

THE SUPREME COURT OF MISSOURI

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No. SC99205

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

Appellant/Relator,

v.

RENEE T. SLUSHER, COMMISSIONER,  
ADMINISTRATIVE HEARING COMMISSION,

Respondent.

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Appeal from the Circuit Court of Cole County, Missouri  
20<sup>th</sup> Judicial Circuit  
The Honorable Jon Edward Beetem, Circuit Judge

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APPELLANT'S SUBSTITUTE REPLY BRIEF

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## TABLE OF AUTHORITIES

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## ARGUMENT

Two points that arise from the Kings Garden Substitute Brief (“KG Brief”) merit a brief response.

**First** is the stark contrast between the logic of the Department’s and Kings Garden’s arguments, particularly as to whether the rules of confidentiality are to be determined by the Constitution or instead by the Administrative Hearing Commission (AHC). The logic of the Department’s argument can be summarized simply:

1. Article XIV requires that the Department keep the information confidential.
2. Though the Department can itself use that information, it cannot disclose the information to third parties.

The logic of the argument set forth by Kings Garden requires more steps:

1. Article XIV allows the use of confidential applicant information for any purpose provided by Article XIV.
2. Article XIV allows AHC review of license denials.
3. The scope of AHC authority and discovery are defined by rule.
4. Supreme Court Rule 56.01(b)(1) (not binding on, but adopted by the AHC, 1 CSR 15-3.420.1) allows discovery “regarding any matter, not privileged, that is relevant to the” license denial.
5. Other applications are relevant to the Kings Garden license denial.

6. Other applications can be used by other applicants pursuing review at the AHC.
7. The AHC can order the disclosure of any confidential applicant information.

The Kings Garden logic fails to fully account for the constitutional nature of the promise of confidentiality to the other applicants. The key point at which it fails is step 3.

Step 3 assumes that when the people adopted Article XIV, they adopted the AHC's discovery rules. That reading is not compelled by Article XIV. Nor is it consistent with a reading of Article XIV as a whole. And unless subject to some limiting principle (and Kings Garden has not articulated one), it would delegate to the AHC the ability to define, and thus to substantially decrease, the scope of confidentiality promised by the constitution.

The Kings Garden logic necessarily means that when the people adopted Article XIV, they did not just adopt current AHC rules and practice, but they effectively left the question of confidentiality entirely in the hands of the AHC. According to the Kings Garden logic:

- The AHC can, by rule or order, allow the broadest possible discovery of confidential information;
- The AHC can order disclosure of confidential information without an adequate protective order—or without any protective order at all; and

- The AHC can allow the confidential information to be put on the public record at hearing.

Again, Kings Garden has not suggested *any* limiting principle or rule to prevent those steps. And without a practical, constitutionally-derived limiting principle, the Kings Garden logic cannot be reconciled with the intent of those who drafted and those who adopted Article XIV.

**Second**, Kings Garden assumes that some amorphous right to due process entitles them automatically to see all the other applications, just because Kings Garden has some legal theory in support of its claim under which those applications could be relevant. Kings Garden cites neither constitutional provision nor precedent in the due process section of its argument (KG Brief 14-15). But assuming the due process right that Kings Garden is asserting is the due process right set out in Article I, § 10, of the Missouri Constitution, it is necessarily subject to other provisions of that same constitution—including the confidentiality provision of Article XIV. When the people adopted the confidentiality provision of Article XIV, they did so based on a proposal that did not hint that the information they submit to the Department subject to the constitutional guarantee of confidentiality (which they could easily see) would be disclosed to their competitors—which is exactly what Kings Garden is.

Moreover, nothing that Kings Garden cites establishes that to have due process, a litigant must be able to obtain relevant information in the most efficient method possible. Assuming that the process to which Kings Garden is due included *some* method through which it can obtain and use necessary information from competitors' applications, that would not mean that it is entitled to *this* method: to get the information from the only source that is constitutionally bound to hold the information confidential. Maybe this is more convenient or efficient than the alternatives. But we are not aware of any holding that there is some convenience or efficiency element to due process, whether under the Missouri or the U.S. constitutions.

Nor is there a due process right to engage in a fishing expedition. If due process did require that the Department disclose to a competitor information from other applicants despite the constitutional guarantee of confidentiality, the disclosure would have to be justified and specific. In other words, the mandated disclosure would have to be:

- based on a strong showing of a specific need for the particular, narrow-as-possible disclosure; and
- allowed only after weighing the impact of the disclosure on the particular person whose information is to be disclosed—which ought to require notice to that person and an opportunity for them to be heard.

Kings Garden does not claim to have made such a showing, and the AHC did not even purport to consider the impact of its decision on the constitutional rights of the applicants whose confidential information the AHC ordered be given to Kings Garden.

## CONCLUSION

For the reasons stated above and in its Substitute Brief, the Department respectfully requests that the Court reverse the circuit court and hold that the Missouri Constitution prohibits the Department from disclosing to Kings Garden information submitted by third parties with the guarantee it would be kept confidential, even if the information is sought in discovery at the AHC.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that the foregoing Appellant'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 1,138 words, as determined by the Microsoft Word 2010 word-counting system.

/s/ James R. Layton