

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ALLEGHENY REPRODUCTIVE  
HEALTH CENTER, et al.,

No. 26 MD 2019

Petitioners,

v.

PENNSYLVANIA DEPARTMENT OF  
HUMAN SERVICES, et al.,

Respondents.

**ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2019, upon

consideration of Petitioners' Application for Leave to File Verifications Under Seal, it is hereby **ORDERED** that said application is **GRANTED**, and the verifications shall be filed under seal only to be viewed by the Court.

BY THE COURT:

\_\_\_\_\_

2019 JAN 16 PM 12:52





In accordance with Pennsylvania Rule of Civil Procedure 1024, the Petition must be supported by a signed verification from each Petitioner. *See* Pa.R.C.P. 1024.

2. The public disclosure of the names of Petitioners' employees has been deemed a threat to the employees' safety. *See In the Matter of Crocco v. Pa. Dep't of Health*, OOR Dkt. AP 2018-0778, attached hereto as Exhibit A (holding that the disclosure of the names of those affiliated with abortion facilities is likely to result in a risk of physical harm to such individuals), *appeal docketed*, No. 1085 C.D. 2018 (Pa. Commw. Ct.).

3. In April of 2018, the Pro-Life Action League, an anti-abortion extremist group, submitted a request (the "Request") to the Pennsylvania Department of Health (the "Department") pursuant to the Pennsylvania Right to Know Law requesting, *inter alia*, the names of certain licensed abortion providers in Pennsylvania and their affiliates. The Department denied the Request with respect to personally identifying information, finding that disclosing such information would pose a threat to the personal security of those providers and their affiliates. *See id.* at 10.

4. The Pro-Life Action League appealed that denial to the Office of Open Records (the "OOR"). While on appeal, several Petitioners in the instant matter requested, and were granted, the right to participate in the appeal. *See id.* at 2-3.

5. In evaluating the appeal, the OOR noted that Section 708(b)(1)(ii) of the Right to Know Law exempts from disclosure a record that “would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual” and denied the appeal on that ground. *Id.* at 7, 10 (*quoting* 65 P.S. § 67.708(b)(1)(ii)).

6. The OOR cited several affidavits submitted in support of the Department’s denial of the Request and noted that abortion providers are frequently subjected to acts of violence, which on occasion have even included murder, and other threats to their safety. *See id.* at 7-8 (*citing* Affidavit of Garrison Gladfelter, the Department’s Chief of the Division of Acute and Ambulatory Care). The OOR further noted that the Pro-Life Action League is an anti-abortion extremist group that seeks out personal information about abortion-facility ownership and employees in order to intimidate and threaten abortion providers, staff, and their families. *Id.* at 9 (*citing* Affidavit of Lisa Brown, Esq., General Counsel and Senior Policy Director of the National Abortion Federation).

7. In accordance with these findings, the OOR held that the names of abortion providers and their affiliates were exempt from disclosure under the Right to Know Law because “disclosure of this information is reasonably likely to result in a risk of physical harm to these individuals.” *Id.* at 10.

8. The Pro-Life Action League subsequently appealed the OOR's determination to this Court, where it is currently pending. *See Crocco v. Pa. Dep't of Health*, No. 1085 C.D. 2018 (Pa. Commw. Ct.).

9. As the public disclosure of Petitioners' employees' names has been deemed by both the Department and the OOR as a threat to personal safety, Petitioners respectfully request permission to file the verifications in the instant matter, which include their employees' names, under seal to be viewed only by the Court in accordance with prior precedent. *See, e.g., Doe v. Zarkin*, 40 Pa. D. & C. 4th 100 (1998) ("In an attempt to respect the privacy warranted by the alleged facts of this case, without disregarding the basic intent and necessity of Rule 1024(c), we believe that it is best to direct that any and all verifications filed by plaintiffs in this matter shall be signed using plaintiffs' legal names, yet placed under seal to be viewed, if necessary, only by the judge.").

WHEREFORE, Petitioners respectfully request that the Court grant their Application to file their verifications under seal and enter an Order in the form attached hereto.

Dated: January 16, 2019

By: Susan Frietsche  
Susan Frietsche (65240)  
Christine Castro (*pro hac vice* pending)  
WOMEN'S LAW PROJECT

Respectfully Submitted,

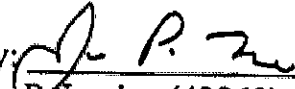
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# EXHIBIT A



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

IN THE MATTER OF

JEAN CROCCO AND THE PRO-LIFE  
ACTION LEAGUE,  
Requester

v.

PENNSYLVANIA DEPARTMENT OF  
HEALTH,  
Respondent

and

DREXEL UNIVERSITY d/b/a DREXEL  
OB/GYN ASSOCIATES OF FEINSTEIN,  
DELAWARE COUNTY WOMEN'S  
CENTER, MAZZONI CENTER FAMILY  
AND COMMUNITY MEDICINE,  
PLANNED PARENTHOOD KEYSTONE,  
PLANNED PARENTHOOD  
SOUTHEASTERN PENNSYLVANIA,  
BERGER & BENJAMIN, ALLEGHENY  
REPRODUCTIVE HEALTH CENTER,  
ALLENTOWN WOMEN'S CENTER,  
PHILADELPHIA WOMEN'S CENTER,  
and PLANNED PARENTHOOD OF  
WESTERN PENNSYLVANIA,  
Direct Interest Participants

Docket No.: AP 2018-0778

### INTRODUCTION

Jean Crocco and the Pro-Life Action League (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 certain registration and licensing applications. The Department partially denied the Request, claiming, in part, that



disclosure of some of the information in the records would threaten personal security. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is denied, and the Department is not required to take any further action.

### FACTUAL BACKGROUND

On April 5, 2018, the Request was filed, seeking “the most recent applications/reapplications for registration and licensing (if applicable) for all the non-hospital abortion facilities in PA.” On April 12, 2018, the Department partially denied the Request, providing redacted copies of the records. The Department argued that disclosure of the names and medical license numbers of the medical providers and the names of others affiliated with the abortion facilities would threaten personal security, 65 P.S. § 67.708(b)(1)(ii). The Department also redacted personal email addresses and postal addresses, claiming that such information constitutes personal identification information, 65 P.S. § 67.708(b)(6)(i)(A).

On May 1, 2018, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure.<sup>1</sup> 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. *See* 65 P.S. § 67.1101(c).

On May 14, 2018, Drexel University d/b/a Drexel OB/GYN Associates at Feinstein (“Drexel”) submitted a request to participate in this appeal pursuant to 65 P.S. § 67.1101(c), along with the sworn affidavit of Dr. Owen Montgomery, Professor and Chair of the Department of Obstetrics and Gynecology at Drexel University College of Medicine.

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<sup>1</sup> On appeal, the Requester does not challenge the Department’s redactions of personal email addresses and postal addresses. As a result, the Requester has waived any objections regarding the sufficiency of the Department’s response regarding these redactions. *See Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011). Also, the Requester granted the OOR additional time to issue a final determination. *See* 65 P.S. § 67.1101(b)(1).

On May 15, 2018, the Department submitted a position statement, reiterating its grounds for denial. The Department also claims that the information is exempt from disclosure under the Abortion Control Act, 18 Pa.C.S. §§ 3201-3220, the Fourth Amendment of the United States Constitution, and Article 1, Section 8, of the Pennsylvania Constitution.<sup>2</sup> In support of its position, the Department submitted that sworn affidavit of Garrison Gladfelter, the Department's Chief of the Division of Acute and Ambulatory Care. The Department also submitted various reports and statistics regarding the dangers faced by medical providers and staff working at abortion service facilities.

On May 23, 2018, Delaware County Women's Center ("DCWC"), Mazzoni Center Family and Community Medicine ("Mazzoni Center"), Planned Parenthood Keystone ("PPK"), Planned Parenthood Southeastern Pennsylvania ("PPSP"), Berger & Benjamin ("B&B"), Allegheny Reproductive Health Center ("ARHC"), Allentown Women's Center ("AWC"), Philadelphia Women's Center ("PWC") and Planned Parenthood of Western Pennsylvania ("PPWP") submitted requests to participate in this appeal pursuant to 65 P.S. § 67.1101(c), along with the sworn declarations<sup>3</sup> of the Clinical Director of the ARHC, the Executive Director of the AWC, the Executive Director of B&B, the President of both the PWC and the DCWC, the CEO of the Mazzoni Center, the President and CEO of PPK, the President and CEO of PPSP, the President and CEO of PPWP, David Cohen, Esq., former staff attorney with the Women's Law Project in Philadelphia, and the sworn affidavit of Lisa Brown, Esq., General Counsel and Senior Policy Director of the National Abortion Federation ("NAF"). The OOR granted all ten requests to participate on May 29, 2018.

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<sup>2</sup> The Department is permitted to assert these new reasons for denying access to records on appeal to the OOR. See *Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

<sup>3</sup> The declarations do not reveal the declarants' names in order "[t]o protect the providers' privacy and safety."

On June 22, 2018, the Requester submitted a position statement, asserting that the Department and Direct Interest Participants failed to present “actual evidence” that disclosure of the requested records would threaten personal security.<sup>4</sup> The Requester also affirms, under the penalty of perjury, that the purpose of the Request “is to improve the quality of medical care in abortion facilities.”

### 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” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. 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.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties

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<sup>4</sup> On June 20, 2018, the OOR reopened the record to permit this submission. *See* 65 P.S. § 67.1102(a)(2).

did not request a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

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)(1). 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 responsive records are not exempt from disclosure under the Abortion Control Act**

The Department first argues that disclosure of the requested records would violate the Abortion Control Act (“Act”), 18 Pa.C.S. §§ 3201-3220, which supersedes any conflicting provisions of the RTKL. *See* 65 P.S. § 67.306 (“Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation

or judicial order or decree”). Section 3214 of the Act provides that “a report of each abortion performed shall be made to the [D]epartment on forms prescribed by it.” 18 Pa.C.S. § 3214(a). The required report includes the name of the physician who performed the abortion. *Id.* at § 3211. Additionally, Section 3214 provides that the contents of the report shall remain confidential and shall not be subject to public access under the RTKL. *Id.* at § 3214(e).

Here, the Request seeks “the most recent applications/reapplications for registration and licensing (if applicable) for all the non-hospital abortion facilities in PA.” Notably, the Request does not seek the reports that are required to be filed pursuant to the Act.<sup>5</sup> As such, the Act’s confidentiality provisions do not apply to the requested records.

## **2. Disclosure of the responsive information would threaten personal security**

The Requester states that the requested records are required to be filed under the Health Care Facilities Act, 35 P.S. § 448.807, which she argues “does not prohibit disclosure of registration applications.” However, the Requester does not point to any language in the Health Care Facilities Act which suggests that such records are unconditionally public. Accordingly, the exemptions under the RTKL may be raised, and the OOR will address the exemptions set forth in the instant appeal. *See Pa. Dep’t of Labor & Indus. v. Heltzel*, 90 A.3d 823, 833 (finding that because records were “not unconditionally public as a matter of law, and the records are sought under the RTKL, the Section 708(b) exceptions asserted must be considered”).

The Department and the Direct Interest Participants assert that disclosure of the requested information would threaten personal security. Specifically, the Department argues that disclosure of the names and medical license numbers of medical providers, as well as disclosure of the names of others affiliated with the abortion facilities, could “result in intense harassment or even

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<sup>5</sup> The Department acknowledges this fact, stating that the “information has been requested through another avenue, that is, license applications as opposed to report forms filed pursuant to Section 3214” of the Act.

violence.” Section 708(b)(1)(ii) of the RTKL exempts from disclosure a record that “would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). To establish that this exemption applies, an agency must show: (1) a “reasonable likelihood” of (2) “substantial and demonstrable risk” to a person’s security. *Del. County v. Schaefer*, 45 A.3d 1149 (Pa. Commw. Ct. 2012). The OOR has held that “[b]elief alone without more, even if reasonable, does not meet this heightened standard.” *Zachariah v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2009-0481, 2009 PA O.O.R.D. LEXIS 216; *see also Lutz v. City of Phila.*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that “[m]ore than mere conjecture is needed” to establish that this exemption applies).

In support of its position, the Department relies on the sworn affidavit of Mr. Gladfelter, who affirms, in relevant part, as follows:

1. I am employed by the Department ... as Chief of the Department’s Division of Acute and Ambulatory Care (“DAAC”).
2. DAAC is responsible for licensing and surveying of abortion facilities.
3. As part of the licensure and survey, abortion facilities provide information to the Department as required by statute and regulation.
4. When providing that information, abortion facilities ask that the information be kept confidential.
5. Specifically, they ask the Department to protect from disclosure personal information of individuals who are associated with the facility, such as names, provider identification numbers and personal contact information, as disclosure of that information would create a reasonable likelihood of endangering the safety of the staff and the facility.
6. National Abortion Federation tracks incidents of violence and disruption against abortion providers in the United States and Canada....
7. The statistics, which only show reportable incidents, indicate that between 2010 and 2017 there were 2,622 reported acts of violence, including murder, and there were 281,639 acts of disruption, including bomb threats, against abortion providers....

9. Revealing the identities of abortion providers would subject them to the substantial risks of physical harm outlined above....

Additionally, the Clinical Director of ARHC declares, under the penalty of perjury, the following:

1. I am the Clinical Director for ... ARHC, a licensed abortion care facility.... My duties include tasks related to patient safety and clinic security.
2. There are protesters outside our facility every day that we provide clinical services to patients. Some of these protesters will engage directly with patients and will follow them down the sidewalk, insulting them or playing on their anxieties.
3. We use volunteer escorts to help patients get safely past groups of protesters. We train these volunteers not to talk to protesters and never to let a protester learn anything personal about them, because any personal detail, however innocent or trivial, will be used to harass and threaten them....
5. ARHC receives harassing phone calls from anti-abortion callers....
6. ARHC also receives harassing mail. Sometimes it consists of graphic bloody photographs; sometimes it demands that we quit our jobs.
7. Prior to moving to its current location, ARHC was subject to acts of vandalism, violence, and sabotage. Our clinic was firebombed. Holes were drilled in the roof during a rainy three-day weekend.... Our locks were glued shut repeatedly....
8. Recently, I learned from our colleagues at Planned Parenthood of Western Pennsylvania that a man with an assault weapon was coming to Pittsburgh to find and kill a doctor who had provided the man's girlfriend with abortion care....
9. I am aware that our physicians, staff, and patients may be in danger from extremists who are willing to resort to violence against us. I reasonably believe that the release of identifying and personal information ... about people affiliated with ARHC will expose us to a heightened risk of physical harm.

The Executive Director of AWC provided a similar sworn declaration, stating, in relevant part, the following:

3. ... AWC is one of the largest providers of abortion care in Pennsylvania....

11. In 2007, a protester ... targeted our former executive director. [The protester] discovered the former director's name and her home address....
12. Around the same time, [the protester] posted death threats against a Planned Parenthood physician on his blog. The post included the doctor's full name, home address, photograph, description of her car, license plate number, the fact that she wore a bulletproof vest, and detailed instructions on how and where to shoot her....
15. There is no doubt in my mind that public disclosure of any information about AWC's staff, administrators, doctors or owners is highly likely to threaten the safety and security of AWC and anyone affiliated with us.

Additionally, Attorney Brown affirms, in relevant part, as follows:

2. NAF is the professional association of abortion providers....
4. NAF has been compiling statistics on incidents of violence and disruption against abortion providers for 40 years....
6. In 2017, the most recent year for which NAF statistics are available, death threats/threats of harm nearly doubled, and trespassing more than tripled, from the previous year....
9. Anti-abortion extremists often seek out personal information about facility ownership and employees in order to intimidate and threaten abortion providers, staff, and their families. The Pro-Life Action League is one of the extremist groups that engage in this practice.
10. Disclosing personal information about abortion providers and facility owners ... could result in harassment, threats, or actual violent harm to these individuals....<sup>6</sup>

Under the RTKL, a sworn statement 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). The Requester argues that the declarations and affidavits submitted in the instant appeal "lack specific facts that demonstrate a link between the records release and a substantial risk of harm." Contrary to the

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<sup>6</sup> The remaining sworn declarations of the Direct Interest Participants detail similar instances of threats of violence and concerns for physician and staff safety.



Requester's argument, the Department and Direct Interest Participants have submitted evidence showing specific instances where protesters harassed and threatened physicians and staff members affiliated with abortion care facilities. As such, the names and medical license numbers of medical providers, as well as the names of others affiliated with the abortion facilities, are exempt from disclosure under Section 708(b)(1)(ii) of the RTKL because disclosure of this information is reasonably likely to result in a risk of physical harm to these individuals.<sup>7</sup> See 65 P.S. § 67.708(a)(1); see also *Gross v. Pa. Dep't of Health*, OOR Dkt. AP 2013-1595, 2013 PA O.O.R.D. LEXIS 921 (holding that the names of those employed at a specific Planned Parenthood facility are exempt under Section 708(b)(1)); *Brown v. Pa. Dep't of State*, No. 1046 C.D. 2017, 2018 Pa. Commw. Unpub. LEXIS 342 (Pa. Commw. Ct. 2018) (finding that "the possibility of retaliation against [Department of Corrections] staff is a sufficient basis for the Department [of State] to exempt information that is likely to identify the residence of medical personnel who work in prisons).

The Requester also argues that the instant appeal is analogous to *Gibson v. Pa. Dep't of Corr.*, OOR Dkt. AP 2017-1550, 2017 PA O.O.R.D. LEXIS 1345. However, the OOR finds that the within matter is readily distinguishable from *Gibson*. Specifically, the requester in *Gibson* sought the medical license numbers of certain named employees. As such, the identities of the employees were already known. The agency provided the medical license number for one named employee during the appeal and successfully argued that the remaining portions of the request were insufficiently specific under Section 703 of the RTKL. Here, the Request seeks *both* names *and* medical license numbers. Consequently, the Requester's reliance on *Gibson* is misplaced.

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<sup>7</sup> Because the requested information is exempt from disclosure under Section 708(b)(1)(ii) of the RTKL, the OOR need not reach the Department's alternative grounds for denying access. See *Jamison v. Norristown Bor. Police Dept.*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927.

Lastly, the Requester states that the purpose of the Request “is to improve the quality of care in abortion facilities” and that the Requester “is performing a valuable public service in trying to ensure that abortion providers operate according to the law.” However, the reason for requesting a record is not relevant to determining a record’s public status. *Advancement Project v. Pa. Dep’t of Transp.*, 60 A.3d 891 (Pa. Commw. Ct. 2013).

### CONCLUSION

For the foregoing reasons, the Requester’s appeal is denied, and the Department is not required to take any further action. 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. 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>8</sup> This Final Determination shall be placed on the OOR website at: <https://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: July 13, 2018**

*/s/ Magdalene C. Zeppos*

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MAGDALENE C. ZEPPOS, ESQ.  
APPEALS OFFICER

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John Gyllenhammer, Esq. (via email only)

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<sup>8</sup> See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).