IN THE
COURT OF APPEALS OF MARYLAND

No. 48

September Term, 2015

Andrew Glenn,

Petitioner,

v.

Maryland Department of Health and Mental Hygiene,

Respondent.

On Appeal from the Circuit Court for Baltimore City
(The Honorable Emanuel Brown, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals of Maryland

BRIEF OF PETITIONER

JOHN GARZA, ESQ.
The Garza Law Firm, P.A.
[redacted]

FRANCIS J. MANION, ESQ.
GEOFFREY R. SURTEES, ESQ.
ERIK M. ZIMMERMAN, ESQ.
American Center for Law & Justice
[redacted]

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

Pursuant to the Maryland Public Information Act ("PIA"), Petitioner 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), the Department filed a "Petition to Continue Partial Denial of Inspection Under Public Information Act" in the Circuit Court for Baltimore City (Case No. 24-C-13-004661), asking the court to allow it to continue to withhold the redacted information.[1] After briefing on the Department's petition was completed, a hearing was held on April 18, 2014.

[1] After the Department filed its petition, the PIA was 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.

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

On April 21, 2015, the Court of Special Appeals affirmed the decision of the Circuit Court in an unreported opinion, holding that the Department had an adequate basis under Gen. Prov. § 4-358 to redact the names set forth in the license applications.

Petitioner filed a petition for writ of certiorari with this Court on June 3, 2015. The petition was granted on August 21, 2015.

QUESTIONS PRESENTED

I. Did the Court of Special Appeals err in granting deference to the Department's legal conclusion that it was authorized, under § 4-358 of the PIA, to redact the records in question?

II. Did the Court of Special Appeals 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?

STATEMENT OF FACTS

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.[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

[2] *See, e.g.*, Andrea K. Walker, *Maryland suspends licenses of 3 abortion clinics*, Baltimore Sun, Mar. 12, 2013, http://tinyurl.com/p7yn3ex.

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]

In light of the new regulations, surgical abortion procedures were suspended at a few clinics in 2013.[5] 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.[6]

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

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[3] *See, e.g., Steven Brigham Time Line*, Philly.com, Jan. 1, 2012, http://tinyurl.com/p54c75f.

[4] Erik Eckholm, *Maryland's Path to an Accord in Abortion Fight*, N.Y. Times, July 10, 2013, http://tinyurl.com/ns5qa94. 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*, Philly.com, Oct. 10, 2014, http://tinyurl.com/obymcgj.

[5] *Unlicensed doctor's surgical abortion procedures suspended; State enforcing new rules requiring abortion clinics to be licensed*, WBLTV.com, Mar. 12, 2013, http://tinyurl.com/nj3cs4g.

[6] *Authorities: Woman died from abortion complications*, USA Today, June 12, 2013, http://tinyurl.com/bnrcdm3.

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).

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 and addresses of the facilities that had submitted applications to the Department. (*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 license 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.

Glenn appealed the decision of the circuit court to the Court of Special Appeals. In an unreported opinion issued on April 21, 2015, the intermediate court affirmed the

circuit court's decision. The court below assessed the "greater risk of harassment or violence based on evidence submitted" and the burden of a chilling effect on the exercise of "a statutorily and constitutionally guaranteed right," which would deter "health care organizations from providing medical services to which access [] is guaranteed by law," and held that the Department's decision to redact the license applications under § 4-358 of the PIA was proper. App. 18-19.

While Petitioner initially requested complete and unredacted copies of the license applications at issue, he has never pressed—either at the circuit court or the intermediate court—for disclosure of email addresses. Here, too, Petitioner only seeks the names of the administrators, officers, owners, and medical directors set forth in the applications, not any email addresses contained in these documents.

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.").[7] 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).

Whether any judicial deference should be afforded to the Department's judgment that the disclosure of the records at issue "would cause substantial injury to the public interest" per § 4-358 is one of the questions presented to this Court for review and is addressed in detail below.

ARGUMENT

I. Introduction

The decision of the Court of Special Appeals radically undermines the PIA, including the PIA provision that lies at the heart of this case: Gen. Prov. § 4-358. In not granting appropriate significance and weight to the standard set forth in that provision—that public records must be disclosed, except when there "would be a substantial injury to the public interest"—the intermediate court granted virtually unbridled discretion to

[7] *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).

government agencies to keep information hidden from public scrutiny. The decision below thus compromises 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,[8] 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.

But even more importantly, the logic of the decision below shuts 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. According to the Department, and 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 of slipshod oversight of abortion clinics in this state

[8] *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://tinyurl.com/p7mwt9d; http://tinyurl.com/p63rcck.

that, in quite recent history, allowed unscrupulous, marginally qualified practitioners to harm—and sometimes kill—women. Thus, a woman's constitutional and statutory right to medical self-determination is subordinated to the Department's desire to shield the identity of those who own and operate abortion facilities within the State.

The rigorous and strict standard of § 4-358 should not be replaced—as the court below has done—with a lesser standard that makes it far easier for government officials to hide public records under a cloak of secrecy. This Court should give full weight to the purpose and words of § 4-358, allowing such officials to withhold or redact public documents only when their release "would cause substantial injury to the public interest."

II. Governing PIA Principles

The right of the public to have access to public records, especially when those records shed light on the activities and decisions of government officials, is a critical one:

> 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 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 a requester, like Petitioner, to demonstrate that disclosure is required, but the burden of the Department to demonstrate

why a denial of inspection is necessary and justified. *See State Conf. of NAACP Branches*, 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).

Finally, with respect to the facts and specific statutory provision at issue in this case, it is critical to note that the motives of the specific requester in seeking public documents are *irrelevant*. *See Moberly*, 276 Md. at 227-28, 345 A.2d at 864 (applying a previous version of § 4-358 and 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). Indeed, as a general matter under the PIA, a requester does not have to explain, much less justify, a request to inspect records, and a custodian cannot require a requester to identify herself or explain why an inspection of records is desired as a condition of disclosure. Gen. Prov. § 4-204 ("Improper Condition on Granting Application"); *Superintendent v. Henschen*, 279 Md. 468, 369 A.2d 558, 561 (1977). Mr. Dooley states in his affidavit that he has "no reason to believe that the requester in this instance seeks the requested information for any improper purpose." E55.

In this case, therefore, Andrew Glenn stands in the place of the public at large, acting on behalf of the interests of every citizen. He is the watchdog monitoring the activities of his government regarding who gets a license to perform abortion services within the State of Maryland and who does not. He is the advocate for women seeking

abortion services and searching for knowledge they need to obtain an abortion in a safe and legal manner. He is the journalist investigating whether the recently enacted abortion service regulations are being vigorously enforced by the Department. He is, quite simply, the citizen who has the right to know what his government is up to.

Unless Section 4-358 is read within the context of the governing principles underlying the PIA, Petitioner's interest in this case will not be seen for what it is: a need of the public to hold its government accountable.

III. Extraordinary Nature of Section 4-358.

Section 4-358 of the PIA, the statutory provision at the heart of this case, provides in full:

> (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.

The procedure for temporary denials of records requests set forth in this section, described in more detail below, 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).[9] This rarely-invoked exception, described as the PIA's "catch-all" public interest provision, *Bowen v. Davison*, 135 Md. App. 152, 165, 761 A.2d 1013, 1020 (2000), provides that the Circuit Court "may" authorize the continued denial of inspection of the record if the court concludes that inspection "would cause substantial injury to the public interest." Gen. Prov. § 4-358(d). The language of the exception, placing a significant burden on the government, suggests why it is such a rarely used procedure: the circuit court must find that the public interest "*would*" (not "may") be injured by inspection of the record, and that such injury would be "*substantial*" (not "hypothetical or remote"), and even if such findings are made the court "*may*" (not "must") authorize continued denial of inspection.

IV. The Court of Special Appeals Erred in Granting Deference to the Department's Legal Conclusion that it was Authorized, under § 4-358 of the PIA, to Redact the Records at Issue.

Whether the Department has met its burden of proving that the release of unredacted records would substantially injure the public interest pursuant to § 4-358 is a legal question that should be reviewed *de novo*, with no deference given to either the Department or the circuit court.[10] The court below, however, incorrectly granted judicial

[9] Section 4-358 proceedings are rare indeed. "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.

[10] *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

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. 4 (citing *Cosby v. Dep't of Human Res*., 425 Md. 629, 638 (2012)). Later in its decision, when the court below addressed a central issue of the case, *i.e*., "whether abortion related violence can be sufficient to render disclosure contrary to the public interest," the court stated that "[w]e note again that 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. 12.

The court's deference to the Department in redacting the applications at issue is misplaced and erroneous as a matter of law. First and foremost, at issue in this case 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.

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)) (emphasis added). In other words, because the Department "does not necessarily have any expertise

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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.").

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.'").

Indeed, the very structure of the PIA precludes any deference to a state agency's decision to withhold or redact documents under § 4-358. Unlike the procedure under Gen. Prov. § 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 of records must file a petition with a circuit court 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 files a petition under this section, though he is entitled to do so. Gen. Prov. § 4-358(c); 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 under § 4-358 would undermine the extraordinary nature of this provision, 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 at issue, 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 intermediate court started from the faulty premise that the Department is entitled to deference, Petitioner had the cards improperly stacked against him when the lower court applied to the law to the facts of the record.

This Court should affirm that state agencies are not entitled to judicial deference when withholding documents under § 4-358.

V. The Court of Special Appeals Erred in Substituting the Rigorous Standard Set Forth in Section 4-358 with a Less Stringent, "Greater Risk" Standard.

As has been discussed in detail *supra*, § 4-358 is unique in its structure and procedure, placing the burden *squarely and solely* on the government to demonstrate that disclosure of information "would [not *could*] cause substantial [not *hypothetical*] injury to the public interest." § 4-358(d).

While the intermediate court is correct that there is a dearth of case law interpreting and applying § 4-358(d), App. 8, the court below improperly recast the plain meaning of the words of that statute into a "greater risk" standard, evaluating whether

disclosure would cause a greater risk of harm to the governmental interests in shielding the information from public view. App. 18-19 (assessing the "greater risk of harassment or violence based on evidence submitted" and the burden of a chilling effect on the exercise of "a statutorily and constitutionally guaranteed right," which would deter "health care organizations from providing medical services to which access [] is guaranteed by law.").

Clearly, the standard created by the lower court here is a far less demanding one than the one set forth in § 4-358(d). That section does not speak of a *risk* of harm, but requires a demonstration that harm *would* occur. The section, moreover, does not speak of *any* asserted harm, such as a speculative or hypothetical one, but a "*substantial injury*."

It is noteworthy than in the two reported decisions that have applied § 4-358 or a previous version of it, *Mayor of Baltimore v. Burke*, *supra*, and *Moberly v. Herboldsheimer*, *supra*, the courts did not appear to engage in a test similar to the one used by the court below, or deem it necessary to wrestle with the plain meaning of the statute. Instead, those courts simply asked and answered the question: would disclosure of the information cause a substantial injury to the public interest? In both cases, after evaluating the relevant facts, the courts answered in the negative.

The intermediate court's reliance on Gen. Prov. § 4-343 in interpreting and applying Gen. Prov. § 4-358 is misplaced. App. 6-9. While the two provisions both speak of the "public interest" and are both discretionary in nature, *i.e.*, providing that the custodian "may" withhold documents, the substantive similarities end there. An

important and critical difference between these two provisions is that while Gen. Prov. § 4-343 allows a custodian to withhold information when disclosure of that information would be "contrary to the public interest," Gen. Prov. § 4-358 imposes a much more stringent standard, allowing a custodian to withhold information only upon a showing that disclosure "would cause a *substantial injury* to the public interest." *Id.* (emphasis added). On their face, therefore, and according to their explicit language, Gen. Prov. § 4-358 places a greater burden of demonstration and proof on the custodian than the one found in Gen. Prov. § 4-343. While a risk of potential harm might well indeed be contrary to the public interest under Gen. Prov. § 4-343, depending on the facts and circumstances of that case, this does not necessarily mean that such a risk constitutes a *substantial injury* to the public interest under Gen. Prov. § 4-358.

For these reasons, should this Court choose to import into Gen. Prov. § 4-358 some sort of balancing test—weighing the public interest in disclosure against the public interest in non-disclosure—it should make clear that any public interest in withholding records cannot be substantiated through a mere risk of potential harm. The custodian must substantiate its discretionary decision to withhold records with facts that clearly demonstrate that disclosure "*would* cause a *substantial injury* to the public interest." *See* 71 Op. Att'y Gen. Md. 288, 1986 Md. AG LEXIS 45, at *15-16 (1986) (noting that the "extraordinary procedure" of § 4-358 is rarely invoked and that meeting the "burden of proof" under that statute "may be difficult, for the PIA generally 'shall be construed in favor of permitting inspection of a public record.'") (quoting Gen. Prov. § 4-103(b)). The question, under such a balancing test, should therefore not be whether the scales tip ever

so slightly in favor of withholding public documents, but whether the scales tip *substantially so* in favor of non-disclosure. Indeed, in order to respect the unique and limited purpose of Gen. Prov. § 4-358, its words must be given full effect. "No portion of the statutory scheme should be read 'so as to render the other, or any portion of it, meaningless, surplusage, superfluous or nugatory.' We shall not interpret a statute in a way that is inconsistent with, or ignores, common sense or logic." *Bowen*, 135 Md. App. at 166-67, 761 A.2d at 1021(2000) (citations omitted).

Thus, while the intermediate court correctly stated that "the procedure for determining whether denial is permissible under § 4-358 is different from the standard procedure for PIA exemptions," App. 16, the lower court went astray in *weakening* the substantive standard of this provision instead of recognizing and applying the *rigorous* standard that it imposes on the custodian of records.

The text of § 4-358 is clear: a custodian may not withhold public documents unless doing so "would cause substantial injury to the public interest." As explained below, the Department failed to satisfy this high level of scrutiny.

VI. The Facts of the Record do not Support the Department's Decision to Redact the License Applications under Section 4-358.

Applying its "greater risk" standard to the facts of this case, and granting deference to the Department's interpretation of the PIA, the court below held that the Department and circuit court were correct to redact the names set forth in the licensure applications. Contrary to the holding of the court below, however, application of the *proper test* to this case yields one conclusion: the Department failed to satisfy the

rigorous standard imposed on custodians for withholding documents pursuant to § 4-358. In fact, for the reasons stated below, the Department fails to satisfy even a weak, "greater risk" standard.

The court below recited several paragraphs of Mr. Dooley's affidavit respecting the alleged harms to the public interest that would occur should the names on the applications be disclosed. App. 14-15. Mr. Dooley's affidavit, however, which provides the sole factual basis for the Department's position and the lower court's conclusions, suffers a fatal flaw. While the affidavit recites the language of § 4-358 in asserting that disclosing the names would substantially injure the public interest, this conclusion is based on nothing more than what *could*, *hypothetically*, happen if the Department allowed for a complete inspection of the records. Mr. Dooley suggests that disclosure of the names "*could* result in harassment, threats or actual violent harm to these individuals" and also "*could* deter others from operating surgical abortion centers or from applying for licensure, restricting access to legal health services and risking injury to the public health." App. 15. Two "*coulds*," however, do not make a "*would*." What *could* be the case is not the standard used in § 4-358; rather, the standard is whether disclosure "*would* cause substantial injury to the public interest." § 4-358(d) (emphasis added). Thus, according to Mr. Dooley's own words, the Department has failed to meet the high bar imposed by § 4-358. *Cf. Blythe v. State*, 161 Md. App. 492, 523-24, 870 A.2d 1246, 1263-64 (2005) ("[A] mere bald assertion that a particular exemption applies . . . [or] conclusory references to claimed exemptions will not suffice to satisfy the burden.").

A. There is no evidence that full disclosure of the license applications would lead to abortion-related violence and harassment.

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, supports the proposition that acts of abortion-related violence or harassment *would* increase should the Department be required to provide Petitioner 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 is a critical missing link in the Department's argument and the lower court's holding. Indeed, it takes an unwarranted leap of imagination to suggest that acts of abortion-related violence perpetrated throughout the nation in the past will be visited upon abortion facility administrators, officers, owners, and medical directors operating within this State in the future as a result of those names being disclosed through a PIA request.

The court below responds to this argument by adopting the Department's position that "the risk of the harm to the public interest is the risk of harassment or violence itself." App. 17. As would be the case with most PIA requests, Petitioner cannot dispute the *possibility* that release of the requested records *could* lead to a marginal *risk* of *potential* increased harm and harassment. Anything is possible. "Could," however, was

not the standard chosen by the General Assembly in fashioning the extraordinary standard set forth in § 4-358. A "could happen" standard would gut the PIA since the government could avoid disclosure of documents under § 4-358 by simply setting forth a list of bad things that might conceivably take place.

The intermediate court further observed that "a custodian would virtually never be able to establish that harassment or violence will result from disclosure because it's highly unlikely that a party would request documents expressing such an intent." App. 17. But that is precisely the point. It is "highly unlikely" that a person wishing to inflict violence on someone associated with an abortion provider would first seek the information he needs to do so by filing a records request under the PIA.

The record is simply 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, *see* http://www.prochoice.org/Pregnant/find/Maryland.html, or the Department's own Licensee Directory, which, unlike the National Abortion Federation, provides street addresses for Maryland licensed surgical abortion facilities, *see* http://dhmh.maryland.gov/ohcq/docs/Provider-Listings/PDF/WEB_SAF.pdf. There is no sound reason to think that an individual learning the names of these businesses' owners, directors, and officers would be motivated to perpetrate a crime or commit a tortious deed where the names and addresses of abortion facilities themselves are so readily available.

Indeed, at least two of the facilities 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.[11] Clearly, the disclosure of such names has not hampered these two abortion providers in applying for surgical abortion licenses.[12] Moreover, it should be pointed out that disclosures by the government of the information requested by Petitioner is not uncommon. The State of Indiana discloses the names of abortion center administrators on a website,[13] and the State of Florida discloses the names of both administrators and owners.[14]

The same arguments used by the Department to redact the names at issue were rejected by the Illinois Supreme Court in deciding whether the names of physicians and

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[11] 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. 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.

[12] As previously mentioned, but bears repeating here, handwritten on the top of the application submitted by Planned Parenthood of Metropolitan Washington DC–Silver Spring is 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." The PIA neither permits a private business seeking licensure to tell a public agency what to exclude or redact upon request for an inspection of that application nor empowers the agency to withhold information on the basis of such a demand.

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

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

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 defendants reason that disclosure of the names of providers of abortion services would subject those physicians to the pressure of special interest groups. This would, in turn, result in fewer physicians willing to perform Medicaid abortions, thus adversely affecting a woman's need to have available to her a physician. . . .
>
> Such an 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. . . .
>
> The next argument the defendants raise is that disclosure of this information would invade the providers' right of privacy. . . . This assertion, which was summarily rejected by the appellate court, is pure speculation. 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.

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 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."). 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, accepted by the court below, are equally speculative here.

In addition to raising allegations of potential violence should the contents of the applications be fully revealed, the Department tries to buttress its arguments with the example of a group of protestors appearing outside the middle school of a child of the landlord of a surgical abortion facility. However, as the article cited by Mr. Dooley's affidavit indicates, no law was broken and no one was arrested. E54-55. One can certainly question whether such tactics are effective in communicating a political message, but no one can doubt that these individuals were exercising their First Amendment right to free speech, which protects even misguided or offensive expression. *See Boos v. Barry*, 485 U.S. 312, 322 (1988); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc*., 515 U.S. 557, 574 (1995). The remote possibility that one *might* engage in First Amendment-protected activity (even if obnoxious), based on information obtained through a PIA request, provides no support for the Department's position that disclosure of the names in question would substantially injure the public interest.

Furthermore, Mr. Dooley's affidavit uses the example of an unnamed Department staff member receiving a call in connection with surgical abortion licensing that the staff

member found to be harassing. E55. There is nothing in the record, however, that supports the notion that, if the Department provides Mr. Glenn with the unredacted records he seeks, government officials will be inundated with harassing telephone calls. It would set a terrible precedent indeed if the government could invoke § 4-358 to keep citizens from inspecting public records due to an unsubstantiated fear that citizens may "harass" public employees after reviewing them. In light of the fact that the Department does not redact the names of officials who evaluate surgical abortion facilities,[15] any claim of potential harassment of government employees is highly specious and far removed from a "substantial injury to the public interest."

Lastly, the intermediate court's reliance on *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006), is misplaced. App. 12-13, 16. In that case, the D.C. Circuit 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, there is a *direct*

[15] Department of Health and Mental Hygiene, *Surgical Abortion Facility Surveys*, http://dhmh.maryland.gov/ohcq/ac/sitepages/surgical%20abortion%20facility%20surveys.aspx.

connection in this case between the names of the administrators, owners, and medical directors of a surgical abortion facility seeking licensure and the government's goal of achieving increased oversight of the operation of such facilities to protect public health and safety. While it is assumed that the FDA does not approve a drug based on the names of those who manufactured it, but rather on the safety of the drug itself, here, the ability to investigate *the individuals* who own and run regulated facilities is critical to the Department's decision whether to issue the license. And if it is critical to the Department to know these names, then Petitioner—and the general public—has a right under the PIA to know them too.

In addition, the burden-shifting approach used by the court in *Judicial Watch* has no place here. The PIA *does not* employ FOIA's burden-shifting standard which dictates that, when disclosure implicates a privacy interest, the burden shifts to the requester to show that "the public interest sought to be advanced is a significant one," and that the information is "likely to advance that interest." 2012 Md. AG LEXIS 5, at *31. Instead, under the PIA, the burden is placed squarely on the agency to prove that disclosure *would* "cause substantial injury to the public interest." *Id*. at *32. The Attorney General has observed that "Maryland's more demanding standard means that federal FOIA precedents are less persuasive with regard to determining the ultimate weight to be accorded the competing interests in privacy and disclosure." *Id*.; *see also Office of Governor v. Wash. Post Co.*, 360 Md. 520, 553-56, 759 A.2d 249, 267-69 (2000) (distinguishing cases involving provisions of other FOIA laws that include "language or exemptions which are different from the language and exemptions of the [PIA]").

B. Full disclosure of the license applications will not chill, impede, or burden the right to access or provide abortion services.

In addition to finding that disclosure of the names at issue created an untoward risk of harm and harassment, the intermediate court also accepted the Department's contentions that disclosure of the names would have a "chilling effect of deterring providers from applying for licensure to provide surgical abortions." App. 18-19. As a basis for its holding, the lower court relied on the Department's observation that the regulations "sought to avoid imposing onerous burdens that would have the principal effect of discouraging providers from seeking licensure or from providing services at all," and its citation of "cases from across the country when surgical abortion regulations were so burdensome that states were found to be in violation of the constitutional right to access." App. 18.

The intermediate court's holding on this point is even more tenuous than the one relating to risks of harm and harassment. What both the Department and intermediate court critically failed to show is how the disclosure of names of those seeking to obtain a license to provide abortion services within the State of Maryland would *in fact* burden or chill the statutory and constitutional rights of these abortion providers. Nor can such a showing be made. As businesses seeking to operate within the State of Maryland, these facilities 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) (defining "public record"). It

takes a fertile imagination to suggest that these businesses submitted their applications to the Department with the understanding that the Department would undertake the extraordinary procedure set forth in § 4-358 to deny public inspection of these applications, including the names provided therein. And *even if* they had such a belief, the lack of any guarantee that the Department would prevail in such an extraordinary proceeding indicates that these businesses were more concerned with obtaining licenses than having the names of their owners, officers, and directors shielded from public view. In other words, the risk that these names might be disclosed—if the abortion facilities were even concerned about their disclosure in the first place—was not great enough for these abortion facilities to decide against submitting their applications at the outset.

In *State ex rel. Stephan v. Harder*, 230 Kan. 573, 641 P.2d 366 (1982), the Supreme Court of Kansas rejected the position of that state's Department of Social and Rehabilitation Services that it could refuse to disclose, pursuant an open records request, the names of doctors who received public funds to provide abortion services. Adopting the language of the Minnesota Supreme Court in *Minnesota Medical Ass'n v. State*, 274 N.W.2d 84 (Minn. 1982), adjudicating a similar matter, the Kansas Supreme Court observed:

> Disclosure places no burden on the doctor, does not destroy the confidentiality of his relationship with patients, and does not restrict his freedom to exercise his medical judgment. Disclosure itself does not have any effect on the moral or ethical considerations that affect his decision whether or not to perform abortions. If antiabortion factions of the public convince him to stop performing abortions, his decision will be the result of private, not state, actions. Therefore, even if the ultimate consequence of disclosure is a reduction in the number of physicians willing to perform

> abortions, that reduction will not constitute an unconstitutional infringement of women's rights of privacy.

Harder, 230 Kan. at 588, 641 P.2d at 378.

These observations have equal force here. If a surgical abortion facility decides to cease providing abortion services on account of the names of its administrators, officers, owners, and medical directors being made known, that would not be the fault of the Department, the PIA, or Petitioner. It would be the separate and independent choice of the abortion provider itself, who would rather keep the identities of its ownership and management a secret. As with any constitutional and statutory right, the right to abortion is not an unfettered one. In order to ensure that abortions are performed in a safe environment, some measure of regulation and oversight is necessary, as the recently enacted abortion safety regulations demonstrate. And just as abortion services should not be provided within the State of Maryland without some measure of public oversight, neither should the identities of those responsible for these services.

Quite simply, there is no interference with anyone's decision to have an abortion by simply 1) ensuring, through government oversight, that abortion facilities are safe, and 2) allowing the public to monitor the government's oversight. To the contrary, effective government oversight *safeguards* women's health. Since even the most well-intentioned regulations cannot enforce themselves, one wonders how the public is supposed to be able to monitor the extent to which the Department is ensuring, through improved oversight, compliance with abortion safety regulations if the public is kept entirely in the dark as to who the owners and administrators of these facilities are. In the absence of *any*

fact beyond the Department's say-so that disclosure of names would keep women from accessing abortion services, the Department has failed to meet the rigors of § 4-358.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Special Appeals and order that the Respondent provide Petitioner with the unredacted records he seeks.

Respectfully submitted,

JOHN GARZA, ESQ.
Garza Building
The Garza Law Firm, P.A.
[redacted]

FRANCIS J. MANION, ESQ.
GEOFFREY R. SURTEES, ESQ.
ERIK M. ZIMMERMAN, ESQ.
American Center for Law & Justice
[redacted]

Counsel for Petitioner

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

APPENDIX

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0489

September Term, 2014

ANDREW GLENN

v.

MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Meredith,
Hotten,
Reed,

JJ.

Opinion by Hotten, J.

Filed: April 21, 2015

Appellant, Andrew Glenn, requested from appellee, the Department of Health and Mental Hygiene ("DHMH"), all applications that were submitted for a license to operate a surgical abortion facility within the State. DHMH provided the requested applications but redacted the names and email addresses of the individual owners, administrators, and medical directors for each facility. DHMH filed a petition in the Circuit Court for Baltimore City, seeking approval to continue withholding the redacted information, asserting that disclosure would be contrary to the public interest due to the documented history of harassment and violence directed toward abortion providers. The circuit court upheld DHMH's continued denial and appellant noted an appeal, presenting one question for our review:

> Has [DHMH] 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 the information is necessary to prevent substantial injury to the public interest that would otherwise occur?

For the reasons that follow, we shall affirm.

FACTUAL AND PROCEDURAL HISTORY

In July 2012, DHMH adopted regulations pertaining to surgical abortion facilities within the State. The Code of Maryland Regulations ("COMAR") 10.12.01.02A provides that "[a] person may not establish or operate a surgical abortion facility without obtaining a license from the Secretary." Following the adoption of the regulations, seventeen surgical abortion facilities submitted applications for a license. On March 12, 2013, appellant, made a records request pursuant to the Public Information Act, ("PIA"), Maryland Code (2014), §4-101 *et seq.* of the General Provisions Article [hereinafter Gen. Prov.], seeking

copies of all applications for surgical abortion facility licensure. On July 3, 2013, DHMH responded via letter, providing the requested applications but with redacted names and email addresses of individual owners, administrators, and medical directors for each applicant facility. DHMH asserted that it was in the public interest to deny access to those particular pieces of information, citing Gen. Prov. §4-358(a) which states:

> *In general* – (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.

Thereafter, on July 19, 2013, DHMH filed a petition in the circuit court seeking authorization to continue redacting the names, as required by Gen. Prov. §4-358(b):

> (b) *Petition* – (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.

A hearing on the petition was held April 18, 2014. DHMH argued that it was in the public interest to redact the names and emails of medical doctors and owners of the facilities because of safety concerns. Specifically, it cited a 2011 incident in Maryland when protesters appeared at the middle school of the child of a landlord of an abortion facility. It also referenced multiple instances from other states where providers had been harassed, assaulted or murdered. DHMH additionally relied upon a U.S. Court of Appeals, District of Columbia Circuit case, *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006), which held that under the Freedom of Information Act ("FOIA"), "fairly asserted abortion

related violence" was a sufficient ground for withholding disclosure of certain information. In response, appellant contended that the PIA should be interpreted in favor of disclosure, and that there was no applicable exception.

On May 8, 2014, the circuit court granted DHMH's petition, indicating in its order that based on public safety concerns, DHMH could "redact the names of the administrators, owners, and medical directors of surgical abortion facilities when releasing copies of surgical abortion facility licensure applications for public inspection." Appellant noted a timely appeal.

Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

STANDARD OF REVIEW

We review questions of statutory interpretation *de novo*. *Harvey v. Marshall*, 389 Md. 243, 257 (2005) (citing *Mohan v. Norris*, 386 Md. 63, 66-67 (2005)). "When the trial court's order involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are legally correct under a *de novo* standard of review." *Garfink v. Cloisters at Charles, Inc.*, 392 Md. 374, 383 (2006) (internal quotations omitted).

This Court gives deference to an agency's interpretation of a statute it administers. *See Cosby v. Dep't of Human Res.*, 425 Md. 629, 638 (2012). "Our review of an agency's determinations of law is plenary, although an agency's interpretation of its organic statute is entitled to some deference. 'While we frequently give weight to an agency's experience

in interpretation of a statute that it administers, it is always within our prerogative to determine whether an agency's conclusions of law are correct.'" *Marks v. Criminal Injuries Comp. Bd.*, 196 Md. App. 37, 57 (2010) (internal citations omitted).

DISCUSSION

DHMH contends that the court was correct in permitting its continued withholding of the names and emails of the owners and administrators because it sufficiently asserted there would be injury to the public interest. Appellant doesn't dispute that there could be some safety concerns, but argues that DHMH failed to sufficiently establish a causal nexus between any alleged potential injury and the disclosure of the names and email.

The PIA, Gen. Prov. §4-103 states:

> **General right to information**
>
> (a) *In general.* – All persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees.
>
> (b) *General construction.* – 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 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.

The Court of Appeals provided a brief history of the PIA in *Office of Attorney General v. Gallagher*, 359 Md. 341 (2000).

> Maryland's Public Information Act was originally enacted in 1970 and codified as Maryland Code (1957, 1975 Repl.Vol.), Art. 76A, §§ 1 through 5. As this Court has reiterated many times, "the provisions of the . . . 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." *Kirwan v. The Diamondback*, 352 Md. 74, 81, 721 A.2d 196, 199 (1998), quoting *Fioretti v. State Board of Dental Examiners*, 351 Md.

> 66, 73, 716 A.2d 258, 262 (1998). The Act expressly provides that "all persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees." § 10-612(a). *See Office of State Prosecutor v. Judicial Watch*, 356 Md. 118, 134, 737 A.2d 592, 601 (1999). In order to carry out this right of access, the Act is to be construed in favor of disclosure. *See* §10-612(b). There are exceptions to this general rule of disclosure, however, as codified in §§ 10-615 through 10-619 of the Act. . . .

Id. at 342-43. Gen. Prov. §4-301 provides that:

> A custodian shall deny inspection of a public record or any part of a public record if:
>
> (1) by law, the public record is privileged or confidential; or
>
> (2) the inspection would be contrary to:
>
> (i) a State statute;
>
> (ii) a federal statute or a regulation that is issued under the statute and has the force of law;
>
> (iii) the rules adopted by the Court of Appeals; or
>
> (iv) an order of a court of record.

The PIA expresses the idea that "all persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees." *Bowen v. Davison*, 135 Md. App. 152, 157 (2000). Maryland Courts have held repeatedly that the PIA must be construed in favor of disclosure. *Id.* However, a custodian may deny disclosure if it can articulate a reason supported by one of the several exemptions enumerated within the PIA or another applicable State or federal law prohibits disclosure. *Id.*

There are two[1] PIA provisions relevant to denials pursuant to the public interest. Gen. Prov. §4-343 provides:

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[1] The public interest is referenced on two other instances in the PIA. One is in Gen. Prov. §4-206 which permits the waiving of certain fees if in the public interest. The other (continued . . .)

> Unless otherwise provided by law, if a custodian believes that inspection of a part of a public record by the applicant would be contrary to the public interest, the custodian may deny inspection by the applicant of that part of the record, as provided in this part.

Likewise, Gen. Prov. §4-358(a), which is the subject of this appeal, states:

> 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.

While a custodian can assert the public interest as a justification for denial of disclosure, Maryland Courts have made it clear that there is no general public interest catchall exemption to the PIA. *See City of Frederick v. Randall Family, LLC*, 154 Md. App. 543, 564 (2004); *Prince George's County v. The Washington Post*, 149 Md. App. 289, 297 (2003) [hereinafter *Washington Post*]; *Kirwan v. The Diamondback*, 352 Md. 74, 82 (1998) (applying Gen. Prov. §4-343 in holding that the University of Maryland's assertion that disclosure of parking violation tickets issued to the men's basketball team players and staff would have a chilling effect on self-reporting of NCAA violations and discourage students from reporting future violations was not sufficient to meet the "public interest" argument, absent the documents falling under any of the other exemptions from disclosure enumerated with the PIA).

In *Washington Post*, *supra*, 149 Md. App. at 297, this Court reviewed an appeal brought by the Washington Post against Prince George's County after the county declined

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(. . . continued)
is Gen. Prov. §4-331, which allows disclosure of the address or phone number of a state employee if his or her employer determines that "inspection is needed to protect the public interest."

to disclose requested police commanders' information sheets, a roster of all county police officers, and certain investigatory files. The county asserted public interest concerns in support of its denial of the documents. *Id.* at 299. After noting that when a custodian denies requested documents, it bears the burden of sustaining its decision, we explained:

> The law is clear that "the [PIA] does not contain a general 'catchall' public interest exemption." [*Office of Governor v. Washington Post Co.*, 360 Md. 520, 554 (2000)]. As the Court of Appeals has stated: "[C]ourts will simply no longer accept conclusory and generalized allegations of exemptions," the first burden on an agency which seeks judicial approval of a claim of exemption is to provide "a relatively detailed analysis in manageable segments." This emphasis on an explanation which presents enough detail to make understandable the issues involved in the claim of exemption without presenting so much detail as to compromise the privileged material is repeatedly reflected in the federal cases. [*Cranford v. Montgomery Cnty.*, 300 Md. 759, 778, 481 A.2d 221, 230 (1984)] (citation omitted). The government must provide a particularized justification for withholding each portion of a public record that it claims is exempt from public disclosure.

Id. at 309-10.

There is a dearth of Maryland cases explaining what specific assertions are sufficient to justify denial under the public interest argument; however, we find guidance in an Attorney General Opinion.[2] 64 Attorney General Opinion 236 (1979). There, the State's Attorney for Howard County requested an opinion regarding whether the County was required to disclose police department investigatory files or whether it could redact names and personal identifying information about the officers. *Id.* The Attorney General

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[2] *See Haigley v. Dep't of Health & Mental Hygiene*, 128 Md. App. 194, 217 (1999) ("We are also mindful that an opinion of the Attorney General is "entitled to consideration in determining legislative intent" concerning a statute."); *Washington Post*, 149 Md. at 325 (relying upon past Attorney General Opinions to decide matters previously unanswered by Maryland Courts).

addressed the County's argument that disclosure would be contrary to the public interest under Article 76A, §3(b), now codified as Gen. Prov. §4-343. *Id.* at 240. The Opinion stated:

> As we noted in an earlier Opinion of this office, the determination of whether disclosure of a record would be "contrary to the public interest" is in the custodian's "sound discretion", to be exercised "only after careful consideration is given to the public interest involved". 58 *Opinions of the Attorney General* 563, 566 (1973).[]
>
> We have found no explicit guidelines, either in the Public Information Act itself or in relevant case law, as to how precisely this determination is to be made. However, we believe that the last clause of §3(b)(i), which sets forth the factors that must be demonstrated to deny disclosure to a "person in interest" – even where the disclosure otherwise would be "contrary to the public in interest"[] – offers a convenient listing of possible reasons for secrecy. Section 3(b)(i) provides that the superior right of a "person interest" to inspect records may be denied only if disclosure would: "(A) interfere with valid and proper law-enforcement proceedings, (B) deprive another person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identify of a confidential source, (E) disclose investigative techniques and procedures, (F) prejudice any investigation, *or* (G) endanger the life or physical safety or physical safety or any person."

Id. at 241. The Opinion continued, explaining that a custodian may not simply state that it believed disclosure was contrary to the public interest, but rather, it must "carefully consider whether that consequence is likely or possible and, then, objectively balance that possibility (and the conclusion that the disclosure would be contrary to the public interest) against the asserted public interest in favor of disclosure – here, the public's "right to know." *Id.* at 242. Finally, the Opinion reiterated that "[t]he objective balancing of competing interests is a task for the custodian of the report, a person familiar with the reasons justifying disclosure or non disclosure" and concluded that if the Police

Department could articulate a reasonable argument regarding why disclosure was contrary to the public interest after weighing the above mentioned considerations, then it could deny disclosure to the entire or part of the requested records. *Id.* at 243.

In *Moberly v. Herboldshiemer*, 276 Md. 211 (1975), the defendant, a local newspaper, had requested information from a hospital regarding the salary of the director of the hospital. The hospital denied disclosure, asserting that the PIA did not apply to it, and the defendant filed a petition for review in the circuit court. *Id.* at 213. The circuit court found that the PIA did apply and the hospital filed a petition for *certiorari* before the Court of Appeals, which was granted. *Id.* After concluding that the hospital was subject to the PIA, the Court addressed the hospital's alternative arguments regarding why the requested information was protected from disclosure. *Id.* at 227. One of its arguments asserted the version of Gen. Prov. §4-358 at the time. *Id.* The hospital contended that the defendant newspaper had held a long time vendetta against the hospital, and accordingly, it only sought the salary information in order to subject the hospital to ridicule. *Id.* The Court of Appeals rejected this argument, stating: "'[t]he Court does not find that invidious or improper motives, if any, can bring information otherwise revealable under the Act into the classification of Art, 76A §3(f) where disclosure would do 'substantial injury to the public interest." *Id.* at 228.

Later, this Court discussed *Moberly* in its opinion in *Mayor and City Council of Baltimore v. Burke*, 67 Md. App. 147 (1986). There, a Baltimore newspaper requested documents from the City of Baltimore pertaining to a waste water treatment plan. *Id.* at 149. The City provided some of the requested documents, but denied access to

approximately 160,000, claiming that disclosure was contrary to the public interest because they involved research and investigations of city attorneys. *Id.* at 150. The City then filed a petition in the circuit court requesting permission to continue denying access to the documents. *Id.* The circuit court granted summary judgment in favor of the newspaper, denying the City's request for continued refusal of disclosure, and the City appealed to this Court. *Id.* at 150-51. Preliminarily, we observed that the City had not asserted any specific exemption, but rather invoked its right pursuant to State Gov't §10-619, now Gen. Prov. §4-358. We explained that "[p]atently, by proceeding under this section the appellants conceded that the records in question were subject to inspection and merely sought a temporary respite from the disclosure requirements of the [PIA]." *Id.* at 152. We continued, citing *Cranford v. Montgomery County*, 300 Md. 759, 776 (1984), noting that Gen. Prov. §4-358 existed for "the unusual case where a public policy factor should control but none of the specific exemptions applies[.]" *Id.* The City's reason for denial was that disclosing the particular documents relating to the City Attorney's investigations would result in the loss of strategic advantages in ongoing arbitration. *Id.* at 153. Following a brief discussion of *Moberly*, *supra*, we concluded that we could not "subscribe to the proposition that a substantial injury to the public interest will result from a hearing of all evidence relevant to the proper resolution" of other claims against the City. *Id.* at 155.

In *Washington Post*, *supra*, this Court considered the County's argument that certain police investigative reports were exempt from disclosure because their release was contrary to the public interest. *Id.* at 306. We rejected the County's argument, explaining:

> In this instance, the County failed to demonstrate that disclosure of the eight closed investigatory files would be contrary to the public interest. The County merely argued to the circuit court that it did not "see any exception in the []PIA about closed and active cases." The record is absent any information concerning the public harm that might be caused by the release of the closed CID records.

149 Md. App. at 332. The Court held that based on the lack of a proffered explanation regarding how the public interest would be harmed by disclosure, the circuit court did not err in requiring the County to release the documents. *Id.* at 333.

The question we are presented in the case *sub judice*, is whether abortion related violence can be sufficient to render disclosure contrary to the public interest. We note again that when reviewing an agency's denial of disclosure under the PIA, we give deference to the agency's interpretation of statutes that it administers. *See Cosby, supra*, 425 Md. at 638. The DHMH maintains that it is entitled to withhold the names and emails of the individual medical directors and administrators because of the risk of harassment and/or physical harm to those persons. In support, it cites *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006), which involves interpretation of FOIA. Preliminarily, we note that this Court has previously acknowledged that cases interpreting FOIA are persuasive since the PIA was adopted from the same language and the purposes of the two are identical.[3] In *Judicial Watch*, the plaintiff submitted a FOIA request with the Food & Drug

[3] *See Haigley*, 128 Md. App. at 210 ("Recently, in *Gallagher v. Office of the Attorney General*, 127 Md. App. 572, 736 A.2d 350 (1999), we noted that the purpose of the PIA is "'virtually identical' to that of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 and that interpretations of the federal statute are ordinarily persuasive."). *See also Office of State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118, 121 (1999).

Administration, seeking information regarding its approval of the abortion drug mifepristone. *Id.* at 144. In response, the FDA disclosed several thousand pages, redacted parts of some pages, and withheld several thousand others. *Id.* The plaintiff brought suit, challenging the FDA's withholding and redaction of documents, and the FDA moved for summary judgment. *Id.* at 145. The federal district court granted summary judgment. On appeal to the U.S. Court of Appeals, District of Columbia Circuit Court, the Court addressed the FDA's redaction of names and addresses of agency personnel, private individuals and companies who worked on the approval of mifepristone. *Id.* at 152. In support of these redactions, the FDA asserted "[e]xemption 6" which permits agencies to withhold files that would constitute an unwarranted invasion of personal privacy. *Id.* The District of Columbia Circuit Court read the exemption broadly, noting that while the language of the exemption discussed "files," it could also apply to bits of personal information, including names and addresses. *Id.* It then explained that the privacy interest asserted by the FDA concerned the "danger of abortion related violence." *Id.* at 153. It referenced affidavits submitted by the FDA detailing abortion clinic bombings and websites encouraging the killing or kidnapping of employees. *Id.* The Court held that these concerns were sufficient to constitute fairly asserted interest in preventing abortion related violence. *Id.*

Returning to the instant case, appellant argues that there is no balancing test appropriate under PIA considerations and that DHMH did not establish a causal nexus between any probable safety concerns and personal information being released. We conclude that DHMH provided a reasonable and sufficiently supported explanation for why

it should have been entitled to withhold the names and emails of the owning doctor and administrators. We explain.

As reflected in *Washington Post*, if a custodian denies disclosure, it bears the burden of sustaining its denial. In support of its assertion that there was a risk of potential violence against abortion providers, DHMH submitted an affidavit to the circuit court from Patrick Dooley, the Chief of Staff of DHMH detailing his rationale for why he believed the redacted information could present a public interest concern if disclosed. He indicated in part:

> 4. In carrying out these duties, I have been involved, from time-to-time, in the process of developing and implementing Maryland's recently-adopted regulations to requiring surgical adoption facilities to obtain a license from the Department. . . . .
>
> 7. From my work in the public health field, I am generally aware that persons affiliated with surgical abortion facilities have been targets of threatened and actual violence, including fatal shootings. . . .
>
> 8. Moreover, as a consequence of my involvement in the Maryland regulatory process regarding surgical abortion facilities, I am generally aware that there are certain websites that collect and publish the names and contact information of persons affiliated with health facilities that provide abortions, including individuals who work or reside in Maryland. . . .
>
> 9. In addition to threats of violence and actual violence, persons who are connected with surgical abortion facilities have experienced unwarranted invasion of personal privacy, such as identification and targeting of spouses and children for protest actions. One recent incident in Maryland involved anti-abortion protestors appearing at the middle school of the child of the landlord of a surgical abortion facility. . . .
>
> 10. At least one staff member of the Department has received a telephone call on a personal telephone number in which the caller referenced the staff member's work in connection with licensing surgical abortion facilities. The staff member found the call to be harassing.

> 11. One concern expressed by some stakeholders in the adoption of the regulations governing surgical abortion facilities was that, if compliance with the regulations were burdensome, the enforcement of the regulations could have the practical effect of restricting women's access to abortion services. If, as a consequence of complying with the regulations, surgical abortion facilities were forced to publicly disclose the identities of key personnel, relevant for state regulatory purposes but generally not publicized by the facilities, an if doing so subjects staff members to potential harassment and threats of violence, an unintended effect of the regulations could be to discourage providers from seeking licensure or from offering the service at all. Not only could this restrict access to health care services, it could also lead to facilities or providers attempting to evade the Department's licensure requirements, increasing the risk to the public health.
>
> 13. In reviewing this request, I therefore concluded that despite the public's important interest in the Department's licensing procedures for surgical abortion facilities, there would be substantial injury to the public interest if the identities of medical directors, administrators, and owners of surgical abortion facilities were disclosed as part of the response to a request for public inspection of the Department's licensure records. First, disclosing these names could result in harassment, threats or actual violent harm to these individuals, as well as unwarranted invasion of their personal privacy and that of their family members. Second, the Department's action in releasing these names could deter others from operating surgical abortion facilities or from applying for licensure, restricting access to legal health services and risking injury to the public health.

Accompanying this affidavit, DHMH attached statistics on violence and harassment towards abortion providers, clinics, and employees from 1977 to 2010.

Regarding appellant's balancing test argument, we hold that when reviewing a denial of disclosure pursuant to Gen. Prov. §4-358 a court must balance the entitlement to access to the information against the alleged harm to the public interest. As Maryland Courts have acknowledged, the PIA is to be interpreted in favor of disclosure and unless an exemption enumerated in the PIA or some other State or federal law, the custodian must disclose. However, as we explained in *Burke*, *supra*, 67 Md. App. at 152, when a custodian

denies disclosure under Gen. Prov. §4-358, it is conceding that the documents or information are subject to disclosure, meaning there is no applicable PIA exemption, but it is requesting to be excused from its duty to otherwise disclose.[4] It follows then that the procedure for determining whether denial is permissible under §4-358 is different from the standard procedure for PIA exemptions. *See Bowen v. Davison*, 135 Md. App. 152, 166 (2000) (highlighting that §4-358 does not apply to PIA exemptions and that Gen. Prov. §4-358 operates under a separate procedure). While a balancing test is not applicable to PIA exemptions, it is appropriate when considering a denial under §4-358.[5] The Attorney General Opinion listed several reasons why disclosing a document may be contrary to the public interest, including that disclosure could "endanger the life or physical safety or physical safety or any person." This same opinion explained that a balancing test must be performed by the agency to determine whether there is harm to the public interest, and the agency must articulate a reasonable argument in support of its denial. The balancing test must be performed by the custodian and it must explain its reasons justifying its withholding of information otherwise entitled to disclosure. Likewise, *Washington Post* required that the agency provide a particularized justification for denial of disclosure.

Akin to the decision in *Judicial Watch*, we hold that DHMH had a fairly asserted argument based on concerns of violence and harassment towards abortion providers to

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[4] Notably, the original name of the section, as codified in Art. 76A, §3, was "court order restricting disclosure of records ordinarily open to inspection."

[5] We also note that the statute provides no explanation regarding what satisfies a harm to public interest. How would a court make this determination, absent language in the statute, without performing some sort of test?

support the denial of the names and email addresses of the applicants in this case. DHMH has established that it carefully balanced the interest of the favor towards disclosure against the privacy and safety concerns of the individuals whose names and emails were at risk of being disclosed. Notably, it did not attempt to deny disclosure of the entire applications. Rather it selected only the information which it deemed posed a personal safety concern: the names and emails of individuals who owned the facilities. DHMH considered that the names and emails were not disclosed to the public by the facilities themselves, that there were multiple documented instances of violence and/or harassment against individuals affiliated with abortion facilities (including within the State of Maryland), and that as a result of instances of harassment or violence, releasing personal information of employees could generate further ramifications, including deterring health care providers from providing abortion services, thereby impacting access to these services throughout the state.

Appellant also maintains that DHMH failed to substantially establish a causal nexus between disclosure and harm to the public interest. He contends that the standard in this instance is *would* cause injury, not *could*. He also asserts that the State's assertions of harassment and/or violence to the facility owners are speculative. In response, DHMH argues that the harm to the public interest is the risk of harassment or violence is itself. We observe on a practical note, that a custodian would virtually never be able to establish that harassment or violence will result from disclosure because it's highly unlikely that a party would request documents expressing such an intent. Therefore, requiring that a custodian affirmatively demonstrate that an act of harassment or violence will occur as a result of

disclosure would be self-defeating. However, a custodian can establish a greater risk of harassment or violence based on evidence submitted, and we conclude that DHMH did so in this case. As Mr. Dooley explained in his affidavit, abortion providers are subject to more threats or risk of physical injury than other healthcare providers. It was reasonable for the court to conclude that the risk of physical harm to those individuals outweighed the interest in disclosure. Mr. Dooley also noted that he has been involved in developing and implementing the abortion facility regulations and through his work specifically in the public health field, he is aware of the risks that disclosure of personal information can pose in these cases. DHMH also asserts that disclosure of personal information could have a chilling effect and deter providers from applying for licensure, thereby impacting the availability of these services in the state. DHMH asserts that when it developed the regulations requiring applications for licensure, it "sought to avoid imposing onerous burdens that would have the principal effect of discouraging providers from seeking licensure or from providing services at all." Additionally, it maintains that exposing individuals affiliated with abortion facilities who apply for licensure, to the risk of harassment or assault would significantly increase the burden on these facilities and potentially violate the mandate set forth in Health General Article §20-209(b): ". . . the State may not interfere with the decision of a woman to terminate a pregnancy." In further support, and to refute appellant's allegation that this is a speculative concern, DHMH cites cases from across the country when surgical abortion regulations were so burdensome that states were found to be in violation of the constitutional right to access. We conclude that the chilling effect of deterring providers from applying for licensure to provide surgical

abortions can be sufficient to warrant withholding personal information out of harm to the public interest. In *Haigley,* 128 Md. App. 194, and *Kirwan*, 352 Md. 74, this Court and the Court of Appeals rejected custodians' respective arguments that disclosure of particular information would have a chilling effect. In *Kirwan*, the University denied disclosure to information about parking tickets obtained by athletic team members and staff asserting that it would discourage students from reporting potential NCAA rules violations. 352 Md. at 87-88. In *Haigley*, the DHMH had denied information regarding a Hepatitis outbreak to one of the individuals who had contracted the disease, citing concerns that if restaurants knew the information collected in these investigations would be disclosed, they would not cooperate in future investigations by the Department. 128 Md. App. at. 227. In both cases, the Courts were not persuaded that any possible chilling effect was substantial enough to warrant non-disclosure. To the contrary, in the instant case, the chilling effect relates to a statutorily and constitutionally guaranteed right. The effect of deterring health care organizations from providing medical services to which access to is guaranteed by law, is greater than the effects asserted in *Haigley* and *Kirwan*, namely discouraging NCAA violations and cooperation with disease outbreak investigations. In conclusion, DHMH sustained its burden of explaining a reasonable and support explanation for withholding the information and the circuit court properly balanced the interests of disclosure and harm to the public interest. Accordingly, we decline to find error.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.

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

§ 4-101. DEFINITIONS

(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:

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

(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

(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 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

(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 applicant for the purpose of contacting the applicant.

§ 4-331. INFORMATION ABOUT PUBLIC EMPLOYEES

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

(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:

(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.

§ 4-343. IN GENERAL

Unless otherwise provided by law, if a custodian believes that inspection of a part of a public record by the applicant would be contrary to the public interest, the custodian may deny inspection by the applicant of that part of the record, as provided in this part.

§ 4-358. TEMPORARY DENIALS

(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.

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;

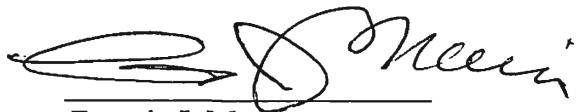
(6) Pertinent safety practices, including the control of fire and mechanical hazards;

(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 that two (2) copies of the foregoing Brief of Petitioner were served, via first class, postage prepaid mail, on: Joshua Auerbach, Esquire, Assistant Attorney General, Office of the Attorney General, 200 Saint Paul Place, Baltimore, Maryland 21202, on this 29th day of September, 2015.



Francis J. Manion
American Center for Law & Justice