# *In the Court of Special Appeals*

September Term, 2014

**No. 489**

ANDREW GLENN,

*Appellant,*

*vs.*

MARYLAND DEPARTMENT OF HEALTH
AND MENTAL HYGIENE,

*Appellee.*

*Appeal from the Circuit Court for Baltimore City, Maryland*
*(The Honorable Emanuel Brown, Judge)*

# BRIEF OF APPELLANT


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## STATEMENT OF THE CASE

Pursuant to the Maryland Public Information Act ("PIA"), Appellant Andrew Glenn requested copies of surgical abortion facility applications ("applications") submitted by surgical abortion facilities to the Maryland Department of Health and Mental Hygiene ("Department"). Glenn received copies of the applications from the Department, but the names of the administrators, officers, owners, and medical directors seeking facility licensure were redacted, along with email addresses that contain the name of an individual. Handwritten on the top of the application submitted by one surgical abortion provider, Planned Parenthood of Metropolitan Washington DC–Silver Spring, was the following note: "Exclude or redact 'Agency email address' and 'Name of Medical Director' from any FOIA inquiries as that information is private and release of it could impact PPMW's security." E42.

Pursuant to Md. Code Ann. Gen. Prov. § 4-358 (formerly Md. Code Ann. State Gov't § 10-619),[1] the Department filed a "Petition to Continue Partial Denial of Inspection Under Public Information Act" in the Circuit Court for Baltimore City (Case No. Case No. 24-C-13-004661), asking the court to allow it to continue

[1] The PIA was recently relocated from the State Government Article (§§ 10-611 to 10-630) to the General Provisions Article (§§ 4-101 to 4-601). 2014 Md. Laws 94.

to withhold the redacted information. After briefing on the Department's petition was completed, a hearing was held on April 18, 2014.

On May 8, 2014, Judge Emanuel Brown granted the Department's Petition, citing only "the public safety concerns" as the basis for the court's order. Andrew Glenn filed this appeal on May 27, 2014.

## QUESTION PRESENTED

Has the Department met its burden of proving that, although no specific PIA exemption justifies the withholding of any information included in the requested records, this is the unusual case in which withholding information is necessary to prevent substantial injury to the public interest that would otherwise occur?

## STATEMENT OF FACTS

On March 12, 2013, Andrew Glenn submitted a records request under the PIA to Verlean Connor of the Department's Office of Health Care Quality. E14-15. In that request, Glenn sought copies of applications submitted to the Department by individuals seeking to obtain a license to operate a surgical abortion facility within the state of Maryland. (*Id.*) Glenn set forth the names of the facilities that submitted applications and their addresses. (*Id.*)

In response to his records request, Glenn received a July 3, 2013 letter from Patrick D. Dooley, Chief of Staff of the Department. E17. The letter informed Glenn that copies of the applications Glenn sought, which were enclosed with

Dooley's letter, *see* E18-51, were redacted to exclude "both the names of individuals listed on the application and email addresses that contain the names of the individuals." E17. The "names of individuals" referred to by Dooley are the names of the administrators, officers, owners, and medical directors of the surgical abortion facilities seeking licensure. *See* E18-51. Dooley stated that the names and email addresses were redacted because the Department had "determined, pursuant to [Gen. Prov. § 4-358] authorizing temporary denial of inspection, that public inspection of the withheld information would cause substantial injury to the public interest." E17.

On July 19, 2013, the Department filed a petition in the Circuit Court for Baltimore City to request authorization to continue the partial denial of inspection. E6-60. The petition contained three exhibits: (1) Glenn's March 12, 2013 records request, E14-15, (2) Dooley's July 3, 2013 letter, with copies of the redacted licensure applications, E17-51, and (3) an affidavit of Patrick Dooley, E53-58.

Glenn filed his opposition to the petition on September 10, 2013, and the Department filed its reply on October 3, 2014. A hearing on the Department's petition was held on April 18, 2014, Judge Emmanuel Brown presiding. E61-89. No witnesses presented any live testimony at the hearing, which concluded with the court taking the matter under advisement.

On May 8, 2014, Judge Brown issued an order granting the Department's petition. E90-91. The court did not issue a memorandum opinion to accompany the order or make any findings of fact, instead holding, as a matter of law, that "public safety concerns" warranted granting the petition. E90.

## STANDARD OF REVIEW

There are no material factual disputes in this case. Rather, the parties' dispute centers on whether the Department has satisfied the requirements of Md. Code Ann. Gen. Prov. § 4-358 by showing that inspection of the requested public records "would cause substantial injury to the public interest."

The Circuit Court's legal conclusion that the Department has met the requisite standard is reviewed *de novo*. *See, e.g., Dep't of Public Safety & Correctional Servs. v. Doe*, 439 Md. 201, 219, 94 A.3d 791, 801-02 (2014) ("[T]he issue . . . involves an interpretation and application of Maryland as well as federal statutory and case law. Therefore, we 'must determine whether the lower court's conclusions are legally correct under a *de novo* standard of review.'"); *Napata v. Univ. of Md. Med. Sys. Corp.*, 417 Md. 724, 732, 12 A.3d 144, 148 (2011) ("The facts of the underlying action are uncontested. Thus, we are simply tasked with a *de novo* review of the Circuit Court's conclusions of law."); *Storetrax.com, Inc. v. Gurland*, 397 Md. 37, 49-50, 915 A.2d 991, 998 (2007) ("[A]n appellate court . . . reviews *de novo* the trial court's relation of [the relevant] facts to the applicable

law.").[2] Two prior decisions that considered § 4-358 petitions did not set forth a specific standard of review, but their analysis appears to be *de novo*. *See Mayor of Baltimore v. Burke*, 67 Md. App. 147, 506 A.2d 683 (1986); *Moberly v. Herboldsheimer*, 276 Md. 211, 345 A.2d 855 (1975).

Furthermore, although Maryland Rule 8-131(c) sets forth a clearly erroneous standard for the review of contested fact questions in actions tried without a jury, in light of the trial court's opportunity to judge the credibility of witnesses, here, no live witness testimony was presented and the matter was decided based upon the parties' papers and oral argument. The undisputed facts should be viewed in the light most favorable to Glenn because the Circuit Court's order granting the Department's Petition is akin to a grant of summary judgment in the Department's favor. *See generally Napata*, 417 Md. at 732, 12 A.3d at 148 (viewing facts in the light most favorable to an individual whose public record request was denied, after the trial court granted the government's motion for summary judgment). This is especially appropriate given the PIA's clear rule of construction favoring, wherever possible, the inspection of public records. *See* Md. Code Ann. Gen. Prov. §§ 4-103(a), (b); *Ireland v. Shearin*, 417 Md. 401, 408, 10 A.3d 754, 758 (2010).

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[2] *Cf. Matter of 2012 Legislative Districting of the State*, 436 Md. 121, 178, 80 A.3d 1073, 1106 (2013) (determining *de novo* whether legally sufficient evidence was produced); *Storetrax.com, Inc.*, 397 Md. at 50, 915 A.2d at 998 (determining *de novo* whether a breach of fiduciary duty had occurred).

## ARGUMENT

### I. Introduction.

This case contains troubling evidence of a regulated business dictating to a regulating agency the terms of disclosure of important public information. If allowed to stand, the Department's withholding of the requested information, ratified by the decision below, would replace the PIA's guiding principle of maximum disclosure with the principle of letting the inmates run the asylum.

The fundamental question in this appeal is straightforward: whether the Department's speculative fear of public safety concerns justifies its permanent withholding of the names of administrators, officers, owners, and medical directors of surgical abortion facilities operating within the state of Maryland as set forth on applications submitted to the Department? The answer to that question must be *no*. Abortion facilities, like any other place of business open to the public that requires state licensure, should not be permitted to hide basic information that it shares with the government in order to obtain a license.

While abortion is undoubtedly a controversial subject matter, there is no controversy exception to the PIA. This is especially important to note in light of numerous well-documented instances in which a lack of adequate government oversight of abortion providers and/or facilities has endangered public health. *See infra*. And while, pursuant to § 4-358, the government can temporarily deny

inspection of public records if releasing such records "would cause substantial injury to the public interest," that is not the case here. To the contrary, allowing the Department to continue to suppress the information Glenn seeks would cause substantial injury to the public's right to know to whom the Department is issuing surgical abortion facility licenses. [3]

## II. Preliminary PIA principles.

> "The cornerstone of a democracy is the ability of its people to question, investigate and monitor the government. Free access to public records is a central building block of our constitutional framework enabling citizen participation in monitoring the machinations of the republic. Conversely, the hallmark of totalitarianism is secrecy and the foundation of tyranny is ignorance. It has been written that 'if a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be.'"

*Jones v. Jennings*, 788 P.2d 732, 735-36 (Alaska 1990) (quoting a letter written by Thomas Jefferson); *see also Att'y Grievance Comm'n v. Kimmel*, 405 Md. 647, 682, n.9, 955 A.2d 269, 290, n.9 (2008) (quoting the adage "Trust, but verify").

The PIA reflects these principles by providing that "[a]ll persons are entitled to have access to information about the affairs of government and the official acts

[3] As noted previously, the application submitted by Planned Parenthood of Metropolitan Washington DC–Silver Spring included the following handwritten note: "Exclude or redact 'Agency email address' and 'Name of Medical Director' from any FOIA inquiries as that information is private and release of it could impact PPMW's security." E42. The PIA neither permits a business seeking licensure to tell a public agency what information to exclude or redact upon a records request nor empowers the agency to withhold information on the basis of such a demand.

of public officials and employees." Gen. Prov. § 4-103(a). The right is made clear in Gen. Prov. § 4-201(a)(1), which states that, "[e]xcept as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time." Inspection or copying of a public record may be denied only to the extent permitted under the PIA. *Id.* § 4-201(a)(2).

Relevant cases have emphasized that "the provisions of the Public Information Act reflect the legislative intent that citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government." *Dep't of State Police v. State Conf. of NAACP Branches*, 430 Md. 179, 190, 59 A.3d 1037, 1043 (2013) (citations omitted). To further "the Public Information Act's broad remedial purpose," the PIA "must be liberally construed," and is interpreted with a presumption in favor of disclosure. *Id*. at 190-91, 59 A.3d at 1043 (citations omitted); *see also City of Frederick v. Randall Family, LLC*, 154 Md. App. 543, 564, 841 A.2d 10, 22-23 (2004) (concluding that the embarrassment that individuals who frequented a house of prostitution would face upon the disclosure of their names was insufficient to outweigh the public's right to receive the information to evaluate the government's handling of the matter).

Conversely, all exceptions to public disclosure and inspection are construed narrowly. *See Office of Governor v. Wash. Post Co*., 360 Md. 520, 545, 759 A.2d

249 (2000). The PIA imposes more demanding standards upon the government when it seeks to avoid disclosure than does the federal FOIA. 97 Op. Att'y Gen. Md. 95, 2012 Md. AG LEXIS 5, at *32 (2012). It is therefore not the burden of Glenn to demonstrate that disclosure is required, but the burden of the Department to demonstrate why a denial of inspection is necessary and justified. *See* 430 Md. at 191, 59 A.3d at 1044. In sum, the PIA contains a "*strong* preference for public access to government documents [that] must be considered whenever a court is applying the particular provisions of the statute." *Id*. (emphasis added).

## III. Glenn, and the general public, have a right to act as a "watchdog" to review the government's oversight of those who own and operate surgical abortion facilities.

In July 2012, the Department adopted final regulations pertaining to surgical abortion providers within the State of Maryland. COMAR 10.12.01.00, *et seq*. These regulations were necessary to protect public health and safety through increased government oversight of surgical abortion facilities. As the Department stated, when the regulations were being considered:

> The Department proposes these regulations to strengthen quality and safety assurances of surgical abortion facilities and to allow the Department to act in the instance of a violation of the standard of care for surgical abortions.
>
> The proposed regulations address deficiencies identified in recent Maryland cases. A review of the Board of Physicians public orders from 1991 revealed five physicians were disciplined for violating the standards of care governing abortions. According to the disciplinary records, women died or were seriously injured in each case. Women

> were harmed by improper administration or monitoring of general anesthesia under the care of three of the five physicians. In addition to those disciplinary actions, in August and September, 2010, the Board directed charging documents to three additional physicians for performing abortions in a manner inconsistent with standards of practice at a site in Elkton, Maryland.
>
> These proposed regulations will provide protections and address deficiencies identified in these cases.

39-1 Md. Reg. 46, 46 (Jan. 13, 2012).

Upon enactment of the regulations, the Department stated, "[t]he purpose of this final action is to protect the health and life of women seeking abortions by assuring the quality of surgical abortion services in Maryland. . . . [T]hese regulations will strengthen quality and safety assurances of surgical abortion facilities." 39-14 Md. Reg. 835, 835, 837 (July 13, 2012).

The surgical abortion facility regulations were designed to remedy a lack of sufficient government oversight of such facilities, which caught the public's eye in 2010 after a botched abortion in Elkton, Maryland by Dr. Steven C. Brigham.[4] Government officials and the public were appalled to learn that Brigham, who had previously lost his license to practice medicine in Pennsylvania, New York, and Florida, and had a tax evasion conviction, had largely evaded the watch of

[4] *See, e.g.*, Andrea K. Walker, *Maryland suspends licenses of 3 abortion clinics*, Mar. 12, 2013, http://articles.baltimoresun.com/2013-03-12/health/bs-hs-abortion-clinic-suspension-20130308_1_abortion-clinics-clinics-face-surgical-abortion-procedures.

Maryland health officials prior the 2010 incident coming to light.[5] A *New York Times* article noted that "[t]he continuing case of Dr. Brigham is a cautionary one, showing that a determined person, working behind the anonymity of private corporations and moving among states, can flout even strong medical regulations."[6]

In light of the new regulations, surgical abortion procedures were suspended at a few clinics in 2013.[7] The issue of the adequacy of the State's oversight of abortion providers was further thrust into the spotlight in June 2013 when an autopsy confirmed that a 29-year-old schoolteacher's tragic death was caused by complications from a Maryland abortion earlier that year.[8]

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[5] *See, e.g., Steven Brigham Time Line*, Jan. 1, 2012, http://articles.philly.com/2012-01-01/news/30579167_1_steven-brigham-late-term-abortions-american-women-s-services.

[6] Erik Eckholm, *Maryland's Path to an Accord in Abortion Fight*, N.Y. Times, July 10, 2013, http://www.nytimes.com/2013/07/11/us/marylands-path-to-an-accord-in-abortion-fight.html?pagewanted=all&_r=0. The New Jersey Board of Medical Examiners pulled Brigham's last remaining medical license in early October, 2014. *New Jersey yanks abortion doctor's license*, Oct. 10, 2014, http://articles.philly.com/2014-10-10/news/54832376_1_steven-brigham-elkton-clinic-voorhees-clinic.

[7] *Unlicensed doctor's surgical abortion procedures suspended; State enforcing new rules requiring abortion clinics to be licensed*, Mar. 12, 2013, http://www.wbaltv.com/news/maryland/i-team/Unlicensed-doctor-s-surgical-abortion-procedures-suspended/-/10640252/19274024/-/item/0/-/3ka3loz/-/index.html.

[8] *Authorities: Woman died from abortion complications*, USA Today, June 12, 2013, http://www.usatoday.com/story/news/nation/2013/02/21/woman-late-term-abortion-bled-to-death/1935799/.

According to the July 12, 2013 regulations, "[a] person may not establish or operate a surgical abortion facility without obtaining a license from the Secretary." COMAR 10.12.01.02(A). In order to obtain such a license, the person must, *inter alia*, "[f]ile an application as required and provided by the Department." *Id*. at .03(A)(2). The application provided by the Department requires the applicant to name the officers and owners of the facility, its administrator, and its medical director, among other items of information. E18-51. These names are directly relevant in determining whether the applicant may obtain a surgical abortion license, as the regulations provide that

> [t]he Secretary may deny a license to:
>
> (a) A corporate applicant if the corporate entity has an owner, director, or officer:
> (i) Whose conduct caused the revocation of a prior license; or
> (ii) Who held the same or similar position in another corporate entity which had its license revoked;
>
> (b) An individual applicant:
> (i) Whose conduct caused the revocation of a prior license; or
> (ii) Who held a position as owner, director, or officer in a corporate entity which had its license revoked; or
>
> (c) An individual or corporate applicant that has consented to surrender a license as a result of a license revocation action.

COMAR 10.12.01.03(D)(1).

Glenn, and the general public, are entitled to see the information included on the license applications for the same reasons that the Department requests that

information. As the examples noted above illustrate, there is an important public interest in knowing the names of individuals who have applied for and been given a license to provide surgical abortion procedures within the State of Maryland.[9] Though the Department might assert that it is well equipped and committed to vigorously enforcing these rules on its own, without any oversight from the public, any governmental agency, department, or board facing a records request could say the same thing, entirely defeating the point of the PIA.

A well-recognized purpose of open records laws, like the PIA and the federal FOIA, is to allow the public to obtain information to act as a "watchdog" of their government. *Baltimore Sun v. U.S. Marshals Serv*., 131 F. Supp. 2d 725, 729-30 (D. Md. 2001) ("Because obtaining information to act as a 'watchdog' of the government is a well-recognized public interest in the FOIA context, a valid public interest exists in the names and addresses at issue in this case."); *see also* 2012 Md. AG LEXIS 5, at *26-27 (discussing cases that noted that the federal FOIA law is designed to enable the public to review "what the government is up to").

[9] It should be noted that, while the Department has acknowledged that it has "no reason to believe that the requester in this instance seeks the requested information for any improper purpose," E55, Glenn's subjective motive(s) for making his request are irrelevant as a matter of law. As a general rule, the granting of a records request cannot be conditioned upon the applicant's identity, affiliations, or disclosure of the purpose for the request. Md. Code Ann. Gen. Prov. § 4-204(a); *see also Moberly*, 276 Md. at 227-28, 345 A.2d at 864 (holding that "invidious or improper motives" of the requester do not bring information otherwise revealable under the Act into the "substantial injury to the public interest" exception).

Since a past lack of adequate government oversight has, tragically, contributed to public health risks posed by unscrupulous facilities (both in Maryland and nationwide), the public has a keen interest in ensuring that the government does not repeat the mistakes of the past. Disclosure of the relevant names here would allow Glenn and any other interested parties to ensure that the government is not inadvertently (or otherwise) providing surgical abortion licenses to individuals with previous licensure issues or other red flags. As such, the Department's claim that there is no conceivable relationship between disclosing the names of those who seek surgical abortion facility licensure and the protection of public health and safety is puzzling. E71.

Similarly, the Department's argument that the lack of oversight concerning Dr. Brigham is not relevant to Glenn's records request because regulatory changes were made in response to that situation, E70-72, misses the point because *regulations do not enforce themselves*. The story of Dr. Kermit Gosnell provides a cautionary tale:

> Dr. Gosnell was sentenced [in 2013] to life in prison for snipping the spines of babies born alive in illegal, late-term abortions in Pennsylvania. . . .
>
> Dr. Gosnell was not caught earlier, other clinic directors say, because *Pennsylvania did not enforce its existing rules*, failing to inspect his West Philadelphia clinic for more than 17 years. Since his indictment

> in early 2011, the Pennsylvania Health Department has fired some officials and restarted inspections of clinics in the state.[10]

The PIA aids the public's ability to monitor whether the government officials charged with enforcing the new regulations do an adequate job. The public is not required to *assume*, without access to relevant information that is contained in public records, that the enactment of new regulations necessarily means that adequate *enforcement and oversight* will occur.

Additionally, contrary to the Department's suggestion, the ability of the Board of Physicians to discipline individual physicians who act improperly *after the fact*, E70-72, does not justify shielding the process for approving surgical abortion facilities in the first place from public view. Rather, as one article notes, "Maryland officials . . . tried to devise a licensing regime *to detect and prevent violations*. 'The idea is to take action before there's a problem,' said Dr. Joshua M. Sharfstein, the state's secretary of health and mental hygiene."[11]

Furthermore, other provisions of the PIA suggest that names, business addresses, and business phone numbers should rarely be redacted from validly requested public records in situations similar to this one. For example, Gen. Prov. § 4-333 provides a general rule of non-disclosure "of the part of a public record that contains information about the licensing of an individual in an occupation or

[10] Eckholm, *supra* (emphasis added).
[11] Eckholm, *supra* (emphasis added).

profession," but states that inspections of the part of such records that indicate *the person's name*, business address (or home address if no business address is available), business phone number, and any orders and findings resulting from any formal disciplinary actions in those records *shall be permitted*. Similarly, Gen. Prov. § 4-331 generally protects against the disclosure of the home address or telephone number of state or local government employees, but does not provide any specific protections for their names, business addresses, or business phone numbers. The Department has failed to provide a sufficient justification for redacting the requested information here when the PIA contemplates the disclosure of such information in many similar circumstances.

## IV. This is not an "unusual" case in which compliance with a public records request would cause substantial injury to the public interest.

The procedure for temporary denials of records requests set forth in Gen. Prov. § 4-358 is reserved only for the "unusual case where a public policy factor should control but none of the specific exemptions applies." *Cranford v. Montgomery Cnty.*, 300 Md. 759, 776, 481 A.2d 221, 229 (1984).[12] This rarely-invoked exemption is quite narrow in scope: the Circuit Court "may" authorize the continued denial of inspection of the record if the court concludes that inspection

[12] Section 4-358 proceedings are quite rare. "The Maryland courts have applied [§ 4-358] in only two reported decisions." 97 Op. Att'y Gen. Md. 95, 2012 Md. AG LEXIS 5, at *14 (citing *Moberly*, 276 Md. 211, and *Burke*, 67 Md. App. 147). "In both cases, the court concluded that the custodian had not established that disclosure would cause a 'substantial injury to the public interest.'" *Id.* at n.5.

"would cause substantial injury to the public interest." Gen. Prov. § 4-358(d). The language of the exemption reinforces its limited nature: the court must find that the public interest "*would*" (not "may") be injured by inspection of the record, and that such injury would be *substantial*, and even if such findings are made the court "*may*" (not "must") authorize continued denial of inspection. As such, the Department's characterizations of the exemption as "broad" and "very broad" are inaccurate. E73, E76-77.

The Department has advanced two related reasons to support its position that the redaction of names is necessary to prevent "substantial injury to the public interest": (1) "people affiliated with abortion facilities experience harassment, threats of violence and, most concerningly, actual acts of violence," and (2) disclosure of names could "discourage[] health care practitioners from offering surgical termination of pregnancy as a service and thereby impede[] access to the service." E9-10. Neither of these reasons is persuasive.

The same reasons cited by the Department here were rejected by the Illinois Supreme Court in deciding whether the names of physicians and hospitals that provided abortion services under the Illinois Medicaid program should be disclosed pursuant to the Illinois State Records Act. *See Family Life League v. Dep't of Pub. Aid*, 112 Ill. 2d 449, 493 N.E.2d 1054 (1986). The court explained:

> [The government's] analysis makes two unfounded assumptions: first, that the plaintiffs are a vigilante assemblage, and, second, that terrorist

> acts will result from disclosure of the information sought. These assumptions are not in any way supported by the record. . . .
>
> It would be inappropriate for a court to assume that, when given access to certain information, the public will react in a tortious or criminal manner. There are certainly sufficient legal avenues available to combat criminal and tortious acts. The denial of the People's right to public information is not one of them. . . .
>
> There is no evidence in the record to demonstrate that the plaintiffs or anyone else would utilize the information in any unlawful manner or that any physician would be dissuaded from performing Medicaid abortions as a result of disclosure. Contrary to the defendants' contention, the notoriety of providers which furnish abortion services is already well established through advertisements in telephone directories, brochures, newspapers and magazines.

*Id.* at 455-57, 493 N.E.2d at 1057-58.

While the Illinois case involved the names of physicians who actually provided the abortion services, Glenn does not ask for the names of any such physicians here. He requests *only what the application itself includes*, namely, the identity of the administrators, officers, owners, and medical directors—none of whom necessarily perform abortions.[13] Thus, if it was unduly speculative in the Illinois case to think that the disclosure of physician names would lead to harassment, violence, and a future lack of abortion providers, the Department's reasons are even more speculative here.

[13] The regulations do not require that an owner, officer, or administrator be a licensed physician. While the medical director must be a physician licensed to practice in Maryland, *see* COMAR 10.12.01.05(B)(2), the medical director need not perform surgical abortions.

On the other hand, *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006), which dealt with a federal FOIA privacy exemption that the Supreme Court has read "broadly," *id.* at 152, is distinguishable. There, the court held that withholding the names of FDA employees and private individuals involved in the approval process for the drug mifepristone was warranted because privacy and safety interests outweighed any public interest in disclosure of the names, as "[e]ven if mifepristone has significant health risks, these names and addresses prove nothing about the nature or even the existence of the risks." *Id.* at 153. In other words, the alleged health risks giving rise to the FOIA request were attributable to *the drug itself*, not any individual's conduct.

Conversely, since unsafe facilities and unfit medical personnel have, unfortunately, proceeded under the radar due to a lack of adequate government oversight of their conduct, the names of surgical abortion facility license applicants are *the most relevant information possible*. Unlike in *Judicial Watch*, the relevant names may shed light upon, and directly relate to, "the nature or even the existence of the risks" to public health. *See id.*

Furthermore, the record is devoid of any evidence that inspection or disclosure of the names at issue here would itself create or increase any tangible risk of harm. Anyone wishing to undertake criminal or tortious activities against abortion providers in Maryland can readily find these businesses by accessing the

National Abortion Federation's website,[14] or the Department's own Licensee Directory,[15] which provides street addresses for Maryland licensed surgical abortion facilities. There is no reason to think that a citizen learning the names of these businesses' administrators, officers, owners, and medical directors would be thereby motivated to commit a crime or tortious act where the names and addresses of abortion facilities themselves are so readily available.[16]

Tellingly, at least two of the businesses that submitted applications for surgical abortion licensure to the Department, Planned Parenthood of Maryland and Planned Parenthood of Metropolitan Washington D.C., annually disclose the names of officers and directors, including the names of their medical directors, on IRS Form 990's filed with the United States Internal Revenue Service.[17] Clearly, the disclosure of such names has not hampered these two abortion providers in applying for surgical abortion licenses, as they have in fact done so.

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[14] http://www.prochoice.org/Pregnant/find/Maryland.html.

[15] http://dhmh.maryland.gov/ohcq/docs/Provider-Listings/PDF/WEB_SAF.pdf.

[16] That an unnamed Department staff member allegedly received a call in connection with surgical abortion licensing that he or she found to be harassing is paltry evidence to substantiate a claim of "substantial injury to the public interest." E55. Government officials often receive feedback from the public they may find harassing. This concern is not compelling enough for the Department to redact the names of officials who have evaluated surgical abortion facilities. *Ambulatory Care Surgical Abortion Facility Surveys*, http://dhmh.maryland.gov/ohcq/AC/SitePages/Surgical%20Abortion%20Facility%20Surveys.aspx.

[17] Copies of IRS Form 990's are readily available through *GuideStar.org*, as noted by the IRS here: http://www.irs.gov/uac/Routine-Access-to-IRS-Records.

As for the other applications for licensure, there is no privilege to withhold the names of individuals seeking facility licensure from the public. As businesses operating within the State of Maryland, they have the obligation to be aware of relevant Maryland laws, including the PIA. They should therefore know that their applications, *i.e.*, documents received by an agency of the State government "in connection with the transaction of public business," would be open to inspection upon request. Gen. Prov. § 4-101(h)(1)(i). It would stretch the imagination to suggest that these businesses submitted their applications with the understanding that the Department would undertake the extraordinary and rarely-invoked procedure set forth in § 4-358 to partially deny public inspection of these applications. And even if they had such a belief, the lack of any guarantee that the Department would prevail in a § 4-358 proceeding indicates that these businesses are more concerned with obtaining licenses than having the names of their administrators, officers, owners, and medical directors shielded from public view.[18]

[18] The Department's argument that disclosing the names of individuals seeking facility licensure would deter facilities from continuing to provide abortion services is mere conjecture and speculation. There is no evidence whatsoever that these individuals submitted their applications with the assurance that their names would remain a secret as far as the public is concerned. The *one application* that requested that the name of the medical director be kept private, *supra* at n.3, did not indicate that the facility wished to withdraw its application if this information was not redacted.

## CONCLUSION

The Dr. Brighams and Dr. Gosnells of the world exploit lax government oversight whenever possible, costing lives and endangering health. The public has a strong interest in obtaining adequate information from public records to effectively monitor the government's oversight of surgical abortion facilities and those who own and operate them. If the Department's tenuous, unsupported concerns about hypothetical crimes or torts that could be loosely connected to the disclosure of the records sought here were accepted, Section 4-358 could become the exception that swallows the rule; it is not difficult to imagine similar hypothetical evils that could conceivably be related to the disclosure of many public records. The Department's conjecture is not *proof* that disclosure "*would* cause substantial injury to the public interest." § 4-358(d) (emphasis added).

For the foregoing reasons, Appellant Glenn respectfully requests that the lower court's decision be reversed, and that the Department be required to provide Appellant with unredacted copies of the public records he requested.

Respectfully Submitted,

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Pursuant to Maryland Rules, this brief has been prepared in Times New Roman, 13 point font.

## APPENDIX

**Maryland Public Information Act**
**General Provisions Article (§§ 4-101 to 4-601). 2014 Md. Laws 94.**
**(excerpts)**

**§ 4-101. DEFINITIONS.**[1]

(h) (1) "Public record" means the original or any copy of any documentary material that:

(i) is made by a unit or an instrumentality of the State or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business; and

(ii) is in any form, including:

[19] Formerly, State Government Article § 10-611.

1. a card;
2. a computerized record;
3. correspondence;
4. a drawing;
5. film or microfilm;
6. a form;
7. a map;
8. a photograph or photostat;
9. a recording; or
10. a tape.

(2) "Public record" includes a document that lists the salary of an employee of a unit or an instrumentality of the State or of a political subdivision.

(3) "Public record" does not include a digital photographic image or signature of an individual, or the actual stored data of the image or signature, recorded by the Motor Vehicle Administration.

**§ 4-103. GENERAL RIGHT TO INFORMATION**[20]

(a) All persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees.

(b) To carry out the right set forth in subsection (a) of this section, unless an unwarranted invasion of the privacy of a person in interest would result, this title shall be construed in favor of allowing inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection.

(c) This title does not preclude a member of the General Assembly from acquiring the names and addresses of and statistical information about individuals who are licensed or, as required by a State law, registered.

**§ 4-201. INSPECTION OF PUBLIC RECORDS**[21]

(a) (1) Except as otherwise provided by law, a custodian shall allow a person or governmental unit to inspect any public record at any reasonable time.

(2) Inspection or copying of a public record may be denied only to the extent

[20] Formerly, State Government Article § 10-612.
[21] Formerly, State Government Article § 10-613.

provided under this title.

(b) To protect public records and to prevent unnecessary interference with official business, each official custodian shall adopt reasonable rules or regulations that, subject to this title, govern timely production and inspection of a public record.

(c) Each official custodian shall consider whether to:

(1) designate types of public records of the governmental unit that are to be made available to any applicant immediately on request; and

(2) maintain a current list of the types of public records that have been designated as available to any applicant immediately on request.

## § 4-204. IMPROPER CONDITION ON GRANTING APPLICATION[22]

(a) Except to the extent that the grant of an application is related to the status of the applicant as a person in interest and except as required by other law or regulation, the custodian may not condition the grant of an application on:

(1) the identity of the applicant;

(2) any organizational or other affiliation of the applicant; or

(3) a disclosure by the applicant of the purpose for an application.

(b) This section does not preclude an official custodian from considering the identity of the applicant, any organizational or other affiliation of the applicant, or the purpose for the application if:

(1) the applicant chooses to provide this information for the custodian to consider in making a determination under Subtitle 3, Part IV of this title;

(2) the applicant has requested a waiver of fees under § 4-206(e) of this subtitle; or

(3) the identity of the applicant, any organizational or other affiliation of the applicant, or the purpose for the application is material to the determination of the official custodian in accordance with § 4-206(e)(2) of this subtitle.

(c) Consistently with this section, an official may request the identity of an

[22] Formerly, State Government Article § 10-614(c).

applicant for the purpose of contacting the applicant.

## § 4-331. INFORMATION ABOUT PUBLIC EMPLOYEES[23]

Subject to § 21-504 of the State Personnel and Pensions Article, a custodian shall deny inspection of the part of a public record that contains the home address or telephone number of an employee of a unit or an instrumentality of the State or of a political subdivision unless:

(1) the employee gives permission for the inspection; or

(2) the unit or instrumentality that employs the individual determines that inspection is needed to protect the public interest.

## § 4-333. LICENSING RECORDS.[24]

(a) Subject to subsections (b) through (d) of this section, a custodian shall deny inspection of the part of a public record that contains information about the licensing of an individual in an occupation or a profession.

(b) A custodian shall allow inspection of the part of a public record that gives:

(1) the name of the licensee;

(2) the business address of the licensee or, if the business address is not available, the home address of the licensee after the custodian redacts any information that identifies the location as the home address of an individual with a disability as defined in § 20- 701 of the State Government Article;

(3) the business telephone number of the licensee;

(4) the educational and occupational background of the licensee;

(5) the professional qualifications of the licensee;

(6) any orders and findings that result from formal disciplinary actions; and

(7) any evidence that has been provided to the custodian to meet the requirements of a statute as to financial responsibility.

(c) A custodian may allow inspection of other information about a licensee if:

[23] Formerly, State Government Article § 10-617(e).
[24] Formerly, State Government Article § 10-617(h).

(1) the custodian finds a compelling public purpose; and

(2) the rules or regulations of the official custodian allow the inspection.

(d) Except as otherwise provided by this section or other law, a custodian shall allow inspection by the person in interest.

(e) A custodian who sells lists of licensees shall omit from the lists the name of any licensee, on written request of the licensee.

**§ 4-358. TEMPORARY DENIALS**[25]

(a) Whenever this title authorizes inspection of a public record but the official custodian believes that inspection would cause substantial injury to the public interest, the official custodian may deny inspection temporarily.

(b) (1) Within 10 working days after the denial, the official custodian shall petition a court to order authorization for the continued denial of inspection.

(2) The petition shall be filed with the circuit court for the county where:

(i) the public record is located; or

(ii) the principal place of business of the official custodian is located.

(3) The petition shall be served on the applicant, as provided in the Maryland Rules.

(c) The applicant is entitled to appear and to be heard on the petition.

(d) If, after the hearing, the court finds that inspection of the public record would cause substantial injury to the public interest, the court may issue an appropriate order authorizing the continued denial of inspection.

**COMAR 10.12.01**
**Title 10 DEPARTMENT OF HEALTH AND MENTAL HYGIENE**
**Subtitle 12 ADULT HEALTH**
**Chapter 01 Surgical Abortion Facilities**
**(excerpts)**

**.01 Definitions.**

[25] Formerly, State Government Article § 10-619.

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) “Department” means the Department of Health and Mental Hygiene.

(2) “Facility” means a surgical abortion facility.

(3) Health Professional.

(a) “Health professional” means an individual who is licensed, certified, or otherwise authorized under Health Occupations Article, Annotated Code of Maryland, to provide health care services.

(b) “Health professional” does not include a physician.

(4) “Physician” means an individual licensed to practice medicine in this State under Health Occupations Article, Title 14, Annotated Code of Maryland.

(5) “Regular service” means that surgical abortion procedures are performed on site on a routine basis.

(6) “Surgical abortion facility” means an outpatient facility that provides surgical termination of pregnancy as a regular service except if the facility is regulated by the Department under:

(a) Health General Article, Title 19, Subtitle 3, Annotated Code of Maryland;

(b) Health General Article, Title 19, Subtitle 3A, Annotated Code of Maryland; or

(c) Health General Article, Title 19, Subtitle 3B, Annotated Code of Maryland.

**.02 License Required.**

A. A person may not establish or operate a surgical abortion facility without obtaining a license from the Secretary.

B. License Period. A license is valid for 3 years from the date of issuance, unless suspended or revoked by the Secretary.

C. A license issued under this chapter is not transferable.

**.03 Licensing Procedures.**

A. A person desiring to operate a facility shall:

(1) Be in compliance with all applicable federal and State laws and regulations;

(2) File an application as required and provided by the Department; and

(3) Submit a written description of its quality assurance program as required by Regulation .16 of this chapter.

B. In addition to meeting all of the requirements of Regulation .03A and F of this chapter, the applicant or licensee shall submit a nonrefundable fee of $1,500 with an application for:

(1) An initial license; or

(2) A license renewal.

C. Based on information provided to the Department by the applicant and the Department's own investigation, the Secretary shall:

(1) Approve the application unconditionally;

(2) Approve the application conditionally; or

(3) Deny the application if the applicant:

(a) Has been found liable for or has been convicted of:

(i) Fraud or a felony that relates to Medicaid or Medicare; or

(ii) A crime involving moral turpitude; or

(b) Does not comply with the requirements of this chapter.

D. Denial of License for Prior Revocation or Consent to Surrender License.

(1) The Secretary may deny a license to:

(a) A corporate applicant if the corporate entity has an owner, director, or officer:

(i) Whose conduct caused the revocation of a prior license; or

(ii) Who held the same or similar position in another corporate entity which had its license revoked;

(b) An individual applicant:

(i) Whose conduct caused the revocation of a prior license; or

(ii) Who held a position as owner, director, or officer in a corporate entity which had its license revoked; or

(c) An individual or corporate applicant that has consented to surrender a license as a result of a license revocation action.

(2) The Secretary shall also consider the factors identified in Regulation .19B of this chapter when deciding whether to deny a license.

E. A person aggrieved by a decision of the Secretary under this regulation may appeal the Secretary's action by filing a request for a hearing in accordance with Regulation .20 of this chapter.

F. Renewal of License.

(1) At least 60 days before a license expires, the licensee shall submit to the Secretary:

(a) A renewal application; and

(b) The fee as specified in §B of this regulation.

(2) The Secretary shall renew the license for an additional 3-year period for a licensee that meets the requirements of this chapter.

**.05 Administration.**

A. Administrator.

(1) Each facility shall have an administrator, who is responsible for the daily operation of the facility, including but not limited to:

(a) Consulting with the staff to develop and implement the facility's policies and procedures required under §C of this regulation;

(b) Organizing and coordinating the administrative functions of the facility;

(c) Coordinating the provision of services that the facility provides;

(d) Training the staff on the facility's policies and procedures and applicable federal, State, and local laws and regulations; and

(e) Ensuring that all personnel:

(i) Receive orientation and have experience sufficient to demonstrate competency to perform assigned patient care duties, including proper infection control practices;

(ii) Are licensed or certified by an appropriate occupational licensing board to practice in this State, if required by law; and

(iii) Perform or delegate duties and responsibilities in accordance with standards of practice as defined by the Health Occupations Article, Annotated Code of Maryland.

(2) The administrator shall ensure that:

(a) The facility's policies and procedures as described in §C of this regulation are:

(i) Reviewed by staff at least annually and are revised as necessary; and

(ii) Available at all times for staff inspection and reference; and

(b) All appropriate personnel implement all policies and procedures as adopted.

B. Medical Director.

(1) The surgical abortion facility shall have a medical director who:

(a) Is responsible for the overall medical care that is provided by the facility; and

(b) Advises and consults with the staff of the facility on all medical issues relating to services provided by the facility.

(2) The medical director shall be a physician licensed to practice in Maryland.

C. Policies and Procedures.

The facility shall have policies and procedures concerning the following:

(1) The scope and delivery of services provided by the facility either directly or through contractual arrangements;

(2) Personnel practices, including but not limited to:

(a) Procedures for the accountability of personnel involved in patient care;

(b) Job descriptions on file for all personnel: and

(c) Procedures to ensure personnel are free from communicable diseases;

(3) Postoperative recovery, if applicable;

(4) The transfer or referral of patients who require services that are not provided by the facility;

(5) Infection control for patients and staff;

(6) Pertinent safety practices, including the control of fire and mechanical hazards;

(7) Preventive maintenance for equipment to ensure proper operation and safety; and

(8) The services and procedures specified in Regulations .07—.12 of this chapter.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY two (2) copies of the foregoing Brief of Appellant were served, via first class, postage prepaid mail, on : Joshua N. Auerbach, Esquire Assistant Attorney General, Department of Health & Mental Hygiene, 300 West Preston Street, Suite 302, Baltimore, Maryland 21201 on this 4th day of November 2014 .

Respectfully submitted,

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