



### FINAL DETERMINATION

IN THE MATTER OF

NICHOLAS STARINIERI,  
Requester

v.

PENNSYLVANIA DEPARTMENT OF  
HEALTH,  
Respondent

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Docket No: AP 2022-0103

### INTRODUCTION

Nicholas Starinieri, Esq. (“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 security camera video footage. The Department denied the Request, arguing that the footage can only be released pursuant to a court order. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the Department is required to take additional action as directed.

### FACTUAL BACKGROUND

On December 30, 2021, the Request was filed, stating as follows:

I represent Cynthia Romig<sup>1</sup> who was seriously injured when she was a pedestrian struck by a truck on 9/24/21 in the parking lot near the Apothecarium in Thorndale,

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<sup>1</sup> As further described in the Request, Ms. Romig is the Requester’s client.

PA. My client was on her way to LabCorp in the parking lot when she was struck. We have been informed that the Apothecarium has video of my client's accident.... Can you please let me know with whom I can speak at [the Department] so that I may obtain the requested video or, at the very least, make arrangements to view it? My request does not violate 28 Pa. Code 1141.22(b). I have no interest in anyone that could be in the video, other than my client and the driver which struck her....

On January 7, 2022, the Department denied the Request, arguing that "[t]he records sought cannot be release absent a court order" and citing 28 Pa. Code § 1141.22(b).

On January 14, 2022, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. 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 January 19, 2022, the OOR received correspondence from Joe Pangaro, Esq., Assistant General Counsel<sup>2</sup> for TerrAscend Corp. ("TerrAscend"), the establishment that possesses the requested video footage. Attorney Pangaro stated that TerrAscend had no objection to providing the footage to the Requester; however, Attorney Pangaro further noted that it would comply with the Department's directives relating to the footage. Thereafter, additional correspondence was exchanged between the parties and the OOR regarding, among other things, the contents of the footage.

On February 17, 2022, the Requester submitted a position statement, asserting that 28 Pa. Code § 1141.22(b) does not apply to the video requested because the limited footage sought by the Requester does not identify patients or employees of the dispensary and would not undermine the security of the facility. The Requester also provided a sworn affidavit from Victoria Simonetti, General Manager of the Apothecarium, and a Confidentiality Agreement executed by the Requester.

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<sup>2</sup> Attorney Pangaro is no longer employed by TerrAscend.

On February 18, 2022, the Department submitted a position statement, reiterating the argument above and further arguing that the records are exempt as “records of an individual’s medical history or status and related information that would disclose individually identifiable health information.” 65 P.S. § 67.708(b)(5). More specifically, the Department argues that disclosure of the video footage could identify medical marijuana patients and caregivers or could constitute “[i]nformation regarding the physical features of, and security measures installed in, a facility.” 28 Pa. Code §§ 1141.22(b)(3), (8)-(9). In support of its arguments, the Department provided affidavits, made under the penalty of perjury, from Tabbith Bosack, Compliance Manager of the Department’s Office of Medical Marijuana, and Michael Azar, Safety Inspection Supervisor of the Department’s Office of Medical Marijuana.

On March 18, 2022, in response to a request for additional information from the OOR, the Department provided a supplemental submission, explaining that the Department’s temporary regulations relating to the medical marijuana program remain in effect. On the same day, the Requester replied to the Department’s submission, arguing that, even if the regulations have the full force and effect of law, the responsive video footage is not subject to the confidentiality provisions within the regulations.

### **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). The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the 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. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

The Department argues that the requested video footage is made confidential by 28 Pa. Code § 1141.22(b), which states, in relevant part as follows:

(b) The following information is considered confidential, is not subject to the [RTKL] and will not otherwise be released to a person unless pursuant to court order:

(3) Individual identifying information concerning a patient or caregiver, or both. ...

(8) Other information regarding a patient, caregiver, practitioner or 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 of, and security measures installed in, a facility.

28 Pa. Code §§ 1141.22(b)(3), (8)-(9)<sup>3</sup>; *see also* 35 P.S. § 10231.302(a) (“All information obtained by the [D]epartment relating to patients, caregivers and other applicants shall be confidential and not subject to disclosure under [the RTKL], including: ... (1) [i]ndividual identifying information about patients and caregivers.”).

**1. The Department has not proven that disclosure of the video footage would reveal individual identifying information of patients or caregivers, or other confidential information regarding a patient, caregiver, practitioner or medical marijuana organization.**

First, the Department contends that release of the video footage would identify confidential information of patients or caregivers utilizing the dispensary. In his affidavit, Mr. Azar attests, in relevant part, as follows:

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<sup>3</sup> The Department’s temporary regulations were set to expire on May 12, 2020; however, pursuant to Act 10 of 2020, they were extended until November 20, 2021, and Act 44 of 2021 again extended the Department’s authority to draft temporary regulations through May of 2022.

I serve as Safety Inspection Supervisor for [the] Office of Medical Marijuana within the [Department].

In this capacity, I am familiar with the records in the possession, custody and/or control of the Office of Medical Marijuana of the Department....

Prior to the Department's receipt of the above [R]equest, I received email correspondence from counsel for the dispensary facility whose records are the subject of the instant [R]equest, who provided a link to the security footage at issue and sought clarification as to whether the Department's regulations permitted the release of the footage to Requester. ...

While viewing the security footage, I observed what appeared to be medical marijuana patients or caregivers walking up to the front door of the dispensary, presenting identification cards, and entering and exiting the dispensary.

Based on this observation, I believed that the footage may be confidential pursuant to the Department's temporary regulations, and I relayed what I saw on the video to the Department's Office of Legal Counsel and sought advice on whether to release the video.

Counsel advised that the security footage should not be released without a court order.

Furthermore, Ms. Bosack attests that the video footage exists as part of the security system installed at the facility and reiterates Mr. Azar's assertion that the footage shows marijuana patients and caregivers entering and existing the facility. *Bosack* Affidavit, ¶¶4-5. Ms. Bosack further attests as follows:

Additionally, I observed a truck striking a pedestrian in front of the dispensary exist, and an individual walking up to assist the fallen pedestrian.

Right after the accident occurred and while the fallen pedestrian was receiving assistance, I observed what appears to be two patients or caregivers leave the dispensary, and an additional two apparent patients or caregivers enter the dispensary.

Based upon her observations, Ms. Bosack believed the footage may be confidential pursuant to the Department's temporary regulations and, as a result, sought advice from the Department's legal office. *Bosack* Affidavit, ¶8.<sup>4</sup>

The Requester argues that the limited amount of video footage he is seeking “does not depict any patients nor employees of the facility” and, as a result, does not violate 28 Pa. Code §§ 1141.22(b)(3) or (b)(8). In support of his position, the Requester provided a sworn affidavit from Ms. Simonetti, who serves as the General Manager of the Apothecarium. Ms. Simonetti attests that she “...reviewed the security camera footage requested related to the incident in question on 09/24/2021” and determined the only individuals captured on the video were an individual exiting a vehicle and walking toward the front door of LabCorp, another business entity located near the Apothecarium, the driver of a white box truck, several individuals who exited LabCorp, and first responders including police officers and paramedics. *Simonetti* Affidavit, ¶¶4-16. Additionally, Ms. Simonetti affirms that “[b]etween 13:49:32 and 14:00:18 (the video footage requested by [the Requester]), no employees of Apothecarium and no patients of Apothecarium could be identified.”

While the Department contends that the video footage depicts individuals walking to the front door of the dispensary, presenting identification cards, entering or exiting the facility, the affidavits of Ms. Bosack and Mr. Azar do not explain whether patients, caregivers or other patrons of the dispensary can be observed during the relevant portions of the footage. Furthermore, the Department has not clearly articulated the times during which potential patients or caregivers were seen entering and exiting the dispensary. Conversely, Ms. Simonetti clearly describes the individuals able to be viewed on the footage and affirms, as the General Manager of the dispensary,

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<sup>4</sup> Under the RTKL, a statement made under the penalty of perjury is competent evidence to sustain an agency's burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

that no employees or patients can be observed from 13:49:32 through 14:00:18, the portion of the footage sought by the Requester. Based upon the evidence provided, therefore, the Department has failed to meet its burden of proving that the responsive portion of the video footage showed patients or caregivers such that the footage would be confidential under 28 Pa. Code §§ 1141.22(b)(3), (b)(8) or 35 P.S. § 10231.302(a)(1).<sup>5</sup> *See Delaware Cnty. v. Schaefer ex rel. Phila. Inquirer*, 45 A.3d 1149, 1156 (Pa. Commw. Ct. 2012) (“[a] preponderance of the evidence standard, the lowest evidentiary standard, is tantamount to a more likely than not inquiry”).

**2. The Department has not proven that release of the video footage would disclose information regarding the physical features of, and security measures installed in, the dispensary.**

Next, the Department argues that the video footage is confidential because “it exists part of a dispensary facility’s security surveillance system, and very plainly constitutes ‘[i]nformation regarding the physical features of, and security measures installed in, a facility.’” *See* 28 Pa. Code § 1141.22(b)(9). Mr. Azar attests that “[t]he video footage at issue exists as part of the security surveillance system installed in a medical marijuana dispensary facility permitted by the [Department].” The Requester, on the other hand, challenges the notion that video footage from an exterior camera depicting exterior portions of the dispensary constitutes “the type of security protections ... contemplated and covered by 28 Pa. Code § 1141.22(b)(9).”

As noted by the Requester, the responsive video footage was captured by a single exterior camera and depicts the front of the dispensary, including the parking lot. *Simonetti Affidavit*, ¶1. The Department has presented no evidence to suggest that the video footage from this camera

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<sup>5</sup> The Department also argues that the video footage would be exempt under Section 708(b)(5) of the RTKL, 65 P.S. § 67.708(b)(5), as it would disclose individually identifiable health information. However, for the same reasons as set forth in Section 1 of this Final Determination, the Department has not demonstrated that disclosure of the requested video footage would reveal individually identifiable health information. *See also* 65 P.S. § 67.706 (stating that an agency “shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access”).

shows any of the physical features of the facility outside of those visible from the front of the facility. Furthermore, apart from Mr. Azar's conclusory statement, the Department has not submitted evidence to demonstrate how an eleven-minute piece of video footage, taken from a "front door entrance camera," would reveal the types of "security measures installed in" the dispensary. *Cf. McKelvey v. Pa. Dep't of Health*, 255 A.3d 385, 397 n.12 (Pa. 2021) (permitting the redaction of medical marijuana applications to remove information regarding building security). Accordingly, the Department has failed to meet its burden of proving that the video footage is confidential under 28 Pa. Code § 1141.22(b)(9).<sup>6</sup>

### CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Department is required to provide the Requester with the responsive video footage, as discussed above, within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal 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 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.<sup>7</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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<sup>6</sup> Notwithstanding this finding, under no circumstances must the Department provide the Requester with video other than the limited footage identified in Ms. Simonetti's Affidavit, nor must the Department provide the Requester with any footage showing individuals showing their identification cards and entering or exiting the building.

<sup>7</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).



**FINAL DETERMINATION ISSUED AND MAILED: 25 March 2022**

*/s/ Joshua T. Young*

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