

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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No. 1085 CD 2018

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JEAN CROCCO, *Petitioner*,

v.

PENNSYLVANIA DEPARTMENT OF HEALTH,

*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, *Respondents*.

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Appeal from Final Determination of the Office of Open Records,  
AP 2018-0778, issued July 13, 2018

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**BRIEF FOR RESPONDENTS 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**

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## **STATEMENT OF JURISDICTION**

The Commonwealth Court has appellate jurisdiction over this matter pursuant to the Right to Know Law, *see* 65 P.S. § 67.1301(a), and the Judicial Code. 42 Pa. C.S. § 763(a).

## **COUNTERSTATEMENT OF STANDARD AND SCOPE OF REVIEW**

This Court exercises *de novo* review of a Final Determination of the Office of Open Records and may adopt the appeals officer's factual findings and legal conclusions when appropriate. *Bowling v. Office of Open Records*, 75 A.3d 453, 474 (Pa. 2013). This Court's scope of review is broad or plenary when it hears appeals from determinations made by appeals officers under the Right to Know Law. *Id.* at 466.

## **COUNTERSTATEMENT OF THE QUESTIONS INVOLVED**

1. Are the names and medical license numbers of the physicians, administrators, medical directors, directors of nursing, owners, trustees, and board members affiliated with Pennsylvania's registered and/or licensed non-hospital abortion facilities exempt from disclosure under the Right to Know Law and Abortion Control Act?

*Answer below: Yes, as to the Right to Know Law.*

*Suggested answer: Yes.*

2. Has Crocco waived her newly-raised claims that the names and medical license numbers of medical providers and other persons closely affiliated with Pennsylvania's abortion facilities are unconditionally public?

*Answer below: Yes.*

*Suggested answer: Yes.*

### **COUNTERSTATEMENT OF THE CASE**

This is an appeal from a Final Determination of the Office of Open Records, AP 2018-0778, issued July 13, 2018, finding that the names and medical license numbers of medical providers and other persons closely affiliated with Pennsylvania's licensed abortion facilities are exempt from disclosure under the personal safety and security exemption of the Pennsylvania Right to Know Law, 65 P.S. § 67.708(b)(1)(ii).

On April 5, 2018, Petitioner Jean Crocco filed a request pursuant to the Pennsylvania Right to Know Law ("RTKL"), 65 P.S. §§ 67.101-67.3104, with Respondent Pennsylvania Department of Health, seeking production of "the most recent applications/reapplications for registration and licensing (if applicable) for all the non-hospital abortion facilities in PA." R.285a. Petitioner Crocco is an employee of the Pro-Life Action League, an extremist organization based in Chicago that is dedicated to closing down abortion providers. R.212a-213a



(Affidavit of Lisa Brown ¶¶ 9-10, 13-16). The evidence in the record below indicates that the Pro-Life Action League has a lengthy history of threatening and harming abortion providers, including several of the respondents. R.202a (Decl. of President and CEO of Planned Parenthood Southeastern Pennsylvania ¶ 11); R.205a (Decl. of President and CEO of Planned Parenthood of Western Pennsylvania ¶ 4).

In response to Crocco’s Right to Know request, the Department produced the medical facilities’ licensure records after redacting personal email and postal addresses pursuant to 65 P.S. § 67.708(b)(6)(i)(A). R.14a. The Department further redacted or withheld names and medical license numbers of medical providers and others affiliated with the facilities pursuant to the Right to Know Law’s personal safety and security exemption, 65 P.S. § 67.708(b)(1)(ii). R.14a.

On April 25, 2018, Crocco filed an appeal which was received by the Office of Open Records (“OOR”) on May 1, 2018. Crocco’s appeal letter was printed on the letterhead of the Pro-Life Action League, whose “National Director” was listed as Joseph M. Scheidler.<sup>1</sup> Crocco did not appeal the Department’s redactions of

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<sup>1</sup> The Pro-Life Action League was founded and for many years led by Joseph Scheidler, author of the 1980 anti-abortion manual, “Closed: 99 Ways to Stop Abortion.” *See* <https://prolifeaction.org/about/>. Joseph Scheidler openly endorses the use of force to close down abortion facilities. R.187a (Decl. of Lisa Brown ¶ 15) (citing reports in which Scheidler states, “crimes against real estate aren’t going to cause me to lose any sleep”). In 1998, a unanimous federal jury found that anti-abortion extremists including Joseph Scheidler and the Pro-Life Action Network had committed illegal acts against abortion providers including assault, trespass,

personal email and postal addresses, but sought all names and license numbers of physicians, administrators, medical directors, directors of nursing, owners, and trustees or board members affiliated with Pennsylvania’s registered and/or licensed non-hospital abortion facilities. R.12a-13a.

On May 15, 2018, the Department filed Additional Information and Legal Argument, R.39a-45a, supported by an affidavit from Garrison E. Gladfelter, Jr., Chief, Division of Acute and Ambulatory Care for the Pennsylvania Department of Health. R.35a-38a. The Gladfelter affidavit revealed that the Department was acutely aware of the risks posed to the personal safety and security of individuals affiliated with abortion clinics. *See* R.36a (Decl. of Garrison E. Gladfelter ¶ 5) (noting that abortion facilities “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”); R.36a (Decl. of Garrison E. Gladfelter ¶ 9) (“Revealing the identities of abortion providers would subject them to . . . substantial risks of physical harm.”).

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blockades, and vandalism. *See* Respondents’ Br., *Scheidler v. NOW, Inc.*, 547 U.S. 9 (2006) *available at* 2005 WL 2776999 \*2-4 (summarizing jury findings).

Pursuant to 65 P.S. § 67.1101(c), the Department notified the third parties who have a direct interest in the non-disclosure of their licensure records: ten Pennsylvania-based health care facilities that provide abortion services under the close regulation of the Department of Health. These non-hospital abortion providers submitted briefs, declarations, and documentary evidence to the OOR as direct interest participants, with Drexel University, d/b/a Drexel Ob/Gyn Associates of Feinstein, separately represented. R.22a.

The direct interest participants provided overwhelming evidence of the harm they will suffer if the requested records are provided to Crocco in an unredacted form. Each of these health care providers has experienced direct threats to personal safety and security from anti-abortion extremists. These experiences range from hate mail and vandalism to firebombing, chemical attacks, and assault.

The direct interest participants' declarations described what happens to them when their identities are publicized to anti-abortion activists.

- Anti-abortion activists seek out personal details about the facility staff and doctors and then use those details to taunt and harass them. R.201a (Decl. of President and CEO of Planned Parenthood Southeastern Pennsylvania ¶ 9) (protesters call her by name and use anti-Semitic slurs). Sometimes the personal character of these taunts conveys an implied threat. R.178a (Decl. of Clinical Director of Allegheny Reproductive Health Center ¶ 4) (protester called Clinical Director “worst mother ever,” raising question of how protester knew whether Clinical Director had a child).
- Abortion facilities also receive hate mail from anti-abortion extremists. R.190a (Decl. of CEO of Mazzoni Center ¶ 8) (Eric Scheidler, current executive director of Pro-Life Action League, sent Mazzoni Center

handwritten note with photo of doctor in handcuffs and warning that “Could you be next?” along with pair of plastic handcuffs).

- When protesters learn the name of a provider of abortion care, they place it on fliers and billboards and post it on websites maintained by extremist organizations that celebrate and promote violence against abortion providers. R.198a (Decl. of President and CEO of Planned Parenthood Keystone ¶ 12) (protester erected huge sign on roof of car with doctor’s name and photo and the words “Harrisburg Killer” and “Murderer of Children”); R.184a (Decl. of Executive Director of Berger & Benjamin ¶ 6) (clinic owner’s name placed on hit list website maintained by extremist group Army of God). In this context, when abortion opponents violate the privacy of staff or patients by photographing and videotaping them as they enter or leave the facility, this conduct takes on a more sinister cast. R.198a (Decl. of President and CEO of Planned Parenthood Keystone ¶ 13) (describing nonconsensual up-close photographing and videotaping).
- Abortion opponents go to extremes to gather detailed personal information about providers. They create directories of information on providers including photos, license plate numbers, home addresses, professional affiliations, and family members’ names and business affiliations. R.198a (Decl. of President and CEO of Planned Parenthood Keystone ¶ 13) (fliers contained Planned Parenthood’s doctor’s family member’s place of employment). One provider was the subject of an entire chapter of a 400-page book compiled by one of the protesters at her facility. R.206a (Decl. of President and CEO of Planned Parenthood of Western Pennsylvania ¶ 11).
- When anti-abortion activists learn the home address of a doctor or administrator, they picket the neighborhood and leaflet the providers’ neighbors to pressure the provider to change jobs. R.183a (Decl. of Executive Director of Berger & Benjamin ¶ 4) (owner picketed at his home); R.181a (Decl. of Executive Director of Allentown Women’s Center ¶ 11) (describing campaign of harassment against former administrator).
- Anti-abortion extremists seek to punish anyone associated in any way with an abortion provider. R.206a-207a (Decl. of President and CEO of Planned Parenthood of Western Pennsylvania ¶ 13) (describing harassment campaign against Pittsburgh pediatrician who hosted Planned Parenthood fundraising event); R.187a (Decl. of President of Women’s Centers ¶ 12) (describing

harassment of DCWC staffer's mother); R.165a (Pro-Life Action League hosted event to "crash" private Planned Parenthood fundraiser).

- Doctors who work for the abortion providers have been stalked and threatened with deadly force. R.206a (Decl. of President and CEO of Planned Parenthood of Western Pennsylvania ¶ 12) (man charged with terroristic threats for posting on Facebook his plans to use a stolen AR-15 to kill Planned Parenthood physician); R.208a-211a (Decl. of David S. Cohen ¶¶ 3-12) (describing federal civil action against protester who stalked and threatened doctor by posting her name, photo, address, make and model of car, and license plate number on protester's blog, with instructions on how to kill her, and sending that information to people incarcerated for crimes against abortion providers).
- Between 1977 and 2017, the National Abortion Federation (NAF) reported 8,812 incidents of violence against abortion providers and 436,868 incidents of disruption (acts like harassment and obstruction of entrances). R.218a (Decl. of Lisa Brown, General Counsel, National Abortion Federation, Ex. A (2017 Violence and Disruption Statistics)). Over the same period, 11 people involved with providing reproductive health care have been murdered, and 26 have been victims of attempted murder. *Id.*

At no time has Crocco disputed the veracity of these declarations or provided proof that the facts contained in the declarations are erroneous.

On July 13, 2018, the OOR appeals officer upheld the redaction of the medical providers' names and medical license numbers, based on the RTKL's personal safety and security exemption, finding that the evidence showed specific instances of harassment and violence against these very providers. R.289a. The OOR determined that the responsive records were not exempt from disclosure under the Abortion Control Act, noting that these records were in a different

format and comprised a different set of documents than the information the Abortion Control Act requires the Department to keep confidential. R.288a.

Crocco filed a motion for reconsideration, arguing for the first time that the Health Care Facilities Act, 35 P.S. § 448.103, designates the names of 5% owners and officers of health care facilities as unconditionally public information and not subject to the RTKL's exemptions. R.296a-298a. Crocco also argued, for the first time, that a statement on the Department's facility licensure application form rendered certain forms unconditionally public and outside the protection of the RTKL's exemptions. R.298a. The OOR denied the motion for reconsideration, R.301a, and this appeal followed.

## **SUMMARY OF THE ARGUMENT**

The Office of Open Records correctly determined that the names and license numbers of medical providers and others closely affiliated with abortion facilities are exempt from disclosure under the personal safety and security exemption of the Right to Know Law. A weighty, un rebutted evidentiary record supports this determination. Every medical facility whose records are at issue in this case produced compelling proof that requiring the Department of Health to disclose personal information about abortion providers and their close associates is highly likely to subject the providers to harassment, abuse, and physical danger. That evidence was not speculation; rather, it was grounded in the providers' direct experience.

The personal safety and security exemption of the Right to Know Law does not require direct interest parties to wait until they have already been victimized before they may invoke the protection of this exemption. Waiting for that level of certainty would protect no one and would ignore the plain language of the exemption, which includes not only the risk of physical harm but also the risk to personal security.

Protecting medical providers' names and other identifying information is in harmony with the confidentiality provisions of the Abortion Control Act, which generally prohibit the Department of Health from publicly releasing reports filed

pursuant to that Act. It also comports with the constitutional mandate that states may not unduly burden the right to abortion by imposing regulatory burdens that outweigh the regulation's health benefits.

Crocco's late-raised and insubstantial claims that the medical providers' names and license numbers are unconditionally public are waived and should not be considered by this Court.

For these reasons as well as those set forth in the Brief for Respondent Department of Health, the Court should affirm the Final Determination of the Office of Open Records.



## ARGUMENT

### **I. THE OOR CORRECTLY HELD THAT THE NAMES AND LICENSE NUMBERS OF MEDICAL PROVIDERS AND OTHERS CLOSELY AFFILIATED WITH ABORTION PROVIDERS ARE EXEMPT FROM DISCLOSURE.**

Section 708(b)(1)(ii) of the RTKL protects records from disclosure 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). The exemption provides two specific protections: protection from physical harm to the individual, and protection of the personal security of the individual. *See Governor’s Office of Admin. v. Purcell*, 35 A.3d 811, 820-21 (Pa. Commw. Ct. 2011) (finding personal security exemption protects against disclosure of date of birth of public employees).

A party seeking to avail itself of this exemption must show “(1) a ‘reasonable likelihood’ of (2) ‘substantial and demonstrable risk’ to an individual’s security if the information is not protected.” *Pennsylvania Dep’t of Revenue v. Flemming*, No. 2318 C.D. 2014, 2015 WL 5457688, \*3 (Pa. Commw. Ct. 2015) (quoting *Governor’s Office of Admin. v. Purcell*, 35 A.3d 811 (Pa. Commw. Ct. 2011)). “Substantial and demonstrable” risk means that the risk must be “actual or real and apparent,” requiring “more than mere conjecture.” *Id.* (citations omitted). The risk must be proven by a preponderance of evidence. *Delaware Cty. v.*

*Schaefer*, 45 A.3d 1149, 1156 (Pa. Commw. Ct. 2012). When the security of a group of individuals is at risk, “an agency may establish the existence of an exception covering a large group of individuals based upon evidence that establishes that the release of certain information poses a likelihood of a substantial and demonstrable risk to the personal security of that group of individuals.” *State Employees’ Ret. Sys. v. Fultz*, 107 A.3d 860, 862 (Pa. Commw. Ct. 2015).

The record before the OOR contained abundant evidence that the respondent medical providers and their associates have been subjected to a decades-long campaign of harassment by abortion opponents, including by Crocco’s employer, the Pro-Life Action League. Crocco does not deny that this harassment occurred and offers no rebuttal of the medical providers’ declarations. Instead, Crocco argues that the proof in the record failed to meet the *Purcell* standard because it was speculative. Crocco variously characterizes the providers’ evidence as worthless because it is “statistical,” *see* Amended Br. of Petitioner Jean Crocco at 27-31, and then contradictorily because it is “anecdotal,” *id.* at 31-32, but such conclusory characterizations do not negate the evidentiary value of the highly detailed, particularized, first-hand, unrebutted sworn declarations and the accompanying studies and articles corroborating and contextualizing them.

There is nothing speculative about the harm that is likely to come to an abortion provider whose identity is publicized by anti-abortion extremists. People

affiliated with the respondent medical providers have been assaulted by anti-abortion activists, *see, e.g.*, R.206a (Decl. of President and CEO of Planned Parenthood of Western Pennsylvania ¶ 10) (two escorts assaulted by protester); R.181a (Decl. of Executive Director of Allentown Women’s Center ¶¶ 7, 8) (protester hit escort in head and pepper-sprayed patient in face). Abortion facilities have been vandalized, R.178a (Decl. of Clinical Director of Allegheny Reproductive Health Center ¶ 7) (describing firebombing of Pittsburgh facility); *id.* (describing drilling of holes in facility roof during rainstorm); R.197a (Decl. of President and CEO of Planned Parenthood Keystone ¶ 8) (describing firebombing of Lancaster facility). Abortion facilities have been repeatedly, forcibly closed by mass blockades orchestrated by, *inter alia*, the Pro-Life Action League. R.201a-202a (Decl. of President and CEO of Planned Parenthood Southeastern Pennsylvania ¶¶ 10, 11) (describing Pro-Life Action League blockades of 1990s and more recent “ProtestPP” mass protests in Pennsylvania); R.186a (Decl. of CEO of the Women’s Centers ¶ 11) (describing Pro-Life Action League blockades of former facility). In the words of a leading expert on targeted harassment of abortion providers:

[O]nce anti-abortion extremists discover the provider’s identity—name, address, family members, other places of work, etc.—they use any and all of this information to further harass the provider and his/her family. This can include home picketing, hate mail, phone calls, trespassing, death threats, or worse.

R. 211a (Decl. of David S. Cohen ¶ 14).

The evidence in the record showed that the use of force, intimidation, violence, and threats of violence against Pennsylvania providers occurs within the context of a decades-long nationwide campaign to eliminate access to legal abortion by hounding providers out of practice using any means necessary, legal or illegal. Between 1977 and 2017, the National Abortion Federation (NAF) reported 8,812 incidents of violence against abortion providers and 436,868 incidents of disruption (acts like harassment and obstruction of entrances). R.218a (Decl. of Lisa Brown, General Counsel, National Abortion Federation, Ex. A (2017 Violence and Disruption Statistics)). Over the same period, 11 people involved with providing reproductive health care have been murdered, and 26 have been victims of attempted murder. *Id.* There have been 187 incidents of arson, 99 bombing or arson attempts, 100 butyric acid attacks, 4 kidnappings, 275 incidents of battery and assault, 604 incidents of stalking, and 607 incidents of death threats or threats of harm. *Id.* Incidents of trespass and vandalism occur with even more regularity, with 3,748 and 1,735 incidents respectively. *Id.*

Troublingly, recent years have seen a spike in violence against abortion providers. NAF statistics show that threats of death and harm have almost doubled in the past year, going from 33 to 62. R.216a (Decl. of Lisa Brown, General Counsel, National Abortion Federation, Ex. A (2017 Violence and Disruption

Statistics)). Hate mail and harassing calls also increased. *Id.* Trespass rose from 247 incidents to 823, and incidents of obstruction increased from 580 to 1,704. *Id.*

Evidence before the OOR included the Feminist Majority Foundation's (FMF) 2016 National Clinic Violence Survey, which corroborates NAF's finding of an upsurge in violence. *See* Feminist Majority Foundation, 2016 National Clinic Violence Survey, at 3 (released Feb. 2017), <https://www.feminist.org/anti-abortion-violence/images/2016-national-clinic-violence-survey.pdf>. The percentage of clinics that reported the most severe varieties of anti-abortion activity grew from 19.7% in 2014 to 34.2% in 2016. *Id.* Additionally, 63.2% of clinics nationwide reported anti-abortion activities at their facilities on either a daily or weekly basis. *Id.* FMF points out that, while not every facility experiences the more severe forms of violence every year, the selection of certain providers for heightened anti-abortion activity reflects the strategic targeting of more vulnerable facilities:

In a war of attrition, anti-abortion extremists strategically target a vulnerable minority of clinics, aiming to force them to close their doors before moving on to the next set of targets. Thus a majority of clinics experience no violence, while a smaller number report numerous acts of violence, threats, or harassment.

*Id.* at 6.

If the redacted information at issue in this appeal is produced, Pennsylvania providers' privacy will have been compromised, which will make them more

vulnerable, and hence more likely to find themselves strategic targets for the more extreme forms of violence. It takes no act of the imagination to see that turning over the names and other identifying information of physicians, nurses, owners, directors, trustees, and administrators of abortion facilities to a staff member of the Pro-Life Action League will predictably cause the providers a loss of security and, very likely, harm.

Crocco makes much of the fact that some of the providers have a public profile, and even asserts that she has already discovered their names. *See* Amended Br. of Petitioner Jean Crocco at 15 n.3 (providing purported names of medical facility directors). She goes so far as to state that by identifying themselves, medical providers have abandoned any protection the personal safety and security exemption would otherwise offer. As discussed *infra* Part III, Crocco failed to raise this issue before the OOR, and it is therefore waived.

To the extent Crocco concedes that she already possesses the information she seeks, her admission raises mootness concerns. *See Public Defender's Office of Venango Cty. v. Venango Cty. Ct. of Common Pleas*, 893 A.2d 1275, 1279 (Pa. 2006) (“[I]n general, a court will not decide a moot question.”). As this Court has explained:

[T]here must be an actual controversy at every stage of the judicial process. . . . “A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.”

*J.J.M. v. Pennsylvania State Police*, 183 A.3d 1109, 1112 (Pa. Commw. Ct. 2018) (internal citation omitted). If, as Crocco asserts, she indeed already has the information she seeks, there would be little practical benefit to her for pursuing this appeal, because any remedy ordered by this Court will not bring about any change, the essential requirement for a claim not to be moot.

More to the point, if private individuals lose the protection of the RTKL's personal safety and security exemption simply by being identified in a news report, using social media, or revealing their name in a corporate filing, that exemption would lose much of its vitality, as virtually no one in today's world lives a life of complete obscurity. Whether or not an individual voluntarily reveals personal information on social media or in other contexts is irrelevant to the question of whether an agency must disclose this information upon demand. *See Pennsylvania State Educ. Ass'n v. Commonwealth*, 148 A.3d 142, 161 (Pa. 2016) (Wecht, J., concurring). That the information Crocco requests "may be uncovered by private citizens through industry or skullduggery does not mean that [the agency] must employ public recourse to assist in that activity." *Id.* at 161-62; *see also Dep't of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 500 (1994) ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some other form.").

The personal safety and security exemption of the RTKL is not disabled simply because a person has a social media profile or can be discovered through a computerized search engine. The relevant inquiry here is not whether the private individual has ever identified herself publicly, but whether the further exposure that will ensue if sensitive records are disclosed is “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). The proof adduced below more than satisfies this test.

The well-documented history of violence against abortion providers and facilities amply supports the OOR’s conclusion that a Section 708(b)(1)(ii) exemption was justified. The OOR had already determined in a previous RTKL appeal that handing over personal identifying information of an abortion provider to an anti-abortion protester would leave the provider vulnerable to attack, and hence merited the protection of Section 708(b)(1)(ii). *See Rosalie Gross v. Pennsylvania Department of Health*, OOR Docket AP 2013-1595, available at <https://www.openrecords.pa.gov/Documents/FinalDet/11912.pdf>. In *Gross*, the OOR denied an appeal to obtain “the names of the PA licensed medical personnel (the physician and physician’s assistant and the nurse practitioner and RNs, LPNs and NAs) attending the clientele at Planned Parenthood Associates of PA,



Harrisburg Medical Center (‘Planned Parenthood’).” *Id.* A declaration from the CEO of a Planned Parenthood health center stated:

Intimidation by [protesters] . . . ha[s] included trespassing on private property, blocking the driveway entrance to the center, photography and videotaping of staff at close range, documentation of staff license plate numbers, shouting harassing and offensive words and phrases to patients and staff, including threatening comments in regards to staff’s family, following staff outside of the center to continue harassment, pounding on the front of the Harrisburg Medical Center entrance to harass volunteers, and standing on private property to photograph employees through office windows. Police have been called upon several occasions to remind protesters of the legal limits.

This activity has also included attempts to identify physicians and also placing videos of staff and supporters including local residents and police on the internet. This is consistent with a national trend of more intensive targeting of doctors and clinic personnel.

*Id.* Based on evidence that “protesters attempt to identify staff members so that their names may be published, and that protesters frequently harass and threaten these staff members,” the OOR concluded that the Department met its burden of proving a reasonable likelihood of risk of physical harm to or to personal security of the Planned Parenthood employees. *Id.*

*Gross* is not merely analogous to the present appeal; it is nearly identical, except that 1) here, the respondent medical providers produced even stronger proof supporting the exemption; and 2) unlike *Gross*, Crocco is employed by an organization with an extensive, decades-long history of violent and threatening

conduct aimed at closing down abortion providers, including some of the very providers whose records are at issue. The Pro-Life Action League makes no secret of the fact that it requests government records for the purpose of closing abortion facilities, and even hosted a training on how to make such requests. See “Pro-Life Action League to Offer Training on How to Investigate Your Local Abortion Clinic,” (Jan. 9, 2018), available at <https://prolifeaction.org/2018/monitoring/> (stating that using open records laws to close abortion providers is “a bit like David using Goliath’s own sword to cut off his head”).

The OOR rulings in *Gross* and in the instant case are consistent with rulings from courts in other jurisdictions that have found that disclosure of identifying information poses a significant threat to abortion providers. In *Judicial Watch, Inc. v. FDA*, the FDA withheld names and addresses of individuals involved in the approval of mifepristone, medication used in non-surgical abortion, citing “the danger of abortion-related violence” as one reason to deny disclosure. 449 F.3d 141, 144, 153 (D.C. Cir. 2006). Like the arguments Crocco raised, the requester in *Judicial Watch* argued that public interest required disclosure of personal information because mifepristone may be dangerous to women’s health. *Id.* at 153. The court rejected this argument, finding “names and addresses prove nothing about the nature or even the existence of the risk,” and concluded that “the private interest in avoiding harassment or violence tilts the scales” in favor of

nondisclosure. *Id.* (relying on evidence of abortion clinic bombings and “websites that encourage readers to look for mifepristone’s manufacturing locations and then kill or kidnap employees once found”).

Similarly, the Maryland Court of Appeals (the highest court in the state) affirmed denial of disclosure of “the names and email addresses (where the email address contained the individual’s name) of individuals who were listed as owners, administrators, and medical directors for each [abortion] facility.” *Glenn v. Dep’t Health & Mental Hygiene*, 132 A.3d 245, 247 (Md. 2016). Referring to *Judicial Watch*, the court concluded: “[The] history of violence associated with the provision of abortion services is undeniable.’ . . . [W]e cannot disagree with DHMH’s conservative approach to disclosure of information about the providers, administrators, and facility managers.” *Id.* at 251-52 (quoting *Judicial Watch*, 449 F.3d at 153).

In a similar New Hampshire case, that state’s supreme court found that “the public interest in the names of the individuals at issue is attenuated at best,” because disclosure of an abortion provider’s site managers, medical directors, and consultant pharmacists “does not further the public interest in assuring that the requirements of [the statute] are met.” *New Hampshire Right to Life v. New Hampshire Charitable Trusts*, 143 A.3d 829, 852 (N.H. 2016). The court ultimately determined that “because [abortion facility] employees have a

cognizable privacy interest in nondisclosure that outweighs such a negligible and speculative public interest . . . disclosure is not required by the Right-to-Know Law.” *Id.* at 853.

Courts in other jurisdictions have acknowledged that disclosing identifiable information about providers burdens abortion access and does not serve the public interest. In *Glenn*, the court determined that disclosure of providers’ names would create a chilling effect that would “deter ultimately access to women who seek an abortion.” 132 A.3d at 253. Weighing the burden of this request against its benefits compels the conclusion that complying with Crocco’s request for the redacted information would likely create an undue burden on the right to abortion. *See Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016) (striking down abortion regulations because burdens they imposed outweighed benefits).

## **II. DISCLOSURE OF THE REQUESTED RECORDS WOULD FRUSTRATE THE PURPOSES OF THE NONDISCLOSURE PROVISIONS OF THE ABORTION CONTROL ACT.**

The Pennsylvania Department of Health licenses health care facilities, including, pursuant to Act 122 of 2011, abortion facilities. The Department’s responsibilities include not only facility licensure, but comprehensive oversight of all aspects of abortion care within the Commonwealth. The Pennsylvania Legislature gave explicit regulatory authority to the Department to implement the Abortion Control Act, 18 Pa. C.S. §§ 3201-3220, *see* 18 Pa. C.S. § 3207(a), and its

accompanying regulations, *see* 28 Pa. Code §§ 29.31-29.43, as well as to closely regulate non-hospital-based providers as a subcategory of ambulatory surgical facility. *See* 28 Pa. Code §§ 551-571. As part of this regulatory scheme, the Department requires abortion facilities to provide it with extensive information, including the names of facility administrators, doctors, nurses, board members, and owners.

The Pennsylvania Abortion Control Act specifically addresses the privacy of records produced by abortion providers to the Department of Health. Abortion reports submitted to the Department pursuant to 18 Pa. C.S.A. § 3214 are not public records as defined by the Right to Know Law and are to remain confidential:

Reports filed pursuant to subsection (a) or (h) shall not be deemed public records within the meaning of that term as defined by the act of June 21, 1957 (P.L.390, No.212), referred to as the Right-to-Know Law, and shall remain confidential, except that disclosure may be made to law enforcement officials upon an order of a court of common pleas after application showing good cause therefor. The court may condition disclosure of the information upon any appropriate safeguards it may impose.

18 Pa. C.S.A. § 3214(e)(2). In requiring the Department of Health to prepare an annual statistical summary of these abortion reports, the Pennsylvania legislature took special care to ensure that “[s]uch report shall not lead to the disclosure of the identity of any person filing a report or about whom a report is filed,” 18 Pa. C.S.A. § 3214(e)(1), even going so far as to provide criminal penalties for

unauthorized disclosure of the identifying information contained in providers' reports to the Department. 18 Pa. C.S.A. § 3214(e)(4). Disregarding this clear directive by forcing the Department to disclose the very identifying information protected so explicitly by the Abortion Control Act would frustrate the Pennsylvania Legislature's clear intent and undermine the Department's role in regulating abortion facilities. It would also run afoul of the constitutional mandate that when the state regulates abortion care, the burdens its health regulations place on abortion providers must never outweigh the health benefits of such regulations. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016).

In fact, despite Crocco's representations to the contrary, the information requested would not advance any public interest in patient safety. Abortion providers are extremely heavily regulated, *see, e.g.*, 18 Pa. C.S.A. §§ 3201-3220; 28 Pa. Code §§ 29.31-29.43; 28 Pa. Code §§ 551-571, and the redacted records verify that the abortion facilities in question qualify for licensure or certification by or through the Department in conformity with these extensive health regulations. Far from advancing public health and safety, disclosing providers' identities will endanger them and the public they serve.

This Court has explained that "[t]he RTKL is remedial in nature and 'is designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make the public officials

accountable for their actions.”” *West Chester Univ. of Pa. v. Schackner*, 124 A.3d 382, 393 (Pa. Commw. Ct. 2015) (citation omitted). Disclosure of individuals’ personal information reveals nothing about the internal workings of the government. *Id.* at 343. Indeed, “nothing in the RTKL suggests that it was ever intended to be used as a tool to procure personal information about private citizens or, in the worst sense, to be a generator of mailing lists.” *See Pennsylvania State Educ. Ass’n v. Commonwealth*, 148 A.3d 142, 158 (Pa. 2016).

Crocco should not be permitted to turn the Department of Health into a clearinghouse which coerces abortion providers into surrendering sensitive personal information to people intent on destroying them. Though Crocco presents herself as a non-violent person with good intentions, she works at an anti-abortion extremist organization; as noted by the Department, the logical inference from this information must be heeded because “the Department of Health is in no position to evaluate the risk of violence posed by each individual RTKL requestor.” R.43a. Furthermore, there is no guarantee that the requested information would not be further disseminated to others who wish to harm abortion providers. R.36a (Affidavit of Garrison E. Gladfelter, Jr. ¶ 10); *see also* R.214a (Affidavit of Lisa Brown ¶¶ 19-20) (Pro-Life Action League works closely with other extremist organizations and shares information with network of anti-abortion extremists).

### **III. CROCCO’S REMAINING ARGUMENTS WERE NOT RAISED BEFORE THE OOR AND THUS ARE WAIVED AND SHOULD NOT BE CONSIDERED BY THIS COURT.**

It is well-established that issues not raised in the lower court are waived and cannot be raised for the first time on appeal. Pa. R.A.P. 302(a); *Pennsylvania Dep’t of Conservation & Nat. Res. v. Vitali*, No. 1013 C.D. 2014, 2015 WL 5458521, at \*7 (Pa. Commw. Ct. July 7, 2015) (holding that OOR properly did not consider evidence submitted for the first time in conjunction with a motion for reconsideration).

Crocco argues that the names of 5% owners and officers, as well as board members and trustees of the health care facilities, must be disclosed under the Pennsylvania Health Care Facilities Act. *See* Amended Br. of Petitioner Jean Crocco at 32-34 (citing 35 P.S. § 448.103). This claim is waived, because Crocco did not raise this issue during her appeal to the OOR of May 1, 2018. Rather, Crocco did not raise this argument until she filed a motion for reconsideration on July 28, 2018, after the OOR had issued its Final Determination on July 13, 2018. R.296a-298a. Subsequently, the OOR Chief Counsel denied Crocco’s motion for reconsideration because she asserted an argument that was not before the OOR during the appeal. *See Fort Cherry School Dist. v. Coppola*, 37 A.3d 1259, 1262 (Pa. Commw. Ct. 2012) (“[T]he OOR should not accept evidence submitted after the [final] determination issues, as, presumably, the determination is reached based



on the evidence timely submitted.”). Therefore, because Crocco did not raise this issue before the OOR, it was not preserved and should not be considered by this Court.<sup>2</sup>

Similarly, Crocco has waived her contention that because some of the respondent medical providers currently have or have in the past had an internet presence, they have forfeited any protection under the RTKL. Crocco raised this issue for the first time before this Court and, as such, it is waived. *See Brown v. Pennsylvania Dep’t of State*, 123 A.3d 801, 804 n.7 (Pa. Commw. Ct. 2015) (holding that requester waived an issue on appeal because he failed to raise it before the OOR). Indeed, Crocco does not even attempt to argue before this Court that her newly raised claims are not waived.

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<sup>2</sup> Even if this Court were to reach the issue, there is nothing in the Health Care Facilities Act that compels disclosure of the redacted names and license numbers Crocco seeks. Simply because a record is generally a public record does not remove it from the protection of the RTKL’s statutory exemptions.

## CONCLUSION

For these reasons, as well as those set forth in the Brief for Respondent Pennsylvania Department of Health, the Court should affirm the July 13, 2018, Final Determination of the OOR and enter judgment for Respondents.

Date: January 14, 2018

Respectfully Submitted,

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## **CERTIFICATE OF WORD COUNT COMPLIANCE**

Pursuant to Pa. R. App. P. 2135, the text of the foregoing Brief consists of 6,166 words as determined by the Microsoft Word word-processing program used to generate this document.

Dated: January 14, 2019

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify on this 14th day of January, 2019, I caused to be served a true and correct copy of the foregoing **Brief for Respondents** via the Court's PACFile System and U.S. first-class mail upon the following:

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**APPENDIX: Final Determination of the OOR dated July 13, 2018**