IN THE

COURT OF APPEALS OF MARYLAND

No. _____

September Term, 2015

Andrew Glenn,

Petitioner,

v.

Maryland Department of Health and Mental Hygiene,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS

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INTRODUCTION

The decision of the Court of Special Appeals in this case effectively guts the Public Information Act ("PIA"). In fabricating a hitherto unheard of standard for withholding public information (increased risk of a "chilling effect"), and in granting virtually unbridled discretion to bureaucrats to decide to keep information hidden from public scrutiny, the decision below eviscerates a law designed to let the citizens of Maryland monitor activities of government agencies in a myriad of areas that effect all of our lives.

For example, a Maryland Sierra Club member trying to find out if an Allegany County coal mine operator has been cited for environmentally shoddy practices in Kentucky or West Virginia, or a Humane Society member looking to cross-check what background data Pennsylvania authorities might have on a Howard County puppy-mill's owners, can be thwarted in their research by a state regulator's mere citation of the well-documented history of harassment and violence perpetrated by environmental and animal rights activists,[1] coupled with the regulator's conclusion that disclosure of identifying information on licensure applications and other documents would pose an "increased risk of harassment and violence," and, thus, have a "chilling effect" on the owners of regulated businesses.

[1] See, *e.g.*, information compiled by both the Anti-Defamation League and the Southern Poverty Law Center on eco-terrorism and animal rights activist harassment and violence. http://archive.adl.org/learn/extremism_in_america_updates/movements/ecoterrorism/default.html#.VWx1RWCRT0A (last visited June 1, 2015); http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/spring/negotiation-is-over (last visited June 1, 2015).

But even more perversely, the logic of the decision below would shut out a Maryland woman who, having decided that surgical abortion was the right choice for her, wants to do her own research on the safety record in other states of the owners and medical director of the Maryland clinic where she is considering having the procedure performed. Under the reasoning of the court below, she is not entitled to know who owns the clinic or what physicians are employed by the clinic despite the well-documented history (documented by the Department of Health itself) of slipshod oversight of abortion clinics in this state that, in quite recent history, allowed unscrupulous, marginally qualified practitioners to harm—and sometimes kill—women. Instead, in a stunning display of regulatory paternalism that carries with it more than a whiff of the worst kind of sexist and classist condescension, the woman's right to medical self-determination must be subordinated to the clinic owner's "right" to be free of anything that might have a "chilling effect" on his business.

The PIA's requirement that nondisclosure can only be justified by proof of "substantial injury to the public interest" should not be replaced—as the court below has done—by a made-up standard of "increased risk of injury to the public interest" as determined by a bureaucrat whose decision is then practically unassailable in a court of law. This Court should grant the petition and reverse the decision of the Court of Special Appeals.

QUESTIONS PRESENTED

I. Did the court below err in granting deference to the Maryland Department of Health and Mental Hygiene ("Department")'s legal conclusion that it was authorized,

under § 4-358 of the PIA (Md. Code Gen. Prov. § 4-101 *et seq.*), to redact the records in question?

II. Did the court below err in substituting for the PIA's requirement of proof of "substantial injury to the public interest" the far less demanding standard of mere "greater risk" that disclosure of public information might have a "chilling effect" on owners of regulated businesses?

PERTINENT PROVISIONS

Md. Code Gen. Prov. § 4-358.

STATEMENT OF THE CASE

In 2012, the Department adopted regulations that sharply tightened oversight of surgical abortion facilities within the State of Maryland. The regulations were intended to address what the Department acknowledged was a history of "deficiencies" leading to serious injuries and death among Maryland women seeking abortions. 39-1 Md. Reg. 46, 46 (Jan. 13, 2012).

The regulations include the requirement that one obtain a license from the Department in order to operate a surgical abortion facility. COMAR 10.12.01.02A. After the regulations were adopted, seventeen facilities submitted applications for a license. Handwritten on one of these applications was the statement, "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."

A critical precipitating event for the enactment of the regulations was a high-profile incident occurring in 2010 in which a woman was hospitalized after Dr. Steven

Brigham began a late-term abortion in New Jersey and ended it at an unmarked, unregulated clinic in Elkton, Maryland.[2] 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 Maryland health officials prior the 2010 incident coming to light.[3] 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."[4]

On March 12, 2013, Petitioner Andrew Glenn filed a public records request with the Department seeking copies of the surgical abortion facility applications. On July 3, 2013, Mr. Glenn received copies of the applications that were redacted to exclude the names of the administrators, officers, owners, and medical directors of the facilities, along with email addresses containing names of individuals. He also received a letter from Patrick D. Dooley, Chief of Staff of the Department, stating that the Department had determined, pursuant to Gen. Prov. § 4-358(a), that public inspection of the redacted information would cause substantial injury to the public interest. Section 4-358(a) provides, "Whenever this title authorizes inspection of a public record but the official

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[2] *See* 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.

[3] *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.

[4] 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.

custodian believes that inspection would cause substantial injury to the public interest, the official custodian may deny inspection temporarily."

On July 19, 2013, the Department filed a petition in Baltimore circuit court seeking authorization to continue to withhold the redacted information. *Dep't of Health & Mental Hygiene v. Glenn*, No. 24-C-13-004661. The petition was filed pursuant to the procedure set forth in Gen. Prov. § 4-358(b)-(d). After holding a hearing on the Department's petition, on May 8, 2014 the circuit court ordered that the petition be granted, thus adjudicating all claims in the action in their entirety. The court did not issue a memorandum opinion or make any findings of fact, instead holding, as a matter of law, that public safety concerns warranted granting the petition. App. 6.

Subsequently, after hearing arguments, the Court of Special Appeals issued an unreported opinion on April 21, 2015 affirming the decision of the circuit court, and issued the mandate on May 21, 2015. *Glenn v. Dep't of Health & Mental Hygiene*, No. 0489. The court held that the Department was entitled to judicial deference in its decision to redact the applications. App. 11-12, 19. Further, the court held that the PIA's standard of proof of "substantial injury to the public interest" could be satisfied by showing that disclosure of requested information poses a "greater risk" of harassment or violence so as to create a "chilling effect" on owners of regulated entities. App. 25-26. The court thus concluded that the Department had "sustained its burden of explaining a reasonable and support [*sic*] explanation for withholding the information and the circuit court properly balanced the interests of disclosure and harm to the public interest." App. 26.

REASONS FOR GRANTING THE WRIT

The PIA is founded on the principle that "[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees." Gen. Prov. § 4-103(a). The Act states that, "[e]xcept as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public record . . . ," *id.* § 4-201(a)(1); this right may be denied only to the extent permitted under the PIA. *Id.* § 4-201(a)(2). Cases have emphasized that the PIA "reflect[s] 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 adequately evaluate the government's handling of the matter).

The decision of the court below undermines the PIA—and thereby harms the public interest—in two significant ways: (1) the court improperly granted deference to a state agency's decision to withhold documents under the PIA, and (2) the court substituted for the PIA's intentionally rigorous standard to justify nondisclosure a low burden for an agency to meet to show that inspection of public documents "*would* cause

substantial injury to the public interest." If left undisturbed, this decision will give sweeping cover to an agency that wants to keep documents from public view. Moreover, there is a "dearth of Maryland cases explaining what specific assertions are sufficient to justify denial under the public interest argument." App. 15. This case provides this Court with the opportunity to explain to governmental entities bound by the PIA the precise scope of Gen. Prov. § 4-358.

I. The decision below improperly deferred to the judgment of the Department.

Whether the Department has met its burden of proving that the release of unredacted records would substantially injure the public interest is a legal question that should be reviewed de novo, with no deference given to either the Department or the circuit court.[5] The court below incorrectly granted judicial deference to the Department's decision to redact the records, stating, "when reviewing an agency's denial of disclosure under the PIA, we give deference to the agency's interpretation of statutes that it administers." App. 19. At issue in this case, however, is *not* the Department's interpretation of any "statutes that it administers," *id.*, but rather its determination that it was authorized, *under § 4-358 of the PIA*, to redact the requested records.

[5] *See Caffrey v. Dep't of Liquor Control*, 370 Md. 272, 290, 296-312, 805 A.2d 268, 278-79, 282-92 (2002) (reviewing a PIA holding de novo); *cf. Am. Mgmt. Servs. v. Dep't of the Army*, 703 F.3d 724, 729 (4th Cir. 2013) ("Whether a document falls within a prescribed [FOIA] exemption . . . is a question of law that we review de novo."); *Elec. Frontier Found. v. Office of Dir. of Nat'l Intel.*, 595 F.3d 949, 955 (9th Cir. 2010) (citations omitted) ("[L]egal rulings, including [the] decision that a particular exemption applies, are reviewed de novo.").

As noted in *Haigley v. Department of Health & Mental Hygiene*, "[t]he deference we would ordinarily accord to the agency's interpretation of its own regulations is tempered by our obligation to safeguard the objectives of the PIA, which instructs us to construe its provisions 'in favor of permitting inspection of a public record.'" 128 Md. App. 194, 214, 736 A.2d 1185, 1195 (1999) (quoting Gen. Prov. § 4-103(b)). In other words, because the Department "does not necessarily have any expertise with respect to the PIA," it is not entitled to any deference in this case. *Id*. at 216; *cf. U.S. DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989) ("Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'").

The very structure of the PIA precludes any deference to a state agency's decision to withhold or redact documents. Unlike the procedure under § 4-362, where a requester who is denied inspection of a record may seek judicial relief, § 4-358 mandates that the *custodian* seek judicial relief when it withholds records. The custodian must file its petition within ten days of the denial, § 4-358(b), and failure to do so is a misdemeanor that carries a fine of up to $1,000, § 4-402. In fact, § 4-358 does not even require the requester to appear in court when the government petitions under this section. 97 Op. Att'y Gen. Md. 95, 2012 Md. AG LEXIS 5, at *36, n.4 (2012). The government must provide "a particularized justification for withholding each portion of a public record that [a custodian claims] is exempt from public disclosure." *Prince George's Cnty. v. Wash. Post Co*., 149 Md. App. 289, 310, 815 A.2d 859, 871 (2003). To grant any judicial

deference to the custodian would undermine § 4-358, which places a heavy burden on the government to justify its decision, as well as the PIA as a whole, whose provisions must be "liberally construed . . . in order to effectuate [its] broad remedial purpose.'" *Kirwan v. The Diamondback*, 352 Md. 74, 81, 721 A.2d 196, 199 (1998) (citation omitted). If the General Assembly wanted courts to defer to the government when it invokes § 4-358, it would have required requesters to seek judicial relief, not the other way around.

By deferring to the Department's decision to redact the records, the court below acted contrary to the very purpose of the PIA, which "establishes a public policy and a general presumption in favor of disclosure of government or public documents." *Haigley*, 128 Md. App. at 209, 736 A.2d at 1192. And because the court started from the faulty premise that the Department is entitled to deference, Mr. Glenn had the cards improperly stacked against him from the outset. This Court should grant certiorari to reaffirm that state agencies are not entitled to deference when withholding documents under § 4-358.

II. The decision below improperly substituted a lesser standard for the one set forth in the Public Information Act.

The court below adopted *in toto* the Department's argument that the mere "greater risk" that some abortion providers might be "chilled" by disclosure of their identities is, without more, proof of "substantial injury to the public interest" justifying nondisclosure. Such a conclusion, however, is unwarranted by the language and purpose of the PIA, applicable Maryland and federal case law, and the specific factual context of the present dispute between the Department and Mr. Glenn. In addition, the decision is at odds with

the position taken by at least one other state's highest court in a substantially similar factual setting.

The Maryland Department of Health and Mental Hygiene does not dispute that lax government oversight of surgical abortion facilities endangers public health. And while the regulatory changes promulgated by the Department in 2012 requiring greater oversight of such facilities were obviously a step in the right direction, even the most well-intentioned regulations cannot enforce themselves. The PIA aids the public's ability to monitor whether the government officials charged with enforcing the regulations do an adequate job. The public is not required to *assume* that the enactment of new regulations necessarily means that adequate *enforcement and oversight* will occur. *See Randall Family*, 154 Md. App. at 569, n.8, 841 A.2d at 25, n.8 ("[T]he press, as surrogates for the public, is under no obligation to accept at face value the truth of what public officials say."). In light of the decision of the court below, however, one wonders how the public is supposed to be able to monitor the extent to which the Department is ensuring that serious injuries or deaths related to inadequate oversight of surgical abortion facilities do not recur if the public may be kept entirely in the dark as to who the owners and administrators of these facilities are.

Although the practice of abortion has, unfortunately, motivated some to perpetrate acts of violence and harassment, there is a stark disconnect between that vague generality and the facts of *this case*. Nothing in Mr. Dooley's affidavit, relied on by the court below, supported the idea that acts of abortion-related violence or harassment *would* increase should the Department be required to provide Mr. Glenn with unredacted copies of the

requested records. The Department presented no evidence of any abortion-related crime being perpetrated based, directly or indirectly, *on information obtained through a public records request*. The absence of any showing of a causal nexus between any documented bad act and the obtaining of victim-identifying information from public documents was, and remains, a critical missing link in the Department's argument. The Court of Special Appeals' attempt to gloss over this logical lacuna by positing that the mere risk of harm produced by disclosure is sufficient would, if applied consistently, effectively justify nondisclosure of identifying information in any and every citizen's request for public information.

Disclosures by the government of the information requested by Mr. Glenn is not uncommon. The State of Indiana discloses the names of abortion center administrators on a website,[6] and the State of Florida discloses the names of both administrators and owners.[7] Also, the Department itself provides addresses for Maryland surgical abortion facilities,[8] and does not redact the names of officials who evaluate these facilities.[9] Additionally, the non-profit entities that were subject to Mr. Glenn's request are already required to publicly disclose the names of officers, directors, trustees, and key employees

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[6] *See* Indiana State Department of Health, *Abortion Center Directory*, http://www.in.gov/isdh/reports/QAMIS/abordir/wdirabor.htm.

[7] *See* Agency for Health Care Administration, *Facility/Provider Locator*, http://www.floridahealthfinder.gov/facilitylocator/FacilitySearch.aspx (select "Abortion Clinic" under "Facility/Provider Type").

[8] *Licensee Directory*, http://dhmh.maryland.gov/ohcq/docs/Provider-Listings/PDF/WEB_SAF.pdf.

[9] *Surgical Abortion Facility Surveys*, http://dhmh.maryland.gov/ohcq/ac/sitepages/surgical%20abortion%20facility%20surveys.aspx.

in their annual IRS 990 forms.[10] Since these entities are willing to allow these names to be disclosed in order to keep their non-profit status, the Department's and the court below's speculation about a "chilling effect" seems far-fetched.

The same reasoning relied upon by the court below was 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. 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. . . . [T]he notoriety of providers which furnish abortion services is already well established. . . .

Family Life League v. Dep't of Pub. Aid, 493 N.E.2d 1054, 1057-58 (Ill. 1986).

At least one Maryland court has reached a similar conclusion about the crucial distinction to be observed between the obligation to make public information available to

[10] The 2012 990 Form of Planned Parenthood of Metropolitan Washington DC, for example, is available at http://990s.foundationcenter.org/990_pdf_archive/530/530204621/530204621_201309_990.pdf?_ga=1.225552350.57815346.1372717963. This form discloses thirty-one names, including the names of the medical director and the patient services director.

the public and protecting the public from any who would misuse such information to do harm. *Cf. Comptroller of the Treasury v. Immanuel*, 216 Md. App. 259, 269, n.8, 85 A.3d 878, 885, n.8 (2014) ("[P]ublic information is, at least within the bounds defined by the [PIA], available to the public, and other bodies of law protect the public from those who would misuse that information if it is otherwise appropriate to disclose it.").

The court below's heavy reliance on *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006) was misplaced. To begin with, *Judicial Watch* dealt with a federal FOIA privacy exemption that the Supreme Court has read "broadly," *id.* at 152, and, thus, is distinguishable from the PIA provision at issue here. Yet, even without that critical legal distinction, the factual differences between the case at bar and *Judicial Watch* are enough to demonstrate the case's lack of applicability here. In *Judicial Watch,* the court held that FOIA's Exemption 6, 5 U.S.C. § 552(b)(6), permitted the FDA to redact the names of agency personnel and private individuals who worked on the approval of mifepristone (RU-486). The court balanced the privacy interests of those involved in the manufacture of RU-486, as well as a possibility of violence or harassment, against the public interest in disclosure, and concluded that there was no legitimate public interest in disclosing the names because "[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.

Unlike the tenuous connection between knowing the names of those involved in the manufacture and approval of RU-486 and the safety of the drug itself, there is a *direct connection* between the names of the administrators, owners, and medical directors of a surgical abortion facility and the government's goal of achieving increased oversight of

the operation of such facilities. Indeed, 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*. Since the ability to investigate *the individuals* who run regulated facilities is critical to the Department's decision whether to issue a license, the general public has a right under the PIA to know who these individuals are.

Finally, the court below erroneously saw fit to give credence to the Department's flight of fancy that allowing women in Maryland (for their own safety's sake) to find out who owns the abortion facilities whose services they might choose to avail themselves of somehow amounts to the State interfering with a woman's right to decide to terminate a pregnancy. App. 25. But neither the court, nor the Department for that matter, cited (nor could cite) any case in which a court anywhere has struck down on such grounds a law or regulation that would simply allow a woman seeking an abortion, and understandably made anxious by her own state's undeniably *spotty* oversight of abortion profiteers, to do her own research into the regulatory compliance history of any particular abortion provider.

This case does not concern the constitutionality of any law limiting access to abortion services; rather, it concerns whether § 4-358 can be invoked to shield the names of owners and managers of abortion facilities—and thereby shield the Department's oversight of such facilities—from public view. There is no "interference" with anyone's decision to have an abortion by simply ensuring, through government oversight, that abortion facilities are safe, and allowing the public to monitor that oversight.

There is nothing in the language of, or case law construing, the PIA that would permit an agency to invoke the concept of a "chilling effect" on a regulated entity's owners to thwart the public's right to public information. Indeed, it would be an irony of the highest order if this concept, taken from First Amendment jurisprudence about preventing governments from hindering the free flow of ideas and *information*, should now become a tool in the hands of government with which they may do just that.

CONCLUSION

For the reasons set forth herein, this Court should grant the petition.

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