitled to examine the successful applications. Doc 5, p. 1-6;

Appellant's Appendix A-16 to A-21. The Department is not limited in the number of licenses it can issue. It chose to limit the number of licenses it would issue thereby creating a system of competition between applicants. Mo. Constitution Article XIV s. 1.3(15); 19 CSR 30-95.050(1)(A). The AHC entered a protective order to prevent redisclosure of confidential information obtained by Kings Garden in the course and scope of discovery. Doc. 8, p. 14; Appellant's Appendix A-12 to A-15.

The Department requested and received a preliminary writ from the Circuit Court of Cole County. Doc. 20. After briefing and argument, the Circuit Court denied the petition and quashed the preliminary writ. Doc. 21 p. 6; Appellant's Appendix A-27. The Court of Appeals issued its decision upholding the ruling of the Circuit Court. The Department thereafter appealed to this Court.

POINT RELIED ON

THE CIRCUIT COURT DID NOT ERR IN QUASHING ITS PRELIMINARY WRIT OF PROHIBITION AND DENYING THE WRIT OF PROHIBITION BECAUSE COMMISSIONER RENE SLUSHER ACTED WITHIN HER DISCRETION TO ALLOW DISCOVERY IN KINGS GARDEN'S APPEAL IN THAT THE CONSTITUTION DOES NOT CREATE A DISCOVERY PRIVILEGE AS A DEFENSE TO THE INFORMATION SOUGHT.

State ex rel. Mo. Ethics Comm'n v. Nichols, 978 S.W.2d 770, 773-74 (Mo. App. E.D. 1998)

State ex rel. Ford Motor Co. v. Messina, 71. S.W.3d 602, 606 (Mo. banc 2002)

Article XIV s. 1.3(5)

Article XIV s. 1.3(23)

STANDARD OF REVIEW AND PRESERVATION

The sole question presented is whether the Missouri Constitution prohibits the disclosure of relevant information relating to successful medical marijuana cultivation applications during the course of an appeal of the denial of a medical marijuana cultivation application. The question is one of law. "This Court determines questions of law *de novo*." *Hamilton v. State*, 598 S.W.3d 607, 610 (Mo. 2020).

ARGUMENT

THE CIRCUIT COURT DID NOT ERR IN QUASHING ITS PRELIMINARY WRIT OF PROHIBITION AND DENYING THE WRIT OF PROHIBITION BECAUSE COMMISSIONER RENE SLUSHER ACTED WITHIN HER DISCRETION TO ALLOW DISCOVERY IN KINGS GARDEN'S ADMINISTRATIVE APPEAL IN THAT THE CONSTITUTION DOES NOT CREATE A DISCOVERY PRIVILEGE TO THE INFORMATION SOUGHT.

Introduction & Background

The people of Missouri approved medical marijuana by constitutional amendment. The Amendment provided for a minimum number of licenses. The Department of Health and Senior Services (hereinafter "Department") thereafter promulgated regulations restricting the number of licenses to the constitutionally mandated minimum, created a scoring process that required applicants to compete for those limited licenses and now seeks a ruling from this Court which would make their decision making immune from meaningful review despite the guarantee of due process contained in the constitutional amendment. Throughout its scattershot brief, the Department sets forth multiple complicated arguments regarding statutory interpretation combined with speculation of what was in the mind of the voters when the constitutional amendment was approved. In all of the Department's arguments, it fails to acknowledge that the simplest answer is the right answer: The constitutional amendment itself allows for the use of information submitted to the Department to be used for purposes of appealing denied licenses.

Kings Garden was denied licensure by the Department for its two Medical Marijuana Cultivation Applications filed with the Department. Upon denial of its applications for Cultivation Licenses, Kings Garden filed an appeal with the Administrative Hearing Commission as prescribed by 19 CSR 30-95.025(6). Notably, this section does not provide limitations on the appeal nor limit the scope of discovery.

Kings Garden filed its appeal because, among other things, Kings Garden believes that applicants who did receive a cultivation license answered the same questions with virtually identical answers to Kings Garden yet received higher scores. Respondent's Appendix R-15). Kings Garden believes this to be true for several reasons: First, between its own two cultivation applications, which had **identical or nearly identical** answers, scores varied wildly; and second, many successful applicants, including Kings Garden, utilized consultants who assisted with the application process and provided substantially similar advice to all applicants. Well pled facts are assumed to be true. *Mitchell v. Phillips*, 596 S.W.3d 120, 122 (Mo. banc 2020).

The Department of Health and Senior Services' scoring guide provides as follows:

> Department rules require that the same individual score each question if possible. A scorer may be assigned to score only a few of the total questions, or even just one question. It is imperative that every response is scored in a consistent manner for all applicants. Some of the questions and answers may require a scorer to use his or her own professional knowledge and expertise in scoring the responses. In doing so, a scorer must score every response consistently. For example, if two applicants applying for the same facility type provide identical responses to a question, ***the score must be the same***.

Respondent's Appendix R-66 (emphasis added). This scoring standard, set by the Department itself, makes all of the individual answers and scores to questions relevant to

the appeal filed by Kings Garden. By examining and comparing its two cultivation applications, Kings Garden knows that the Department failed to follow its own rules in that the scores were different for identical answers. However, in order to submit evidence that the scoring resulted in Kings Garden being wrongfully denied a license, it must have access to inconsistent scoring across all cultivation applications to prove it received lower scores than mandated by the Department's own rules. By adopting this rule internally, the Department had to know that it was creating a structure that opened all of this information to discovery upon appeal by denied licensees.

The Department chose to create a competitive process in the award of medical marijuana cultivation, manufacturing and dispensary licenses. The constitutional amendment did not mandate that choice. That choice did, however, generate massive, non-refundable fees payable to the Department. As a result of this choice, the Department is now stuck with the process it created. Rather than judging applications based upon their own merits, as is done in other licensing contexts, they chose to pit applicants against each other in a "battle royale" for licensure. Now, after serving as the judge, jury and executioner for the losing applicants, a government agency seeks to deprive those applicants the due process of an appeal by stating that no critical analysis of their scoring can be allowed in a court of law because of constitutional confidentiality of applicant materials. Denied applicants are instructed to "trust" the scoring of the Department and are not given any meaningful method to question whether scoring was arbitrary and capricious. Without other applicants' answers and scores, the individual scores for Kings Garden can only be reviewed in a vacuum by the Administrative Hearing Commission –

exactly the opposite of how they were reviewed by the Department in its decision-making process.

The sole issue for this Court is: Does the provision of the Missouri Constitution prohibiting public disclosure of information prohibit denied applicants from obtaining information relevant to their appeals through normal discovery processes? The Court should find that it cannot and does not.

General Scope of Discovery and Application of Discovery Rules to "Confidential" Information

"Discovery allows access to relevant, non-privileged information, while minimizing undue expense and burden. Discovery should be conducted on a 'level playing field' without affording either side a tactical advantage." *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 606 (Mo. banc 2002). This Court, in following its own rules, has mandated that parties to litigation should be given access to relevant, non-privileged documents. The Department, in all of its filings, does not credibly dispute the relevance of the documents. They simply rely on their claim of "constitutional confidentiality" to deny disclosure.

Rule 56.01(b)(1) provides as follows:

> (1) *In General*. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Here, the documents sought by Kings Garden are relevant to its appeal. The Department, in its filings with the AHC, the circuit court and now with this Court, seeks to confuse

issues. The Department conflates confidentiality with privilege. These are separate and distinct concepts. While the documents sought by Kings Garden may be confidential from public disclosure and publication, they are not subject to any recognized privilege. Missouri courts have dealt with this exact question when analyzing the disclosure of "closed" records under the sunshine law. "[S]tate statutes . . . which protect certain types of documents from disclosure, but do not specifically protect them from discovery, do not create a privilege to withhold relevant documents from judicial discovery in a court action." *State ex rel. Mo. Ethics Comm'n v. Nichols*, 978 S.W.2d 770, 773-74 (Mo. App. E.D. 1998).

Since the information sought in discovery is not privileged, at best it is confidential. Confidential information is not immune from discovery and, in fact, is regularly sought and obtained in discovery. Whether it be information relating to trade secrets, design schematics, et cetera, courts routinely order the production of documents in litigation which is considered "confidential" by some or all of the parties. The proper course in those instances is to order the production of the relevant records pursuant to a protective order. Rule 56.01(c). That is what the AHC did. Interestingly, while the Department complains about the particular protective order entered by the AHC, it declined to submit a proposed order when invited to do so by Commissioner Slusher. The Department chose not to provide any input to the AHC as to the form and/or substance of the protective order.

The *Nichols* case is instructive. There is no provision of the Missouri Constitution or other statute, regulation or case law that protects the information sought here from discovery. The Department cites *State ex rel. Dept. of Social Services v. Tucker,* 413

S.W.3d 646 (Mo. banc 2013) for the proposition that the confidentiality language in the Constitution creates a discovery privilege applicable to the denial of an application for a medical marijuana cultivation license. As addressed more fully below, *Tucker* is inapposite here. Here, the constitutional provision in question specifically states that "such reports or other information **may be used only for a purpose authorized by this section**." Article XIV, s. 1.3(5). In the same section, the amendment allows for administrative review of a denied license without limiting the discovery of information relating to the appeal. See Article XIV, s. 1.3(23). In *Tucker*, the statute specifically excluded individuals from receiving information with the laudable goal of protecting children. Here, the provision itself authorizes the use of the information for purposes of appeal. The State's reliance on *Tucker* is misplaced.

Confidentiality Under the Missouri Constitution

The Department's proposed interpretations of Article XIV, s. 1.3(5) of the Missouri Constitution are irreconcilable. The sub-section of the Missouri Constitution relating to confidentiality provides as follows:

> (5) The department shall maintain the confidentiality of reports or other information obtained from an applicant or licensee containing any individualized data, information, or records related to the licensee or its operation, including sales information, financial records, tax returns, credit reports, cultivation information, testing results, and security information and plans, or revealing any patient information, or any other records that are exempt from public inspection pursuant to state or federal law. Such reports or other information may be used only for a purpose authorized by this section. Any information released related to patients may be used only for a purpose authorized by federal law and this section, including verifying that a person who presented a patient identification card to a state

> or local law enforcement official is lawfully in possession of such card.

This provision protects information from public disclosure (addressing additional protections for medical marijuana patients in the last sentence), while at the same time allowing the information to be used for purposes of carrying out the multiple provisions of Article XIV. The amendment does not contain a discovery privilege and to judicially engraft one on to it would violate applicant's right to due process and be unconstitutional.

In subsection B to its brief, Appellant first argues that a broad interpretation of the amendment must be made to "vindicate the broad confidentiality interest guaranteed by and to the voters". Kings Garden agrees that it is important for information to be kept confidential from *public disclosure.* But here, public disclosure is not the issue, rather it is disclosure in the context of discovery in a lawsuit. Confidential information is routinely ordered to be produced by courts across the state. Private and confidential banking information, health information, trade secrets, confidential expert reports, employment records, et cetera, are routinely required to be produced in discovery because the documents are relevant to the underlying action. The correct approach is not to allow the documents to be hidden, but to order production subject to a protective order, as the AHC did in this case. If blanket confidentiality applies to Kings Garden's discovery requests as argued by the Department, there can be no meaningful appeal. The Department created a competitive process whereby the answers of all applicants are scored against each other. How is an unsuccessful applicant to determine if the process followed the Department's own rules?

As the Circuit Court pointed out, this would require denied applicants an appeal "wearing a blindfold with one hand tied behind its back." Doc 21, p. 5; Appellant's Appendix A-26.

In subsection C of its brief, the Department "reformats" the confidentiality section. In Article XIV, s. 1.3(5), the word "or" is used nine times. The Department arbitrarily chooses which of the uses of the word "or" it deems operational and recasts the first sentence into four categories of documents, rather than reading the whole sentence as written. In this section there is no colon (:) or other punctuation that would suggest that this sentence is anything other than a non-inclusive list of documents which might be sought by sunshine law requests.

In actuality, this provision describes a category of documents that the Department is required to keep confidential from public inspection and disclosure. Of note, the Department's re-writing of this section stops one sentence short of the most important language for the purposes of this appeal – the specific instruction that "[s]uch reports or other information may be used only for a purpose authorized by this section". Appeals are specifically authorized by this section. *See* Article XIV, s. 1.3(23).

The provision relating to confidential information protects information from public disclosure, while at the same time it allows the information to be used for purposes of carrying out the multiple provisions of Article XIV of the Missouri Constitution.

The rules for interpreting constitutional provisions are no different than those applied to a statute. See *Brown v. Morris*, 365 Mo. 946, 956, 290 S.W.2d 160, 167 (1956) ("Constitutional provisions are subject to the same rules of construction as statutes except that consideration should be given to the broader purposes and scope of constitutional

provisions."). Moreover, when a constitutional provision is capable of different interpretations—which is not conceded—courts have used statutory language to aid in its interpretation. See *Akin v. Missouri Gaming Comm'n*, 956 S.W.2d 261, 264 (Mo. 1997) (citing *In re V*, 306 S.W.2d 461, 465 (Mo. banc 1957); *Rathjen v. Reorganized School District R–II*, 365 Mo. 518, 284 S.W.2d 516, 525–26 (1955); *State ex rel. O'Connor v. Riedel et al.*, 329 Mo. 616, 46 S.W.2d 131, 134 (1932); *State ex rel. Heimberger v. Board of Curators of University of Missouri*, 268 Mo. 598, 188 S.W. 128, 130 (1916). A paramount rule is that "[c]onstruction of statutes should avoid unreasonable or absurd results." *Reichert v. Bd. of Educ. of St. Louis*, 217 S.W.3d 301, 305 (Mo. banc 2007). Here, if the constitutional provision is given the meaning suggested by the Department, all appeals will necessarily fail because there will be no meaningful ability to gather the facts necessary to challenge the scores assigned to applicants who were denied licenses. The Department will subjectively contend they were not as good as the others and there will be no way to challenge that contention.

Kings Garden's Right to Due Process

Kings Garden submitted its application, along with the $10,000.00 per application fee with the legitimate expectation that the scoring would be fair and consistent. Additionally, Kings Garden is entitled due process in its appeal of the Department's decision to deny its license at the AHC. As part of this right to appeal, the AHC process affords Kings Garden the right to conduct discovery relating to its request for review. *See generally* Chapter 536, RSMo. In its Complaint at the AHC, Kings Garden alleged that the scoring of the applications for cultivation licenses was arbitrary and capricious and that

applicants with substantially similar or identical answers to the same questions were assigned higher scores than Kings Garden which allowed others to obtain a license that Kings Garden was denied. This well-founded allegation contained in Kings Garden's Complaint makes relevant the application answers of all other marijuana applicants so that it can analyze the answers and scoring with the goal of proving the veracity of its allegations. By allowing the Department to hide this information, no meaningful review can take place and applicants who were denied a license, like Kings Garden, have no meaningful way to challenge the scoring provided by the Department which was the basis for the issuance of licenses.

Even if Kings Garden presents expert testimony about how its application answers should have been scored higher based upon their responses, the Department can respond, "they were not as good as other responses and therefore received lower scores." That assertion is immune to a meaningful challenge or verification if the Department is allowed to conceal the only information that either proves or disproves their defense.

It is telling that throughout the process of the writ and appeals therefrom, the Department does not question the relevance of the information sought. The Department implicitly acknowledges that the information sought is **the most relevant** information available to satisfactorily adjudicate the appeal. Allowing the Department to hide the most relevant information available would be contrary to established law relating to the parameters of discovery.

Access to Patient Information

The Department attempts to deflect from the straightforward legal issues presented here by claiming that the Circuit Court's decision will somehow allow access to protected information of those patients who apply for medical marijuana cards. Patient applications have not been sought by Respondent in discovery. Further, that information is subject to added protection because patient information can only be released for a purpose authorized by federal law or the constitutional section itself. Additionally, the physician patient privilege and the Health Insurance Portability and Accountability Act (HIPAA) apply to protect patients as well. The only reason Kings Garden seeks access and was granted access to the information sought is because the Department chose to create a limit on licenses and a competitive process to award them. Had the Department chosen to review each applicant on its own merits and award licenses based solely upon the information provided by each applicant who met minimum requirements, the information sought would be irrelevant and the confidentiality would remain intact. However, because the Department awarded points to each applicant and then placed them in competition with each other, the points awarded on each of the individual answers by all applicants is highly relevant. The difference in receiving a license and being denied a license could be a score of 10 on one applicant's grading and a 0 on another when they both have identical answers. The only proof of that is to order production of the actual answers to the applications. The Department cannot deny that many deserving applicants who met the requirements of licensure were denied licenses only because they did not score as highly as other applicants. Because of this, the scoring process is highly relevant in this context.

Deciding the issue before this Court will have no impact on confidential patient information submitted to the Department. There is no limit on medical marijuana cards and there is no reason any other applicant's materials would be relevant in the context of an appeal of the denial of a medical marijuana card, just as no other applicant's information is relevant in the appeal of any other license issued by various administrative entities in the Missouri. The Department, through its chosen process, creates the relevance here for manufacturing, cultivation and distribution licenses. If they had simply made minimum requirements for licensure and licensed all those who qualified, there would be no need for this information.

"The People's enactment"

Throughout its brief, the Department continually cites to the "people" enacting Article XIV. As the Court well knows, the "people" had nothing to do with drafting the proposed constitutional amendment. They were provided language drafted by lobbyists, legislators and consultants. They were asked if they wanted medical marijuana and responded, "yes". The "people" did not have a choice as to whether they wanted confidentiality of any sort. Moreover, the "people" were not told at the time of the enactment of the constitutional amendment that there would be a competition for licenses. The "people" could well have thought that any qualified applicant meeting minimum standards would be awarded a license, as it is in **every other licensing context in the state of Missouri.** A minimum standards approach would make confidentiality more reasoned and appropriate. However, once the Department chose to create competition between applicants, comparing and contrasting applications with one another, the Department

created a situation in which the only way to meaningfully review their decisions is to apply the same process, comparing and contrasting applications. The only potential concern of "the people" would be that their personal information not be released when applying for a medical marijuana card. This Court's ruling in this case would not affect the confidentiality of the card holders.

Department's Reliance on State ex rel. Dept. of Social Services v. Tucker

The Department relies on this Court's decision in *State ex rel. Dept. of Social Services v. Tucker*. The Court of Appeals correctly distinguishes the *Tucker* decision in its opinion in this case. The Department consistently fails to reference or analyze the last sentence from the confidentiality provision in the constitution, which states: "Such reports or other information may be used only for a purpose authorized by this section. . ." which includes denied applicants' right to appeal the Department's denial to the AHC and, following the exhaustion of administrative remedies, the right to seek judicial review.

The Department consistently ignores the last sentence allowing the use of the information submitted to the State for purposes of appeal because it cannot be read consistently with the Department's interpretation of the confidentiality provision. Instead of attempting to read it together with the other language in the section, the Department creates red herrings to distract the Court from the fact the amendment specifically authorizes the use of information.

For example, in its Substitute Brief, the Department argues that if the Court allows information to be disclosed in the licensing appeal process, it will open the door for **all litigants** to obtain the information in "domestic, personal injury, tort, worker's

compensation, and other disputes . . .” (Appellant's Substitute Brief page 26). This contention has no basis in law or fact. The constitutional amendment specifically provides that the information can only be used for purposes authorized by Section 1.3 of the Amendment. Nowhere in Section 1.3 is there authorization to release information in domestic, personal injury, tort, worker’s compensation or other disputes outside of the appeal of a denial of a license.

Department’s Reliance on Noranda Aluminum

While the Department relies on language in *Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861, 862-63,* to give the Court the basis for issuing a writ of prohibition here, it ignores the overarching theme in that case. In *Noranda* the question was whether a court’s decision to require an employer to issue a subpoena to obtain information within control of the State was appropriate. The Court found that it was not. In so finding, the Court ordered that the Complainant should be treated as a party and that the State should present that individual for deposition. *Id.*

Here the question is not whether the Court **can** issue a writ, but rather **should** the Court issue a writ. The answer to the latter question is no.

Access to Information Held by the Department

In its arguments to the Circuit Court, and in a footnote to its brief here, the Department argues that Kings Garden should be required to obtain the documents at issue from third parties who were granted a license. The Department cannot dictate which authorized methods of discovery Kings Garden employs to prepare its case and must comply with lawful discovery requests. *See* Rule 56.01. “Discovery allows access to

relevant, non-privileged information, while minimizing undue expense and burden." *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 606 (Mo. banc 2002). "Unless the parties stipulate and the court upon motion, for the convenience of the parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery." Rule 56.01(d).

The Department argues that Kings Garden must use the subpoena *duces tecum* procedures under Rule 58.02 to get the information it seeks from third parties. As provided in Rule 56.01(c),

> Upon motion by a party or by the person from whom discovery is sought, including e-discovery, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery[.]

A protective order under 56.01(c) also requires a showing of "good cause" and requires that a protective order only be issued "as justice requires." *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813, 826 (Mo. banc 2000). The Department ignores both of those requirements in its pursuit of prohibition.

Furthermore, "All parties shall make reasonable efforts to cooperate for the purpose of minimizing the burden or expense of discovery." Rule 56.01(g). The Department has easy access to the information it was ordered to produce by the AHC, but asserts that Kings Garden must undertake the unnecessary, burdensome, and expensive endeavor to subpoena the information from third parties. The least burdensome and least expensive discovery

method for all involved is for the Department to respond to Kings Garden's lawful discovery requests. At the risk of stating the obvious, the Department denied Kings Garden's applications, not "third parties".

The Department wants this Court to ignore that the Department collected the information at issue for the express purposes of comparing each of the applications to each other. That process is what is at issue in Kings Garden's appeal to the AHC. The Department's only rationale for seeking an order compelling Kings Garden to independently collect information that the Department can simply copy, paste and provide is to make the cost of litigation so high that Kings Garden cannot continue nor receive the due process promised by the Department's own rules. The Department in the course of this litigation sought the intervention of non-parties (successful applicants) and consistently ignored valid orders of the Commission.

CONCLUSION

The arguments of the Department must fail for the reasons set forth herein. Missouri law clearly provides a distinction between confidential and privileged information, the former being discoverable. The Department's contention that Article XIV, s. 1.3(5) creates a privilege is not supported by law. The Department effectively concedes the information sought is relevant. Nothing in the constitutional amendment prohibits the disclosure of information held by the Department when the Commission or a Court orders production in accordance with valid discovery requests. The proper remedy for the Department is the entry of a protective order, which has already occurred and is not challenged in this appeal.

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that the foregoing Respondent's Substitute Brief complies with Rule 55.03 and with the limitations contained in Rule 84.06(b). I further certify that this Brief contains 5,328 words, as determined by the Microsoft Word 2010 word-counting system.

/s/ Joshua L. Hill