

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1085 C.D. 2018

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.

BRIEF FOR RESPONDENT

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

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STATEMENT OF JURISDICTION

This Honorable Court has appellate jurisdiction over this matter under section 1301(a) of the Right-to-Know-Law (RTKL), 65 P.S. § 67.1301(a), and section 763(a)(2) of the Judicial Code, 42 Pa. C.S. § 763(a).

**COUNTER STATEMENT OF THE SCOPE AND
STANDARD OF REVIEW**

In an appeal under the Right-to-Know Law (RTKL), 65 P.S. §§ 67.101-67.3104, from a final determination of the Office of Open Records (OOR), the standard of review exercised by this Court is de novo.

The scope of review in this case is plenary review with respect to both questions of fact and law. This Court reviews the OOR's orders independently and may substitute its own findings of fact for those of OOR. *Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013).

COUNTER STATEMENT OF QUESTIONS INVOLVED

- I. Are the names and medical license numbers of medical providers and other persons affiliated with the abortion facilities at issue in this case exempt from disclosure under the Right-to-Know Law and the Abortion Control Act?

Answered partially in the affirmative below.

Suggested answer: Yes

- II. Has Crocco waived the arguments that Direct Interest Participants have social media profiles and, therefore, do not need the protections afforded by the RTKL and that the names of 5% owners and officers of certain facilities must be disclosed under the Pennsylvania Health Care Facilities Act by failing to raise them before the Office of Open Records?

Answered in the affirmative below.

Suggested answer: Yes

COUNTER-STATEMENT OF THE CASE

Factual and Procedural History

On April 5, 2018, the Pennsylvania Department of Health (DOH) received a request for records, pursuant to the RTKL, from Jean Crocco, the Petitioner in this case (Crocco). R.285a. Specifically, Crocco requested “the most recent applications/reapplications for registration and licensing (if applicable) for all the non-hospital abortion facilities in PA.” *Id.*

On April 12, 2018, DOH provided documents that were responsive to Crocco’s request, but first redacted personal email addresses and postal addresses pursuant to section 708(b)(6)(i)(A) of the RTKL, 65 P.S. § 67.708(b)(6)(i)(A). R.014a. DOH further redacted the names and medical license numbers of medical providers and other persons affiliated with abortion facilities pursuant to section 708(b)(1)(ii) of the RTKL, 65 P.S. § 67.708(b)(1)(ii). R.014a.

Appellant appealed DOH’s decision to the OOR on May 1, 2018, claiming that section 708(b)(1)(ii) of the RTKL, 65 P.S. § 67.708(b)(1)(ii), did not apply to the names and medical license numbers of medical providers and other persons affiliated with abortion facilities. R.12a.

DOH informed all interested parties of Crocco’s appeal and, subsequently, the OOR granted participation status to each interested party. R.240a-241a. DOH, along with the following direct interest participants, submitted additional information to the OOR:

- 1) Allegheny Reproductive Health Center;
- 2) Allentown Women's Center;
- 3) Berger & Benjamin;
- 4) Philadelphia Women's Center and Delaware County Women's Center;
- 5) Mazzoni Center Family and Community Medicine;
- 6) Planet Parenthood Keystone;
- 7) Planned Parenthood Southeastern Pennsylvania;
- 8) Planned Parenthood Western Pennsylvania;
- 9) David S. Cohen, Esquire, counsel for a doctor at the Women's Law Project; and
- 10) Lisa Brown, Esquire general counsel for the National Abortion Federation.

See R.177a-238a.

The additional information provided by DOH and the Direct Interest Participants included position statements that highlighted the risks posed to the personal safety of individuals who are affiliated with abortion clinics. *See* R.177a-238a. The affidavits detailed the threats, harassment and crimes perpetrated against those who work or volunteer at abortion clinics including, but not limited to, the following:

- 1) Regular protests outside facilities; R.177a, R.181a, R.186a, R.197a, R.201a, R.205a.
- 2) Protestors know personal information about the employees of the facilities without the employees sharing said information; R.178a, R.197a, R.209a.
- 3) Facilities receive harassing phone calls and threats; R.178a, R.186a, R.190a, R.197a, R.205a.
- 4) Staff is regularly threatened and harassed; R.178a, R.181a, R.183a, R.186a., R.190a, R.197a, R.201a, R.205a.
- 5) Facilities are subject to vandalism and sabotage; R.178a.
- 6) Facilities have been firebombed; R.178a, R.187a, R.212a.
- 7) There was a direct threat of violence from a man with an assault weapon who wanted to kill the doctor who performed an abortion on his girlfriend; R.178a.
- 8) A volunteer with the Allentown Women's Center was assaulted by a protestor; R.181a.
- 9) A patient was assaulted by a protestor using pepper spray; R.181a.

- 10) In 2007, the name and address of a former director became public information. Said director had graphic and violent material sent to her home and leaflets were left in their neighborhood claiming they killed children; R.181a.
- 11) Doctors and staff members have had leaflets distributed in their neighborhoods accusing them of murder and generally harassing them; R.181a, R.198a, R.210a.
- 12) Doctors' names and addresses, along with other personal information, have been leaked in the past which has led to death threats against them; R.182a, R.183a, R.184a, R.197a, R.202a.
- 13) Doctors have been stalked from work and have had their families harassed; R.187a.
- 14) A member of the staff received a harassing mailing directly from the Appellant's place of employment on January 22, 2015 which included a pair of handcuffs; R.190a, R.193a, R.194a, R.195a.
- 15) In January 2015, two volunteers were assaulted at an abortion clinic; R.206a.

- 16) It is common for the names and addresses of workers in these clinics to have their personal information posted on websites advocating for the end of abortion; R.205a, R.210a.
- 17) On March 9, 2018, a man was arrested from making threats against a doctor. He had stolen an AR-15 and was traveling to Pittsburgh to kill an abortion doctor; R.206a.
- 18) Since 1977, there have been 11 murders of staff members and 26 attempted murders of staff members of abortion clinics; R.212a.
- 19) Since 1977, there have been 187 arsons directed at abortion clinics; R.212a.
- 20) Between 2010 and 2017 there were 2,622 reported acts of violence directed towards abortion clinics and staff; R.290a. and
- 21) Between 2010 and 2017 there were 281,639 acts of disruption directed towards abortion clinics and staff. R.290a.

On July 13, 2018, the OOR issued a Final Determination denying the Appellant's appeal. A true and correct copy of the OOR's July 13, 2018 Final Determination is attached hereto as Appendix A.

SUMMARY OF ARGUMENT

The names and medical license numbers of medical providers and other persons affiliated with the abortion facilities at issue are exempt from disclosure pursuant to the personal safety and security exemption in section 708(b)(1)(ii) of the RTKL, 65 P.S. § 67.708(b)(1)(ii). This exemption applies because there is a reasonable likelihood of substantial and demonstrable risk to the personal security of medical providers, supporters, employees, and volunteers of abortion facilities as demonstrated by the long history of violence and harassment against them whenever their information has been made publicly available.

Additionally, the requested records are exempt from disclosure under the Abortion Control Act (ACA) because the ACA states that the disclosure of some of this information, in other circumstances, would constitute a misdemeanor of the third degree. 18 Pa. C.S. § 3214(e)(4).

Finally, Crocco raised two additional issues on appeal that were not raised to the OOR. Specifically, she alleges that the Direct Interest Participants have social media profiles and, therefore, do not deserve the protections afforded by the RTKL. She further argues that the names of 5% owners and officers of certain facilities must be disclosed under the Pennsylvania Health Care Facilities Act. Since she failed to raise these issues before the OOR, they are waived and cannot be considered by this Court.

ARGUMENT

The RTKL requires a Commonwealth agency to provide “public records” in response to a RTKL request. *See* 65 P.S. § 67.301. Records which are in the possession of DOH are presumed public unless they are exempt under the RTKL or other law, or protected by privilege, judicial order, or decree. 65 P.S. § 67.305. DOH has the burden of proof to demonstrate that a particular record is exempt from disclosure. 65 P.S. § 67.708(b). DOH can establish that a particular record is exempt from disclosure by the preponderance of the evidence. 65 P.S. § 67.708(a)(1).

Under the RTKL, an affidavit or statement made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Cmwlth. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Cmwlth. 2010). In the absence of any evidence that DOH has acted in bad faith, “the averments in [the verification] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Cmwlth. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. Ct. 2013)).

I. THE NAMES AND MEDICAL LICENSE NUMBERS OF MEDICAL PROVIDERS AND OTHER PERSONS AFFILIATED WITH THE ABORTION FACILITIES AT ISSUE ARE EXEMPT FROM DISCLOSURE.

This appeal arises from DOH’s denial of and the OOR’s subsequent affirmance of DOH’s denial of written requests for records under the RTKL, 65 P.S.

§§ 67.101-67.1304, filed by Crocco who requested “the most recent applications/reapplications for registration and licensing (if applicable) for all the non-hospital abortion facilities in PA.” R.285a.

In response to Crocco’s request, DOH provided the licensure applications of the abortion facilities at issue, but redacted or withheld the names and medical license numbers of medical providers and the names of others affiliated with those facilities pursuant to the personal safety and security exemption contained in section 708(b)(1)(ii) of the RTKL, 65 P.S. § 67.708(b)(1)(ii), and the Abortion Control Act (ACA), 18 Pa.C.S. §§ 3201-3220, which provides confidentiality for physicians who perform abortions. 18 Pa. C.S. at § 3211.

The OOR, upon review of DOH’s decision, affirmed holding that DOH and Direct Interest Participants showed “specific instances where protesters harassed and threatened physicians and staff members affiliated with abortion care facilities.” R.293a.

A. The requested records are exempt from disclosure under the RTKL.

DOH denied Crocco’s request for records on the basis that disclosure “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 use this exemption, DOH must show that there is a “reasonable likelihood” of “substantial and demonstrable risk” to a person’s security. *Del. County v. Schaefer*, 45 A.3d

1149, 1156 (Pa. Cmwlth. 2012).

Intimidation and violence toward abortion providers commonly occurs and has been recently escalating. *See* R. 046a. Death threats and threats of harm have almost doubled in the last year and incidents of obstruction have tripled. R. 046a-052a, R.216a. Cyberattacks are a new tool in the arsenal to prevent the provision of services by abortion facilities and such attacks appear to be facilitated by the public provision of information about abortion providers. R.052a. Not only are provider websites targeted and shut down, but the internet is used as a tool to widely disseminate private information about providers (“doxing”).¹ Doxing is a well-known means to harass individuals, and the negative impact of doxing has become familiar material in the news. *See* R.053a. When such means are used against abortion providers it results in more than just intense harassment – the threat of which would be reason enough to deny access to the information – but in physical harm. *See* R.057a (“Doxing can put their lives at risk”).

Between 1973 and 2003, anti-abortion activists carried out over 300 attacks on abortion clinics, including arsons, bombings, butyric acid attacks and murders of abortion providers. *See* R.061a. This data was collected as part of a 2010 study which looked at the effect of clinic violence on the availability of abortions during

¹ Merriam-Webster defines doxing as a verb meaning “to publicly identify or publish private information about (someone) especially as a form of punishment or revenge.” *Merriam-Webster Electronic Dictionary*, <https://merriam-webster.com> (last visited December 14, 2018).

that timeframe. The study found, among other conclusions, that abortion providers remained fearful of violence against them and that the political climate may be the impetus for violence in the future. More recent statistics appear to bear this out. *Id.*

Crocco, the requestor in this case, presents herself as being non-violent individual who is interested in the well-being of individuals who want to have lawful medical procedures performed. R.012a-013a. To support this position, she has dedicated an entire section of her brief to it. Petitioner's Brief pg. 26-28. Notwithstanding this, DOH is in no position to evaluate the risk of violence posed by each individual RTKL requestor.² To the contrary, DOH is prohibited from asking *any* requestor the purpose of their RTKL request. 65 P.S. § 67.703. DOH can, however, withhold dissemination of certain information if there is significant likelihood of compromising the personal security and safety of individuals, as demonstrated in this case. *See* 65 P.S. § 67.708 (b)(1)(ii); *Del. County v. Schaefer*, 45 A.3d 1149, 1156 (Pa. Cmwlth. 2012)

Once information is disclosed, DOH cannot control where and to whom such information is further disseminated. While a particular requester may have no present intent to commit a bad act, there is nothing to prevent the information from being shared directly or indirectly far beyond the requester. The information,

² The Appellant is employed by the Pro-Life Action League and made her request on their letter head. R.012a. In January 2015, the Pro-Life Action League sent a Direct Interest Participant a picture of an abortion doctor in handcuffs and a note saying "Could you be next?" to the Direct Interest Participant. R.190a, R.193a, R.194a, R.195a.

combined with the reach of social media, could result in intense harassment or even violence. Further, when regarded against a backdrop of anti-abortion actions that have turned to violence, the requested information must not be made publicly available.

Due to the extensive violence that employees of abortion facilities face, these facilities provide information to the Department based upon assurances from the Department that their information will be kept confidential and will only be used for official purposes. *See* R. 290a; 18 Pa. C.S. § 3214. Disclosure of this information is reasonably likely to cause a demonstrable and substantial risk of physical or financial harm to the personal security of the abortion facility staff and their families. *See generally, Stein v. Office of Open Records*, No. 1236 C.D. 2009 (Pa. Cmwlth. May 19, 2010) (first names of prison guards could be withheld to preserve personal security); *Brown v. Pa. Dep't of State*, No. 1046 C.D. 2017 (Pa. Cmwlth. June 25, 2018) (finding that just the possibility of retaliation is a sufficient basis to withhold information likely to identify the residence of medical personnel who work in prisons).

The potential for harm is not speculative. The filings by the Department and the Direct Interest Participants contain a horrific litany of evidence of violence against individuals performing lawful medical procedures at clinics. This history includes acts of violence, harassment and disruption going back nearly 40 years. *See*

R.061a. The acts of violence, harassment and disruption are not just limited to protests at facilities. Many individuals, including the Direct Interest Participants, have been harassed at their homes. *See* R.181a, R.187a, R.198a, R.210a. This level of harassment is not speculative. It is actual. These acts have occurred and continue to occur.

Distressingly, the affidavits detail harassment, violence and disruption designed specifically to impair the personal safety of all individuals *directly* involved with lawful medical procedures. *See* R.146a-238a. Each affidavit contains *personal knowledge* of harassment and violence. Each affidavit contains *examples of actual harm directed at the actual participants*.

DOH's position is not based on speculation, it is based on the cold hard facts. Doctors who perform abortions are targeted for death. Volunteers who assist abortion clinics get assaulted. Directors of health organizations get accosted at their homes. *See generally* R.146a-238a. DOH has not engaged in speculation. DOH has not had to read tea leaves. It has substantial evidence of the wanton acts of violence, harassment and disruption that occur on a daily basis. There has never been a more apt usage of the personal safety and security exemption than in this case. Crocco, in her brief, argues the record contains no "specific" or "particularized" facts that the Department can use to demonstrate to link the requested disclosure to substantial harm. To the contrary, eleven separate affiants presented specific factual evidence.

See R.146a-290a.

DOH reiterates that the harm which would result from releasing the requested information is based upon material statistics from real incidents and, therefore, is based on more than a mere belief that the release of a record would cause a substantial and demonstrable risk of harm.

It is important to note that Crocco has not questioned the veracity of the affidavits submitted. This is important because, in the absence of any evidence that DOH has acted in bad faith, “the averments in [the verification] should be accepted as true.” *See McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Cmwlth. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. Ct. 2013)). Crocco supplied no evidence that DOH acted in bad faith. Therefore, the averments in the affidavits must be accepted as true. Since the evidence of violence, harm and disruption have not been disproven by Crocco, her challenge to the personal safety exemption is simply without merit.

B. The records requested are specifically prohibited from disclosure by the Abortion Control Act.

Section 102 of RTKL excludes from the definition of “public records” records that are exempt from disclosure under “State law or regulation.” *See* 65 P.S. § 67.102. The presumption that agency records are “public” does not apply if the records are exempt from disclosure under state law or regulation. 65 P.S. § 67.305(a)(3).

Under section 3214 of the ACA, 18 Pa. C.S. § 3214, DOH receives reports of abortions performed, which include identification of the physician who performed the abortion, and, in the event the requirements of section 3211 (relating to abortion on unborn child of 24 or more weeks gestational age) apply, the identities of the concurring and the second physicians, required under section 3211(c)(2) and (c)(5). *See* 18 Pa. C.S. § 3211(c)(2), (c)(5). Section 3214 of the ACA provides that the content of the reports 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. 18 Pa. C.S. § 3214. Notably, recognizing the risk the disclosure of such information could have, the ACA permits the court to condition disclosure upon any appropriate safeguards it feels necessary to impose. *Id.*³

Additionally, the ACA states that any person who willfully discloses any information obtain from reports filed pursuant to section 3214 commits a misdemeanor of the third degree. 18 Pa. C.S. § 3214. Specifically, the ACA states that the disclosure of the names of any attending medical personnel would constitute a misdemeanor of the third degree. 18 Pa. C.S. § 3214(e)(4). “[T]he general powers of the courts do not include the power to order the disclosure of materials that the

³ Although not relevant to this case, original copies of all reports filed are available to the State Board of Medicine and the State Board of Osteopathic Medicine for use in the performance of their official duties. 18 Pa. C.S. § 3214.

legislature has explicitly directed be kept confidential.” *Commonwealth v. Moore*, 584 A.2d 936, 940 (Pa. 1991).

The information the requester seeks includes the identities of physicians who perform abortions at the licensed facilities. While this information has been requested through another avenue, that is, license applications as opposed to report forms filed pursuant to section 3214, the legislature has chosen to protect that information and has made disclosure subject to criminal penalty. Accordingly, DOH cannot release the names of medical personnel who are associated with, and who may be providing services at, an abortion facility.

Appellant argues that the requested information is not a report filed pursuant to the ACA, therefore, the ACA is not relevant. However, the ACA prohibits release of information regarding the individuals who perform the lawful medical procedures in question, going so far as to criminalize the release of that information.

The fact that the ACA not only protects disclosure but also criminalizes its release shows the legislature had no intention of allowing this information to be released regardless of the means by which the information was obtained by DOH. In making this information expressly confidential, the legislature was aware of the danger posed to the individuals performing the procedure from advocates and recognized the great risk of personal harm those individuals faced simply for performing lawful medical procedures.

II. CROCCO WAIVED ALL REMAINING ISSUES BY FAILING TO RAISE THEM BEFORE THE OFFICE OF OPEN RECORDS.

It is axiomatic that issues raised for the first time on appeal are waived. *Pa. Bankers Ass'n v. Pa. Dep't of Banking*, 962 A.2d 609, 621 (PA. 2008). Before the OOR, Crocco raised only one issue. *See* R.012. In her appeal to the OOR, Crocco argued that the personal safety and security exemption found in section 708(b)(1)(ii) of the RTKL, 65 P.S. § 67.708(b)(1)(ii) did not apply. *Id.* Crocco did not mention any other issue for review in her appeal to the OOR. *Id.*

On appeal before this Court, Crocco has raised several additional issues. Petitioner's Brief pgs. 10, 24, 26. Specifically, Crocco alleges that the Direct Interest Participants have social media profiles and, therefore, do not need the protections afforded to them under the RTKL. Additionally, Crocco has argued that the names of 5% owners and officers of certain facilities must be disclosed under the Pennsylvania Health Care Facilities Act. *See* Petitioner's Brief 10-12, 24-28.

Notwithstanding its contention, none of these issues were raised before the OOR in her appeal dated May 1, 2018. R.012a. Moreover, the only issue raised in Crocco's Motion for Reconsideration was the issue of the Pennsylvania Health Care Facilities Act. R.296a, 301a. The OOR specifically concluded that Crocco's Motion for Reconsideration alleged new evidence and, therefore, was not permitted. R.301a. As previously stated, issues raised for the first time on appeal are waived. *Pa.*

Bankers Ass’n v. Pa. Dep’t of Banking, 962 A.2d 609, 621 (Pa. 2008). This rule applies to all participants and is bolstered by *Signature Info. Solutions, LLC v. Ashton Township*, wherein this Court specifically held that agencies are prohibited from altering their reason for denying a RTKL request on appeal. 995 A.2d 510 (Pa. Cmwlth. 2010). Likewise, in the *Pennsylvania Dep’t of Educ. v. Bagwell*, 131 A.3d 638 (Pa. Cmwlth. 2016), this Court expressly prohibited the OOR from accepting new evidence on a motion for reconsideration.

Because Crocco failed to raise these issues in her initial appeal, any issues raised outside of the application of the personal safety and security exemption found in section 708(b)(1)(ii) of the RTKL, 65 P.S. § 67.708(b)(1)(ii), have been waived and, therefore, should not be considered by this Court.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Department respectfully requests this Honorable Court to affirm the Final Determination of the OOR.

Respectfully submitted,

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Date: December 26, 2018

APPENDIX



IN THE MATTER OF

V.

and

JEAN CROCCO AND THE PRO-LIFE

Docket No.: AP 2018-0778

PENNSYLVANIA DEPARTMENT OF

DREXEL UNIVERSITY d/b/a DREXEL

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.¹ 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.

¹ 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.² 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 declarations³ 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.

² 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).

³ 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.⁴ 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

⁴ 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.⁵ 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

⁵ 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....⁶

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

⁶ 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.⁷ 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.

⁷ 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.*,

OOB 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.⁸ 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

MAGDALENE C. ZEPPOS, ESQ.
APPEALS OFFICER

Sent to: Jean Crocco (via email only); Thomas Olp, Esq. (via email only); Carol Mowery, Esq. (via email only);
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⁸ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing Brief of the Department upon the persons and in the manner indicated below on this 26th day of December, 2018, which service satisfies the requirements of Pa. R.A.P. 121 and 1514(c).

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