

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

**PENNSYLVANIA DEPARTMENT OF  
HEALTH,**

**Petitioner,**

**v.**

**NICHOLAS STARINIERI,**

**Respondent.**

**No. \_\_\_\_ C.D. 2022**

**PENNSYLVANIA DEPARTMENT OF HEALTH'S  
PETITION FOR REVIEW  
(APPELLATE JURISDICTION)**

**YVETTE M. KOSTELAC**  
**Chief Counsel**  
**Attorney I.D. 51275**

**KEVIN J. HOFFMAN**  
**Assistant Chief Counsel**  
**Attorney I.D. 209575**

**SHEA SKINNER**  
**Assistant Counsel**  
**Attorney I.D. 326121**

**Commonwealth of Pennsylvania**  
**Department of Health**  
**Office of Legal Counsel**  
**825 Health and Welfare Building**  
**625 Forster Street**  
**Harrisburg, PA 17120**  
**Phone: (717) 783-2500**  
**Fax: (717) 705-6042**

*Attorneys for Petitioner Department of Health*

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

**PENNSYLVANIA DEPARTMENT OF  
HEALTH,**

**Petitioner,**

**v.**

**NICHOLAS STARINIERI,**

**Respondent.**

**No. \_\_\_\_ C.D. 2022**

---

**PETITION FOR REVIEW**

---

**AND NOW** comes the Pennsylvania Department of Health (Department), by and through its undersigned counsel, and petitions this Honorable Court for review of the March 25, 2022 Final Determination (Final Determination) issued by the Office of Open Records (OOR) at Docket Number AP 2022-0103. In accordance with Pa.R.A.P. 1513, the Department provides the following:

**Statement of Jurisdiction**

1. This Honorable Court has jurisdiction in this matter under Section 763(a) of the Judicial Code, 42 Pa.C.S. § 763(a). In reviewing a determination issued by the OOR, this Court's standard of review is *de novo* and its scope of review is plenary. *State Emps. Ret. Sys. v. Campbell*, 155 A.3d 1153 (Pa. Cmwlth. 2017).

**Parties**

2. Petitioner is the Department, an agency subject to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.* (RTKL). *See* 65 P.S. § 67.301.

3. Respondent is Nicholas Starinieri, Esq., a private citizen who made the underlying records request pursuant to the RTKL (Request).

### **Factual and Procedural Background**

4. Starinieri filed a request under the RTKL, seeking to secure the release of video footage from a surveillance system installed at a medical marijuana dispensary facility (the “Facility”) permitted by the Department’s Office of Medical Marijuana, which footage purportedly depicts a vehicle striking Starinieri’s client in the parking lot of the Facility.
5. The Department denied the request on the grounds that the requested footage is confidential pursuant to the Department’s temporary regulations applicable to the Commonwealth’s Medical Marijuana Program, specifically, 28 Pa. Code 1141.22(b), which governs access to certain records related to the Program.
6. Starinieri filed a timely appeal of the Department’s denial, and the Department submitted a position statement.
7. On appeal, the Department emphasized that the requested footage is confidential under 28 Pa. Code § 1141.22(b)(3), (8), and (9), as well as Section 302(a) of the Medical Marijuana Act, 35 P.S. § 10231.302(a), and cannot be released unless pursuant to court order.
8. On March 25, 2022, the OOR found that the Department failed to establish that the responsive portion of the requested video footage was confidential under the

temporary regulations or the Medical Marijuana Act, and directed the Department to provide the responsive portion of the requested footage, exclusive of any footage depicting individuals entering or exiting the Facility.

### **Determination Sought to be Reviewed**

9. The Department seeks review of the OOR's March 25, 2022 Final Determination and accompanying Order, which directed the Department to release the requested footage, subject to redaction.

### **Objections to the Determination**

10. The OOR erroneously disregarded competent evidence in the form of two affidavits demonstrating that the requested recording shows individuals appearing to be medical marijuana patients or caregivers walking up to the front entrance of the Facility, presenting identification cards, and entering and exiting the Facility.
11. The OOR erroneously disregarded competent evidence that the recording, which consists of surveillance footage from a camera installed as part of the Facility's security system, constitutes information regarding the physical features of, and security measures installed in, a facility.
12. The OOR erred as a matter of law in determining that the above evidence was insufficient to prove, by a preponderance of the evidence, that the entirety of the requested recording is confidential and not subject to access under the RTKL.

13. The OOR erred as a matter of law in disregarding appellate precedent recognizing that the “disclosure of security measures and locations of surveillance systems presents a credible threat to physical security of facilities that amounts to more than speculation.” *Mission Pennsylvania, LLC v. McKelvey*, 212 A.3d 119, 135 (Pa. Cmwlth. 2019), *aff’d in part*, 255 A.3d 385, 407-408 (Pa. 2021).
14. The OOR erred as a matter of law in determining that any portion of the requested footage is subject to access under the RTKL, where the Department’s temporary regulations and Medical Marijuana Act control access thereto.
15. The OOR erred as a matter of law in failing to give effect to several provisions of the RTKL by which it unambiguously yields to other statutes or regulations establishing the nonpublic nature of records or controlling access to such records.
16. The OOR erred in applying Section 903 of the RTKL and directing the Department to separate the requested segment of the footage from the rest of the recording, where the entire record is confidential, is categorically not subject to the RTKL, and is accessible only by way of court order.

### **Relief Sought**

The Department respectfully request this Honorable Court reverse the OOR’s Final Determination issued March 25, 2022.

Respectfully submitted,

By: /s/ Shea Skinner  
**SHEA SKINNER**  
**Assistant Counsel**  
**Attorney I.D. 326121**

**KEVIN J. HOFFMAN**  
**Assistant Chief Counsel**  
**Attorney I.D. 209575**

**Commonwealth of Pennsylvania**  
**Department of Health**  
**Office of Legal Counsel**  
**825 Health and Welfare Building**  
**625 Forster Street**  
**Harrisburg, PA 17120**  
**Phone: (717) 783-2500**  
**Fax: (717) 705-6042**

***Attorneys for Petitioner***  
***Department of Health***

Date: 4/25/2022

**CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

By: /s/ Shea Skinner  
**SHEA SKINNER**  
**Assistant Counsel**  
**Attorney I.D. 326121**

**KEVIN J. HOFFMAN**  
**Assistant Chief Counsel**  
**Attorney I.D. 209575**

Commonwealth of Pennsylvania  
Department of Health  
Office of Legal Counsel  
825 Health and Welfare Building  
625 Forster Street  
Harrisburg, PA 17120  
Phone: (717) 783-2500  
Fax: (717) 705-6042

*Attorneys for Petitioner*  
*Department of Health*

**EXHIBIT A**



**IN THE COMMONWEALTH COURT OF  
PENNSYLVANIA**

**PENNSYLVANIA DEPARTMENT OF  
HEALTH,**

**Petitioner,**

**v.**

**NICHOLAS STARINIERI,**

**Respondent.**

**No. \_\_\_\_ C.D. 2022**

---

**CERTIFICATE OF SERVICE**

---

I, Shea Skinner, Assistant Counsel, Pennsylvania Department of Health, Office of Legal Counsel, hereby certify that on this 25<sup>th</sup> day of April, 2022, I served a true and correct copy of the Department's Petition for Review upon the person(s) indicated below, which satisfies the requirements of Pa.R.A.P. 121-122 and 1514(c).

Service via First-Class Mail

Liz Wagenseller, Executive Director  
Office of Open Records  
333 Market Street, 16<sup>th</sup> Floor  
Harrisburg, PA 17126

Office of Attorney General  
393 Walnut Street  
Harrisburg, PA 17120

Nicholas J. Starinieri, Esq.  
DeFino Law Associates, P.C.  
2541 S. Broad Street  
Philadelphia, PA 19148

/s/ Shea Skinner  
**SHEA SKINNER**  
**Assistant Counsel**  
**Attorney I.D. 326121**

Commonwealth of Pennsylvania  
Department of Health  
Office of Legal Counsel  
825 Health and Welfare Building  
625 Forster Street  
Harrisburg, PA 17120  
Phone: (717) 783-2500  
Fax: (717) 705-6042

*Attorney for Petitioner*  
*Department of Health*

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Pennsylvania Department of Health, Petitioner v. : AP 2022-0103  
Starinieri, Nicholas J. :  
:

**PROOF OF SERVICE**

I hereby certify that this 25th day of April, 2022, I have served the attached document(s) to the persons on the date(s)  
and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

**Service**

Served: Attorney General  
Service Method: eService  
Service Date: 4/25/2022  
Address: Strawberry Square  
16th Floor  
Harrisburg, PA 17120  
Phone: (71-7) -787-3391

Served: Nicholas J. Starinieri  
Service Method: eService  
Email: njsesq.dla-pc@verizon.net  
Service Date: 4/25/2022  
Address: 2541 S. Broad Street  
PHILADELPHIA, PA 19148  
Phone: 215-551-9099  
Representing: Respondent Nicholas J. Starinieri

Served: Office of Open Records  
Service Method: eService  
Service Date: 4/25/2022  
Address: 333 Market St.  
16th Floor  
Harrisburg, PA 17101-2234  
Phone: 717--42-5-5991

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

/s/ Shea Michael Skinner

*(Signature of Person Serving)*

Person Serving: Skinner, Shea Michael  
Attorney Registration No: 326121  
Law Firm: Department of Health  
Address: Pa Department Of Health Ogc  
625 Forster St  
Harrisburg, PA 17120  
Representing: Petitioner Pennsylvania Department of Health