



**FEATHERSTONHAUGH,
WILEY & CLYNE, LLP**
ATTORNEYS AND COUNSELLORS AT LAW

99 PINE STREET
ALBANY, NEW YORK 12207
WEBSITE: FWC-LAW.COM

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JAMES D. FEATHERSTONHAUGH
jdf@fwc-law.com

PHONE: (518) 436-0786
FAX: (518) 427-0452

HAND DELIVERED

April 25, 2014

Letizia Tagliaferro
Executive Director
New York State Joint Commission on Public Ethics
540 Broadway
Albany, NY 12207

RE: Notice of Appeal of Denial of an Application for Exemption to Source of Funding Regulation

Dear Ms. Tagliaferro:

Please be advised that our firm represents Family Planning Advocates of New York State (“FPA”) in connection with the appeal of the denial of an application for an exemption from source of funding regulations. FPA was informed by letter dated April 4, 2014 addressed to Ms. Ronnie Pawelko, FPA general counsel, sent from Daniel J. Horwitz, chair of the New York State Joint Commission on Public Ethics (“JCOPE”) and five additional members, that the application:

[D]id not present sufficient evidence demonstrating that compliance with the disclosure requirement would create a ‘substantial likelihood’ of harm to its sources of funding (including individuals and property associated with those sources). Rather the evidence presented was too remote and speculative to establish a substantial likelihood of harm.

Pursuant to 19 NYCRR 938.6, this letter serves as FPA’s appeal of JCOPE’s denial of the application for exemption. A central issue in this proceeding is the statutory standard found in

Legislative Law § 1-h which states as follows:

[A]ny corporation registered pursuant to article seven-A of the executive law that is qualified as an exempt organization by the United States Department of the Treasury under I.R.C. § 501(c)(4) and whose primary activities concern any area of public concern determined by the commission to create a substantial likelihood that application of this disclosure requirement would lead to harm, threats, harassment, or reprisals to a source of funding or to individuals or property affiliated with such source, including but not limited to the area of civil rights and civil liberties and any other area of public concern determined pursuant to regulations promulgated by the commission to form a proper basis for exemption on this basis from this disclosure requirement[.]

FPA also directs the Commission's attention to the Bill Jacket of the Public Integrity Reform Act of 2011 ("PIRA"), which provides guidance in determining the legislative intent of the statute. The Bill Jacket unambiguously states in the Introducer's Memorandum in Support that:

The bill expressly identifies the area of "civil rights and civil liberties" as one area in which organizations are expected to qualify for such an exemption in the Joint Commission's regulations. Among other issues included in this area, organizations whose primary activities focus on the question of abortion rights, family planning, discrimination or persecution based upon race, ethnicity, gender, sexual orientation or religion, immigrant rights, and the rights of certain criminal defendants are expected to be covered by such an exemption.

FPA submitted an application for exemption from disclosing sources of contributions on October 25, 2013. NARAL Pro-Choice New York, another 501(c)(4) organization that supports abortion rights, also submitted an application for exemption on May 1, 2013. What is most notable about FPA's application is that it cites to nearly identical evidence that was submitted by NARAL Pro-Choice New York; the only organization that was granted an exemption from JCOPE. For example, both the FPA and NARAL respective applications submitted compelling evidence by the National Abortion Federation ("NAF") which gave specific statistics and incidents of violence against abortion providers in the United States between 1977 and 2011. According to the NAF, since there has been at least 8 abortion-related murders, 4 cases of kidnapping, 530 cases of stalking and 426 death threats against abortion-providers since 1977 in the United States and Canada. As recognized by the dissenting JCOPE members:

The majority has not explained, nor can it, why these very similar applications have failed and NARAL's did not.

In light of the clear legislative intent of PIRA and applications submitted by other pro-choice organizations, the Majority's interpretation that "the evidence presented [by FPA] was too remote and speculative to establish a substantial likelihood of harm" is clearly erroneous after considering all of the evidence in the record. 19 NYCRR 938.7(c).

By way of background, FPA is a civil rights and civil liberties 501(c)(4) organization that supports abortion rights and access. FPA's members include all nine of the Planned Parenthood affiliates in New York State. All of these Planned Parenthood affiliates provide abortion care at their health centers. There are several reasons why the Majority's determination was clearly erroneous.

First, JCOPE ignored and had no meaningful discussion of evidence set forth in the application proffered by FPA. Had JCOPE conducted a meaningful dialogue of either the application or the applicant, JCOPE would have recognized that the majority of the evidence submitted by FPA was specific acts of "harms, threats, harassment or reprisals" to FPA itself and its Planned Parenthood members. Due to these well-documented direct threats at FPA's members and FPA itself, it is clearly erroneous for the Majority to view the evidence as "too remote and speculative".

Second, the Majority's decision creates a subjective and inoperable framework in determining whether an applicant has demonstrated a "substantial likelihood" of harm to its sources of funding. Because it is beyond dispute that Planned Parenthood and other organizations that support abortions rights and access, have sustained a longstanding pattern of violence, it is highly likely that other threats of harm and harassment will only increase after the sources and members who support pro-choice organizations are disclosed and known to those capable of such acts.

Finally, the fact that numerous other tribunals have determined that other pro-choice organizations have demonstrated a clear and longstanding pattern of violence establishes a strong presumption that the Majority's determination was erroneous and there is a clear "substantial likelihood of [further] harms, threats, harassment or reprisals".

For example, as recognized in a recent March 17, 2014 letter from Jonathan Karmel, Department of Health Records Access Appeals Officer addressed to an individual attempting to gather information concerning abortion services in New York State, the Department of Health agreed that there is a possibility that disclosing information concerning abortion providers would endanger the lives or safety of those individuals. See, NYS DOH FOIL Appeal letter attached hereto as Exhibit "A". In that letter, DOH, who also considered the NAF statistics, specifically held that:

Recognizing the risk to life and safety, the Committee on Open Government has opined that DOH may withhold the names and addresses of physicians who perform abortions, "in view of the violence that has been committed in New York and elsewhere in relation to abortion

providers.” Advisory Opinion No. 11239; see also, American Broadcasting Companies v Siert, 110 Misc2d 744, 751 (Sup. Ct. N.Y. County 1981), holding that when disclosure would “expose [licensee] applicants and their families to danger to life or safety,” POL 87(2)(f) is properly asserted. More recently, the NYS Appellate Division, First Department, has recognized the need to protect the identities of those involved in the manufacturing and marketing of RLJ-486 or Mifepristone (medical abortion pill) in a non-FOIL related matter, agreeing that they could be targeted for harassment or violence. Dance Laboratories v. Chemical Works of Ciedon Richter Limited, 274 AD2d 1,2,9 (NY App Div., 1st Dept. 2000).

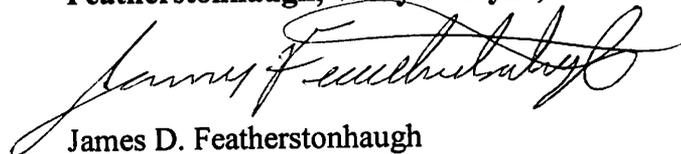
Additionally, the U.S. Court of Appeals, D.C. Circuit upheld the redaction of the names and addresses of individuals and businesses associated with the development, manufacturing, and FDA approval of Mifepristone, in light of abortion-related violence, under the Federal Freedom of Information Act (“FOIA”). Judicial Watch, Inc. v Food and Drug Administration, 449 F3d 141, 153 (U.S. District Ct., D.C. Cir. 2006). In that case the court held that:

[T]he FDA fairly asserted abortion-related violence as a privacy interest for both the name and addresses of persons and businesses associated with [M]ifepristone [the medical abortion pill], and that “evidence of abortion clinic bombings” and “websites that encourage readers to look for [M]ifepristone’s manufacturing locations and then kill or kidnap employees,” was sufficient to show a privacy interest in withholding the information under FOIA that outweighed the public interest in the names and addresses sought. Id.

In the collective view of the determinations of numerous other tribunals, the aggregated applications seeking exemption from source of funding regulations, and the legislative intent of PIRA, the Majority’s narrow interpretation of the source of funding regulation exemption requirements was erroneous and created an excessively burdensome standard for applicants to meet. Accordingly, FPA respectfully requests that the judicial hearing officer issue a written and final decision that reverses the Majority’s determination and grants Family Planning Advocates’ application for an exemption to the Joint Commission on Public Ethics source of funding disclosure requirements.

Very truly yours,

Featherstonhaugh, Wiley & Clyne, LLP



James D. Featherstonhaugh

cc: Ronnie Pawelko

EXHIBIT A

Nirav R. Shah, M.D., M.P.H.
Commissioner

NEW YORK
state department of
HEALTH

Sue Kelly
Executive Deputy Commissioner

March 17, 2014

Mr. John P. Margand
670 White Plains Road, Suite 322
Scarsdale, NY 10583

Re: 3rd FOIL Appeal # 13-04-213

Dear Mr. Margand:

This letter resolves your administrative appeal to the New York State Department of Health ("DOH") from its denial of Greg Pfundstein's request for certain records pursuant to the Freedom of Information Law ("FOIL"), Public Officers Law ("POL") Article 6.

On April 11, 2013, Mr. Pfundstein submitted a FOIL request, asking:

1. How many inspections have been conducted of Article 28 licensed diagnostic treatment centers that offer abortion services since January 1, 2000?
2. How many inspections have been conducted of facilities that offer abortion services but are not licensed under Article 28 since January 1, 2000?
3. Please provide all records of any violations that were found, and the corrective/enforcement action taken resulting from inspections of Article 28 licensed diagnostic treatment centers that offer abortion services since January 1, 2000 and resulting from inspections of facilities that offer abortion services but are not licensed under Article 28 since January 1, 2000.
4. Please provide any records relating to investigations or civil enforcement actions for operating a facility that performs abortion services, for failure to comply with the requirements of Public Health Law Section 2801-A.

On May 13, DOH received the first appeal for this FOIL request, which raised a constructive denial argument. On May 28, I denied the appeal. On August 19, DOH agreed to provide records on a rolling basis, and records partially responsive to this request were provided on September 30 and October 8. On October 23, DOH received the second appeal for this FOIL request, which raised another constructive denial argument and further argued that the redactions made to the documents provided on September 30 and October 8 were improper. On November 6, 2013, I denied that appeal. On February 5, 2014, DOH released its final batch of documents to Mr. Pfundstein, which completed DOH's response to this FOIL request. On

March 4, I received the third appeal in this matter, which was faxed to the Records Access Office ("RAO") on March 3 at 5:18 pm.

This third appeal makes the same arguments raised in the second appeal, and I will therefore reiterate the same reasons for denying the appeal that were contained in my November 6, 2013 denial.

First, DOH responded to your request in a timely and complete manner. Under POL § 89(3)(a), an agency is required to provide "a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied." Due to the large volume of documents released to Mr. Kahrmann, DOH produced documents responsive to this request on a rolling basis as they were located and reviewed to ensure they could be released under the Personal Privacy Protection Law (POL Article 6-A) and that it was appropriate to release them under FOIL. The RAO estimated that DOH would complete its response to this FOIL request by February 5, 2014 and DOH fully complied with this deadline. RAO's response date was therefore reasonable under the circumstances of this request. See Matter of Data Tree v Romaine, 9 NY3d 454, 465; Matter of New York Times Co. v City of NY Police Dept., 103 AD3d 405, 406-407.

Second, DOH has already provided Mr. Pfundstein with thousands of pages of records responsive to this FOIL request. The records that have been released are: 1) a spreadsheet providing the number of routine inspections that have been conducted of 25 Article 28 licensed diagnostic and treatment centers and ambulatory surgery centers which have "abortion services" listed on their operating certificate, responsive to Item 1 of the request; 2) Statements of Deficiencies ("SODs") prepared by the Department in connection with inspections of Article 28 licensed diagnostic treatment centers whose operating certificates indicate that they provide abortion services, and corresponding Plans of Correction ("POCs") prepared by inspected centers, responsive to Item 2 of the request; and 3) Records related to the civil enforcement action concerning one of the twenty-five Article 28 licensed diagnostic and treatment centers, responsive to Item 4 of the request. Although you have only indicated that you are appealing the effective denial of "Item 3 of the Foundation's April 11, 2013 request for records," this appeal decision addresses the types of FOIL exemptions you are challenging in your appeal, in regards to all four items of your original FOIL request. These exemptions include: 1) material that, if disclosed, would be an unwarranted invasion of personal privacy under POL § 87(2)(b); 2) material that if disclosed, could endanger the life and safety of individuals, under POL § 87(2)(f); and 3) quality assurance material that is exempt from disclosure by statute pursuant to POL § 87(2)(a), under Public Health Law ("PHL") § 2805-m and Education Law § 6527(3).

Unwarranted Invasion of Personal Privacy

FOIL expressly exempts from disclosure records and portions of records that, if disclosed, would constitute an "unwarranted invasion of personal privacy." POL § 87(2)(b). POL § 89(2)(b) defines the "unwarranted invasion of personal privacy" to include, among other things, the disclosure of information contained in medical histories and medical records, where that information can be attributed to an identifiable individual. POL § 89(2)(b)(i) and (ii). Disclosure of

such information does not constitute an unwarranted invasion of personal privacy if "identifying details" are redacted, thereby preventing the attribution of the information to an identifiable individual. POL § 89(2)(c)(i). Agencies are authorized to delete such identifying details when they disclose records in response to FOIL requests. POL § 89(2)(a).

In determining whether information is "identifying," the standards for de-identification set forth in the federal regulations promulgated under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") are instructive here. These standards recognize that identifying details may include not only directly identifying information such as name or social security number, but also information that indirectly identifies a patient, such as age, location, or date of medical service. See 45 CFR § 164.514. Likewise, HIPAA forbids the release of information that "could be used alone or in combination with other information to identify an individual who is a subject of the information." 45 CFR 164.514(b)(2)(ii).

The records that have been released contain information about patients' medical condition, as well as information that could be used to identify a particular patient whose care was examined in the course of the inspection. See 45 CFR § 164.514(a), (b) and (c). Such material is properly redacted under POL § 89(2)(b)(ii). Although you argue that the "foundation's FOIL request by its very terms does not seek private medical information," the only records responsive to your third request nevertheless contain such private medical information, which may be redacted.

Endanger the Life or Safety of Any Person

You are correct that in the records that have been provided to you, DOH has redacted the identities of facilities that provide abortion services. Under POL § 87(2)(f), an agency may deny records that "if disclosed could endanger the life or safety of any person." To establish that records fall under this exception, an agency is not "required to prove that a danger to a person's life or safety will occur if the information is made public. . . . Rather, there need only be a possibility that such information would endanger the lives or safety of individuals." Stronza v Hoke, 148 AD2d 900, 901 (emphasis added). The possibility of such danger was expressly acknowledged by Congress in its enactment of the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), 18 U.S.C. § 248 et seq., which established "[f]ederal criminal penalties and civil remedies for certain violent . . . conduct that is intended to injure, intimidate, or interfere with persons seeking to obtain or provide reproductive health services."

In enacting FACE, Congress made the following significant specific findings:

that there was '[a] nationwide campaign of anti-abortion blockades' and violence that was 'barring access to facilities that provided abortion services,' (citing S. Rep. No. 117, 103d Cong., 1st Sess. 3 (1993); H.R. Rep. No. 306, 103d Cong., 1st Sess. 6 (1993)) that abortion opponents had committed at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, 2 kidnappings, 327 clinic invasions, 71 chemical attacks, and the murder of Dr.

David Gunn, a physician who had performed abortions in Florida and several neighboring states; (citing S. Rep. at 3, 6; H.R. Rep. at 6-7; Conf. Rep., Findings and Purpose, *supra*, at 15, no.2). . . . that ‘the avowed purpose of this conduct was to eliminate . . . abortion services by closing clinics and intimidating doctors; (citing S. Rep. at 11) . . . and that state and local law enforcement authorities have proved unable or unwilling to address effectively ‘the systemic and nationwide assault that is being waged against health care providers and patients.’ (citing S. Rep. at 7, 14; H.R. Rep. at 6). U.S. v McMillan, 946 FSupp. 1254, 1261 (1995).

The need to protect the identities of abortion providers is further demonstrated by the many cases of extreme violence that have occurred against abortion providers, as noted above. According to the National Abortion Federation (“NAF”), since 1977, in the United States and Canada, there have been at least 8 abortion-related murders, 4 cases of kidnapping, 530 cases of stalking and 426 death threats against abortion-providers. Examples of violent crimes that have taken place in the United States, against providers who perform abortions include:

- Dr. David Gunn, who was shot to death at a protest in Pensacola, Florida on March 10, 1993.
- Dr. John Britton, who was murdered outside an abortion facility in Pensacola, Florida on July 29, 1994.
- An unnamed doctor and abortion provider was shot at in his home in Perinton, New York on October 28, 1997.
- Dr. Barnett Slepian, who was killed at his home in Amherst, New York on October 23, 1998.
- Dr. George Tiller, who was shot to death in Wichita, Kansas on May 31, 2009.

The violence is not necessarily directed at specific physicians, but threatens anyone working in or around facilities that perform abortions, such as:

- James Barrett, a clinic escort who was killed on July 29, 1994.
- Shannon Lowney and Lee Ann Nichols, clinic receptionists, who were murdered on December 30, 1994. (During these two consecutive attacks on abortion clinics, five other employees were wounded).
- Robert Sanderson, an off-duty police officer who worked as a security guard at an abortion clinic, died in a bombing of an abortion clinic on January 29, 1998, and a nurse was severely injured.

Moreover, there is a history of property-based violence against facilities that offer abortion services. According to the NAF, since 1977 in the United States and Canada, additional property-based crimes committed against abortion providers include 42 bombings, 181 cases of arson, 99 cases of attempted bombings or arsons, 1,490 instances of vandalism, 2,218 cases of trespassing, 100 butyric acid (stink bomb) attacks, 663 anthrax and bioterrorism threats, and 183 cases of burglary. Less violent attacks include 15,479 cases of hate mail and

harassing phone calls, 177 reports of suspicious packages, 657 bomb threats, and since 2012, 79 cases of obstruction. There have also been 775 reports of clinic blockades, with 33,838 related arrests. Some of the more recent property-based crimes have occurred as recently as 2007.

Recognizing the risk to life and safety, the Committee on Open Government has opined that DOH may withhold the names and addresses of physicians who perform abortions, “in view of the violence that has been committed in New York and elsewhere in relation to abortion providers.” Advisory Opinion No. 11239; see also American Broadcasting Companies v Siebert, 110 Misc2d 744, 751 (Sup. Ct. N.Y. County 1981), holding that when disclosure would “expose [licensee] applicants and their families to danger to life or safety,” POL 87(2)(f) is properly asserted. More recently, the NYS Appellate Division, First Department, has recognized the need to protect the identities of those involved in the manufacturing and marketing of RU-486 or Mifepristone (medical abortion pill) in a non-FOIL related matter, agreeing that they could be targeted for harassment or violence. Danco Laboratories v. Chemical Works of Gedon Richter Limited, 274 AD2d 1, 2, 9 (NY App Div., 1st Dept. 2000).

In 2006, the U.S. Court of Appeals, D.C. Circuit upheld the redaction of the names and addresses of individuals and businesses associated with the development, manufacturing, and FDA approval of Mifepristone, in light of abortion-related violence, under the Federal Freedom of Information Act (“FOIA”). Judicial Watch, Inc. v Food and Drug Administration, 449 F3d 141, 153 (U.S. District Ct., D.C. Cir. 2006). The court held that:

[T]he FDA fairly asserted abortion-related violence as a privacy interest for both the name and addresses of persons and businesses associated with [M]ifepristone [the medical abortion pill]. The privacy interest extends to all such employees, and the FDA need not ‘justify the withholding of names on an individual by individual basis under FOIA Exemption 6.’ Id.

The court held that “evidence of abortion clinic bombings” and “websites that encourage readers to look for [M]ifepristone’s manufacturing locations and then kill or kidnap employees,” was sufficient to show a privacy interest in withholding the information under FOIA that outweighed the public interest in the names and addresses sought. Id.

In your appeal letter you argue that “abortion providers go to great lengths to publicize and promote their services, locations and identities to the general public. They advertise widely on the Internet and in local publications, and have done so for many years.” Therefore, you argue that revealing the results of State inspections for these well-known providers will not endanger the safety of anyone. While it is certainly true that some abortion providers advertise this particular service, others do not and are not going to “great lengths to publicize and promote their [abortion] services.” DOH is not in a position to determine which health care providers publicize and promote abortion services and which do not. Also, regardless of whether providers advertise that they perform abortion services and possibly endanger their own lives or safety, I agree with RAO that there is a possibility that it would endanger the lives or safety of individuals if DOH publicizes which health care providers are providing abortions.

This includes not only the lives of physicians, but also nurses, maintenance staff, receptionists, security guards, patients, and contractors of the facilities. Thus, I believe FOIL permits DOH to redact information that identifies the names of abortion facilities to which these incidents/complaints relate.

Exempted From Disclosure by State or Federal Statute

Under POL § 87(2)(a), DOH is prohibited from disclosing records or portions of records that are specifically exempt from disclosure under state or federal statute. In this matter, DOH is prohibited from disclosing records that are confidential under PHL § 2805-m and Education Law § 6527(3). The SODs and POCs which have been produced have been redacted to remove information deemed confidential under New York State Education Law § 6527(3), which protects the proceedings and records relating to performance of a medical or quality assurance review function or a medical malpractice prevention program. For the same reason, the documents have been redacted in accordance with PHL § 2805-m, which assures the confidentiality of any documents, records or committee actions the facility is required to collect and maintain in connection with a quality assurance review function or medical malpractice prevention program pursuant to § 2805-j or as part of the facility's required incident reporting to DOH pursuant to § 2805-l.

The NYS Court of Appeals has emphasized that the quality assurance privilege

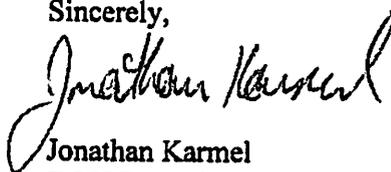
ensure[s] the proper delivery of services and the maintenance and improvement in quality of care. . . . [This] privilege . . . attaches to the proceedings and work product of the hospital quality assurance committees [in order to] 'promote[] the quality of care through self-review without fear of legal reprisal.' Furthermore, such protections 'enhance the objectivity of the review process' and ensure that the committees 'may frankly and objectively analyze the quality of health services rendered.' The cloak of confidentiality covering quality assurance procedures and materials 'is designed to encourage thorough and candid peer review . . . and thereby improve the quality of . . . care.' Matter of Subpoena Duces Tecum, 99 NY2d 434, 439 (2003) (citing Katherine F. v State of NY, 94 NY2d 200, 205 (1999); Logue v Velez, 92 NY2d 13, 17 (1998)).

In Smith v Delago, a complaint was made against a hospital, and DOH investigated the complaint and reviewed the medical care provided. 2 AD3d 1259, 1260-61 (3d Dept. 2003). The court held that under FOIL, DOH was required to disclose its SODs, redacted to remove information that is confidential under PHL § 2805-m. The Court held that other documents regarding the complaint were found to be privileged under PHL § 2805-m, including the circumstances pertaining to the patient's care that the hospital was required to and did report to DOH, and all interviews and documents made available to DOH in furtherance of the hospital's internal quality assurance review obligations under PHL Article 28. Id. at 1261. The purpose of

this statutory protection is “to promote the quality of health care through self-review without fear of legal repercussions by assuring confidentiality to those performing the review.” Id. at 1261.

For the reasons stated above, your appeal is denied in its entirety. This final appeal determination applies to all of the Department’s productions in this matter, and therefore encompasses my prior appeal decision of November 6, 2013. Therefore, judicial review of this final determination, which includes my prior November 6, 2013 appeal determination, may be obtained pursuant to CPLR Article 78.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan Karmel". The signature is written in a cursive, flowing style.

Jonathan Karmel
DOH Records Access Appeals Officer

cc: James P. O’Hare, Acting DOH Records Access Officer
Robert J. Freeman, Executive Director, NYS Committee on Open Government
James E. Dering, DOH General Counsel