IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
10th Judicial District

STATE OF KANSAS, Plaintiff, VS. COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI, INC., Defendant.	)	Case No. 07CR 2701 Division 5

STATE'S RESPONSE TO MOTION TO QUASH SUBPOENA DUCES TECUM

The State offers the following response to the Motion to Quash Subpoena Duces Tecum filed by the Kansas Department of Health and Environment (KDHE). The stated authority for KDHE's motion is K.S.A. 60-245a(b) and K.S.A. 65-445.

I. SUMMARY

Kansas law clearly provides for the admissibility of relevant evidence and requires compliance with a subpoena for such evidence unless the evidence is privileged or other protected matter and no exception applies. K.S.A. 60-245(c)(3)(A)(iii). The documents sought were forms designed by KDHE for compliance with K.S.A. 65-445 and 65-6703 and are completed by abortion providers. The legislative purpose for the creation of such forms is to ensure compliance with state criminal late-term abortion laws. K.S.A. 65-445; K.S.A. 65-6703.

In fact, K.S.A. 65-445 expressly states that such documents may be used "in a criminal proceeding."

A. The Documents Sought Are Not Public Under the Kansas Open Records Act, But Are Clearly Within Reach of A Subpoena in a Criminal Case.

Nothing in the statute allows KDHE to avoid a subpoena in a criminal proceeding. Simply because a statute identifies documents as "confidential" does not place the documents out of reach of a subpoena. Confidential documents are routinely introduced in criminal proceedings and are obtained by subpoena.

The legislature clearly knows how to place documents beyond the reach of a subpoena and how to render documents inadmissible. For example, documents obtained by and provided to the State Review Board that oversees medical practitioners states that all such documents "shall be confidential, shall not be disclosed ***and shall not be subject to subpoena***...." K.S.A. 22a-243j(emphasis added).[1] This Court should not read language into the statute that does not exist, especially when such language works to defeat legislative intent. See e.g., State v. Ruiz-Reyes, 285 Kan. 650, 175 P.3d 849, 852 (2008); State v. Woolverton, 284 Kan. 59, 159 P.3d 985 (2007).

The word "confidential" in K.S.A. 65-445 places the documents, if produced in a manner that identifies the abortion provider, beyond the reach of a Kansas Open Records Act request; it does not allow defiance of a subpoena. Simply because documents are "confidential" does not render them inadmissible. See infra at pp. 6-8.

B. K.S.A. 65-445(c) Only Prevents the Public Disclosure of the Identity of the Abortion Provider by Open Records Request While the Subpoena at Issue Does Not Seek the Identity of the Abortion Provider.

Additionally, K.S.A. 65-445, by its express language, limits the "confidential" nature of the information to the identity of the abortion provider; not the data collected in the forms for statistical purposes.

K.S.A. 65-445(c) reads in part that the information obtained in the reports sought "shall

[1] See also, K.S.A. 8-225c(b); 40-3308; 65-1,113(b); 65-6002(d); 65-6154(a); 73-1228; 75-5556(d); 75-7427(k)(1); K.S.A. 22a-243; all these statutes explain express language placing the records beyond the reach of subpoena.

not be disclosed ***in a manner that would reveal the identity of any (physician or clinic) that submits a report under this section.***" K.S.A. 65-445(c)(emphasis added). The "confidentiality" clause is limited to the identity of the abortion provider. The KDHE forms do not disclose the identity of the abortion provider and that identity is not sought through the subpoena to KDHE.[2] Language later in section (c) also places limits on disclosure of the county or area of the state in which the termination of the pregnancy occurred. Again, this information is not on the forms sought and accordingly, even the confidentiality provision does not apply to the information sought.

C. The KDHE/Comprehensive Health Argument Defeats the Very Purpose of the Reporting Law – the Enforcement of Kansas Abortion Laws; Thereby Defeating Legislative Intent While Claiming to Honor Such Intent.

KDHE's and Comprehensive Health's argument that only the Attorney General can ever see these documents essentially renders the Kansas late-term abortion statute unenforceable and is contrary to the clear wording of the statue. The statute merely allows the Attorney General to have access to all of the information, including the identity of the abortion provider, "upon a showing that a reasonable cause exists to believe that a violation of this act has occurred." K.S.A. 65-445(c).

In other words, the Attorney General can access the records without subpoena if the Secretary is satisfied with the showing. Nothing in the language, however, precludes anyone else by seeing the information, absent provider information, for a criminal proceeding. Law enforcement, courts, witnesses and many others would need to see and view the information in a criminal prosecution.

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[2] KDHE assigns a random code to identify the abortion provider. Only the code is reflected on the RITP forms sought by the subject subpoena. Accordingly, the "confidential" information of K.S.A. 65-445(c) is not even sought by the subpoena, nor revealed if the subpoena is honored. *See*, Deposition of Lorne Archer Phillips, at 40-41 (August 26, 2004)(Exhibit 1) .

It is absurd to argue that no one outside the purview of the Attorney General's office can ever obtain the information. The Attorney General's office does not have original jurisdiction to prosecute violation of these laws.

These records, which do not contain patient identities, do not even identify the abortion provider and have been previously produced by KDHE, clearly are admissible and can be obtained by subpoena in this criminal prosecution.

The records are also admissible, even if all of KDHE's arguments succeed, because they were obtained by subpoena by the Attorney General and are in the possession of the District Attorney of Johnson County with the express permission of the Judge who originally subpoenaed the documents. See *infra* at pages 14-15. In other words, this office has the documents pursuant to express court authority and all the subpoena requires is for KDHE to perform the ministerial duty of confirming that they originally appropriately complied with the initial subpoena.

II. THE DISTRICT COURT HAS AUTHORITY TO QUASH OR MODIFY A SUBPOENA ONLY IF IT REQUIRES DISCLOSURE OF PRIVILEGED OR OTHER PROTECTED MATTER.

A. The Information Sought Is Within the Reach of Subpoena, Is Relevant and Is Not Privileged.

Under the Code of Criminal Procedure, the prosecution and the accused shall be entitled to the use of subpoenas to obtain the attendance of witnesses. K.S.A. 22-3214(1). Such subpoenas shall be issued and served in the same manner and the disobedience thereof punished the same as in civil cases. Id. K.S.A. 22-3214 does not mention motions to quash. However, under the Code of Civil Procedure, the court by which a subpoena was issued has the authority to quash or modify the subpoena "if it requires disclosure of privileged or other protected matter and no exception or waiver applies." K.S.A. 60-245(c)(3)(A)(iii).

The enforcement of a subpoena duces tecum is left to the discretion of the enforcing

tribunal. In re Tax Appeal of Collingwood Grain, Inc., 257 Kan. 237, 255, 891 P.2d 422 (1995).

Generally speaking, a subpoena duces tecum may be used to compel the production of any proper documentary evidence, which is desired for the proof of an alleged fact relevant to the issue before the court or officer issuing the subpoena, provided that the evidence which it is thus sought to obtain is competent, relevant, and material. State ex rel. Stephan v. Clark, 243 Kan. 561, 568, 759 P.2d 119 (1988).

K.S.A. 60-407(f) allows the admission of all relevant evidence, unless otherwise provided by statute. Relevant evidence is defined as "evidence having any tendency in reason to prove any material fact." K.S.A. 60-401(b). The determination of relevancy is a matter of logic and experience, not a matter of law. Nevertheless, there must be some material or logical connection between collateral facts and the inference or result they are suppose to establish for them to be competent. State v. Trammel, 278 Kan. 265, 282, 92 P.3d 1101 (2004).

The defendant, for example, is entitled to present the theory of his or her defense and the exclusion of evidence that is an integral part of that theory violates a defendant's fundamental right to a fair trial. State v. Stano, 284 Kan. 126, 131, 159 P.3d 931 (2007). Few rights are more fundamental than that of an accused to present witnesses in his own defense. Id. [citing Chambers v. Mississippi, 410 U.S. 284 (1983)]. The right to present a defense is subject to statutory rules and case law interpretation of rules of evidence and procedure. Id.

The issue then becomes whether the subpoena duces tecum can be enforced or modified such that there is no required disclosure of privileged or other protected matter and no exception or waiver applies.

In the present case, this has already been accomplished as KDHE uses a code to identify the abortion provider and the identity is not reflected on the documents sought. K.S.A. 65-

445(c) only exempts the identity of the abortion provider from the Kansas Open Records Act and allows such information to be released by subpoena. Since the abortion providers' identity is not sought and will not be provided, 65-445 is not implicated. Further, since patient identities are not in the reports, and are not sought, no privilege exists and neither has one been claimed by KDHE.

III. "INFORMATION" THAT IS LABELED "CONFIDENTIAL" AND "SHALL NOT BE DISCLOSED" UNDER K.S.A. 65-445 IS ADMISSIBLE AS EVIDENCE IN THE COURTS OF KANSAS.

A. The Term Confidential Simply Exempts Specified Information from Disclosure Under the Kansas Open Records Act; It Does Not Support the Defiance of a Subpoena.

KDHE argues that K.S.A. 65-445(c) bars the district attorney from seeking records requested in the subpoena. He bases this upon K.S.A. 65-445(c), which provides that information "shall be confidential and shall not be disclosed in a manner that would reveal ... the identity of any medical care facility which submits a report to the Secretary under this section ...."

For now, without addressing the fact that the information sought does not reveal providers, the question then becomes whether "information" that is labeled "confidential" and "shall not be disclosed" is inadmissible as evidence in the courts of Kansas.

Under the Kansas Open Records Act (KORA), a public agency such as the KDHE "shall not be required to disclose" certain records. K.S.A. 45-221(a). The purpose of the language concerning confidential and shall not be disclosed is to exempt the information from the provisions of KORA.

B. The Legislature Has Placed Some Health Information Beyond the Reach of Subpoena By Expressly Stating So and Here it Has Chosen NOT to Do So.

The Legislature knows how to use language to make information not subject to a

subpoena or privileged or inadmissible as evidence. For example, under K.S.A. 8-255c(b), all medical records reviewed and maintained by the division "shall be kept confidential and shall not be disclosed except upon the order of a court of competent jurisdiction ... and shall not be subject to subpoena, discovery or other demand in any other administrative, criminal or civil matter." Under K.S.A. 22a-243(j), information acquired by the State Review Board "shall be confidential, shall not be disclosed and shall not be subject to subpoena, discovery or introduction into evidence in any civil or criminal proceeding...." Under K.S.A. 40-3308, all information disclosed to the Commissioner of Insurance "shall be given confidential treatment and shall not be subject to subpoena." Under K.S.A. 65-1,113(b), certain information "shall be confidential and shall not be disclosed or made public, upon subpoena or otherwise...." Under K.S.A. 65-6002(d), information relating to HIV or AIDS "shall be confidential and shall not be disclosed or made public, upon subpoena or otherwise...."

K.S.A. 65-6154(a) has the same language pertaining to emergency medical services information that is provided to the Board, which "shall be confidential and shall not be disclosed or made public, upon subpoena or otherwise...." The same goes for the Persian Gulf War Veterans Health Initiative under K.S.A. 73-1228, which makes the information confidential and shall not be disclosed, upon subpoena or otherwise. See also K.S.A. 75-5556(d)[trauma registry information shall be confidential and shall not be disclosed or made public, upon subpoena or otherwise]; K.S.A. 75-7427(k)(1)[information received by the Inspector General concerning fraud in programs administered by the Kansas health policy authority shall be confidential and shall not be disclosed or made public, upon subpoena or otherwise].

While many of these statutes contain exceptions, the Legislature certainly knows how to use language to make relevant information inadmissible in courts of law. Many of the statutes

cited above are in the very same chapter (65) of Kansas statutes and all apply to the agency at issue here.

In this case, the Legislature could have inserted language in K.S.A. 65-445(c) making the evidence confidential and not discloseable or made public "upon subpoena or otherwise" or make the evidence "not subject to subpoena ... in any civil or criminal proceeding," as K.S.A. 22a-243 provides.

C. Confidential Information Does not Equate with Inadmissible Evidence.

In Adams v. St. Francis Regional Medical Center, 264 Kan. 144, 955 P.2d 1169 (1998), the parents of a child who died due to alleged negligent medical treatment appealed the district court's decision that documents gathered by the State Board of Nursing in connection with its investigation of the child's death were protected by statutory privileges.

The Adams court cited United State v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) where the Supreme Court was called on to weigh the presidential privilege against the needs of the judicial process. The Supreme Court held that the fundamental demand of due process of law and the fair administration of justice required that the presidential privilege yield to the specific need for evidence in a pending case. The Adams Court stated:

> Privileges in the law are not favored because they operate to deny the factfinder access to relevant information. The Court in Nixon noted that privileges against forced disclosure are created by the Constitution, statute or common law, and whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed for they are in derogation of the search for the truth.

264 Kan. at 172. (Citing Nixon, 418 U.S. at 710).

The Adams court concluded that, while the interest in creating a statutory peer review privilege is strong, it was outweighed by the plaintiffs' fundamental right to have access to all the relevant facts. The district court's protective order denied plaintiffs that access and violated

their right to due process and a fair determination of their malpractice action against the defendants. The district court was ordered to conduct an *in camera* inspection and craft a protective order that would permit plaintiffs access to the relevant facts. The court could simply redact what was protected the grant plaintiffs access to the portions containing the relevant facts. 264 Kan. at 173-74.

In this instance, it makes perfect sense that the legislature did not place these documents beyond the reach of a subpoena because the very purpose of the statute is to assist in the enforcement of Kansas late-term abortion prohibitions. Further, the primary method of obtaining documentary evidence in a "criminal proceeding" is subpoena. The legislature did not place these records beyond the reach of a subpoena because they fully intended that if the records were relevant to a criminal proceeding, the records would be produced into evidence in that criminal proceeding, thus fulfilling legislative intent.

IV. THE ADMISSIBILITY OF KDHE BUSINESS RECORDS DOES NOT HINGE ON WHETHER THE PROFFERING PARTY IS THE DISTRICT ATTORNEY OR THE ATTORNEY GENERAL.

KDHE next argues that the subpoenaed evidence would be admissible if it was offered by the Office of the Attorney General for use in a criminal proceeding, but not by a county or district attorney. Under KDHE's argument, the accused could not subpoena the information either.

KDHE bases its argument on the following language from K.S.A. 65-445(c):

> Any information disclosed to the State Board of Healing Arts or the Attorney General pursuant to this subsection shall be used solely for the purposes of a disciplinary action or criminal proceeding.

In this case, the information disclosed to the Attorney General (assuming that the inquisition statute does not apply) is being used for the purposes of a criminal proceeding.

Had the Legislature wanted the Attorney General to ***exclusively*** prosecute violations of K.S.A 65-410 *et seq.*, it could have included that language in the Act. The legislature has done so in other statutes. *See, e.g.*, K.S.A. 47-425 [It shall be the duty of the attorney general to enforce the provisions of this act, and all acts amendatory thereto, together with the rules and regulations of the commissioner; and for such purposes the attorney general shall have original jurisdiction in investigations and prosecutions coextensive with that of local officers]; K.S.A. 65-6a48 [The attorney general shall enforce the provisions of this act. The attorney general or the duly authorized agents of the attorney general shall have access at all regular business hours to every retail establishment which sells or offers to sell meat, poultry, eggs or butter to the public]; K.S.A. 65-3506 [The office of the attorney general shall serve as the enforcement agency for the board of adult care home administrators]; K.S.A. 68-2255(f) [The attorney general shall represent the state in all actions and proceedings arising from this section regulating sexually-oriented highway signs]; and K.S.A. 74-5328 [The attorney general shall comply with such directions of the board and prosecute the action regulating psychologists on behalf of the state, but the county attorney of any county where a licensed psychologist has practiced, at the request of the attorney general, or of the board, shall appear and prosecute such action]. The fact that the legislature did not means that a criminal action may be brought by any prosecuting attorney.

A. The Legislature Knows How to Limit the Jurisdiction of Either the District Attorney or the Attorney General and Has Chosen Not to In This Instance.

Had the legislation intended that certain crimes be investigated solely by the Attorney General, it would have stated that in the language of the statute. The legislature has previously given the Attorney General exclusive authority to prosecute. For example, proceedings filed under the Kansas Sexually Violent Predator Act are solely within the discretion of the Office of the Attorney General. State v. Chesbro, 35 Kan.App.2d 662, 668, 134 P.3d 1 (2006). K.S.A. 59-

29a04(a) states that the Attorney General may file a petition alleging that a person is a sexually violent predator.

Similarly, K.S.A. 22-5413 states, "Any action to recover judgment for such expenditures shall be prosecuted by the Attorney General, who may require the assistance of the county attorney...." K.S.A. 16-327 states the Attorney General may, at the request of the Secretary of State, initiate an action to recover payments required to be redeposited to the trust under K.S.A. 16-326. If the legislature wanted to limit the jurisdiction of the District Attorney to prosecute false writing cases, or to give the Attorney General the exclusive jurisdiction to prosecute them, it would have so stated in the language of the statute.

In State of Kansas v. *ex rel.* Hecht, District Attorney v. Felker, Mayor of Topeka (Exhibit 2) the Shawnee County District Attorney filed a petition for ouster against the mayor. The only issue that District Court Judge (now Supreme Court Justice) Eric Rosen addressed was whether the District Attorney had standing to bring an ouster action against the mayor on the remaining allegations. The mayor argued that the Campaign Finance Act controlled who may bring an ouster action to remove elected officials from office for violating its provisions. Mayor Felker argued that the Campaign Finance Act vests sole authority in the Attorney General to bring any ouster action against him. Justice Rosen noted that the District Attorney had standing under Chapter 60 to bring the ouster petition. The pertinent Chapter 25 statutory provisions of the Campaign Finance Act did not enjoin a district attorney from commencing an ouster action against a person who holds a non-state office. The mayor's motion to dismiss was denied.

B. Duties of the District Attorney Include the Authority and Responsibility to Present This Evidence.

A prosecution shall be commenced by filing a complaint with a magistrate. A copy of the complaint shall be supplied to the county attorney and to the defendant. K.S.A. 22-2301(1).

All prosecutions for violations of the criminal laws of Kansas shall be in the name of the State of Kansas. K.S.A. 22-2104. The Kansas Code of Criminal Procedure is intended to provide for the just determination of every criminal proceeding. Its provisions shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. K.S.A. 22-2103.

It shall be the duty of the District Attorney to appear in the several courts of the judicial district in which the district attorney is elected and to prosecute, on behalf of the people therein, all matters arising under the laws of the state. K.S.A. 22a-104(a).

The county or district attorney is the representative of the state in criminal proceedings and has the authority to dismiss any charge or reduce any charge. State v. Ratley, 253 Kan. 394, 855 P.2d 943 (1993). The prosecuting attorney has broad discretion in discharging his or her duty and scope of this discretion extends to power to investigate and to determine who shall be prosecuted and what crimes shall be charged. State v. Williamson, 253 Kan. 163, 853 P.2d 56 (1993). The prosecutor has the discretion to charge whatever crimes are indicated by the facts. State v. McClanahan, 251 Kan. 533, 836 P.2d 1164 (1992). See also State v. Turner, 223 Kan. 707, 576 P.2d 644 (1978)[the district attorney is the representative of the state in criminal proceedings; he controls criminal prosecutions and has authority to dismiss any charge or to reduce any charge].

Plaintiff has standing under Chapter 22 to prosecute violations of Chapter 21 and Chapter 65 of the Kansas Statutes Annotated. In fact, the legislature defined "prosecuting attorney" as any attorney who is authorized by law to appear for and on behalf of the State of Kansas in a criminal case. The definition includes the attorney general, the county attorney, or district attorney, or their assistants, in addition to any special prosecutor. K.S.A. 22-2202(17).

C. Records That Are Lawfully Obtained by the Executive Branch Can Be Used by the Executive Branch.

To the extent that an argument is being made that evidence lawfully recovered by the Attorney General cannot be shared with other prosecuting attorneys, some guidance can be found in Scott v. Werholtz, 38 Kan.App.2d 668, 171 P.3d 646, *petition for review pending* (2007). Vincent Scott argued his rights were violated when his DNA evidence lawfully obtained during an investigation of a burglary case was compared with DNA evidence in other unsolved cases. Scott's counsel was not ineffective because "once law enforcement lawfully obtained Scott's blood sample and DNA evidence, no privacy interest persisted in this evidence. Scott's DNA profile could be used in the investigation of other crimes for identification purposes." 38 Kan.App.2d at 668. Similarly, the evidence recovered by the Attorney General could be used by other prosecuting attorneys, as the Attorney General does not have exclusive jurisdiction to prosecute crimes under Chapter 21 or under Chapter 65 of the Kansas statutes.

In State v. Glynn, 38 Kan.App.2d 437, 166 P.3d 1075 (2007), *rev. denied* 285 Kan. ___ (2008), Glynn argued that three separate searches occurred concerning his DNA: when his saliva was obtained; when his saliva was used to obtain his DNA to compare to the DNA at the home invasion case; and when the DNA was entered into the COTIS to identify characteristics that could be compared to the DNA of the material found in the victim's truck in a separate case. The State argued that law enforcement officers are not prohibited from using evidence obtained in one case in an unrelated case and that there is no additional seizure or invasion of Glynn's privacy because the initial saliva sample was obtained by the use of a valid search warrant. The Glynn court noted that once law enforcement has lawfully obtained a blood sample and DNA therefrom, a defendant has no additional constitutional protected privacy in that evidence and it

may be used in the investigation of other crimes for identification purposes without the necessity of a separate warrant. 38 Kan.App.2d at 448. The trial court correctly denied Glynn's motions to suppress and the DNA evidence was legally and lawfully admitted and used in the trial of his case. 38 Kan.App.2d at 450.

D. The District Attorney Lawfully Possesses These Records, With Express Approval of the District Court of Shawnee County and Is Duty Bound to Present Such Evidence.

The Honorable Judge Richard Anderson, Shawnee County District Court, applied this same reasoning when denying Attorney General Morrison's motion to have these very documents removed from the possession of the Johnson County District Attorney's office.

On April 13, 2007, Attorney General Paul Morrison filed a request styled "Motion by the Attorney General for the Return of Records." The Motion essentially sought an order from Judge Anderson for Johnson County District Attorney Phill Kline to return all records related to the Planned Parenthood investigation. Specifically, the Motion sought the return of all Planned Parenthood medical files and "other unspecified original investigative materials." It is important to note that Attorney General Morrison had copies of all the materials that he sought to remove from District Attorney Kline's possession. The Motion was simply designed to remove all materials from Kline, not enhance the file of the Attorney General. See Memorandum Decision, Honorable Richard Anderson, Judge Third Judicial District, CASE NO. 04-IQ-03 (April 18, 2007)(hereinafter "Decision")(Exhibit 3).

When denying the motion, Judge Anderson stated in part:

> "Among other things, Kline (and/or his assistants) informed the Court that he planned to enlist the help of expert witnesses and possibly district attorneys in Shawnee, Sedgwick and Johnson Counties with respect to the filing of criminal charges. Kline advised the Court that referrals to other law enforcement agencies would entail disclosing the redacted medical records. The Court took the position with Mr. Kline that as chief executive law enforcement officer he had authority to engage other agencies in his investigation and share the evidence. The Court did not establish additional requirements

for management of the medical records, because the records had been de-identified as required by the protective order." Decision, at 2.

Judge Anderson denied General Morrison's motion because the Court reasoned that sharing produced evidence falls into the authority of the executive branch, not judicial branch. This reasoning is also reflective of the clear belief in the 10th Judicial District as the fruits of subpoenas are commonly and routinely shared with various law enforcement agencies, witnesses and even the public as determined by the executive branch; all without leave of court. This has been common practice in Johnson County for decades as it is the Executive Branch that investigates and prosecutes crime.

Also, Judge Anderson stated that then-Attorney General Kline kept the Court informed of his decision and that as Johnson County District Attorney he would have jurisdiction to prosecute criminal violations that may be revealed in the records. Decision, at 4. Further, the Court correctly found that the public interest would not be forwarded by impairing an investigation and potential prosecution by removing evidence already obtained pursuant to valid subpoena from an investigative authority. *Id.*, at 5.

E. Testimony Before this Court Has Demonstrated the Relevancy of Subpoenaed Documents and the Seriousness of the Issue at Hand.

On January 16, 2008, this Court held a hearing on the State's motion to disqualify defense counsel. The motion was based on the argument that defense counsel faced a conflict of interest in the proffering of key documents, in response to a subpoena by Judge Anderson, that the state alleges are not what they purport to be.

At the hearing, the State provided testimony by Mr. Steve Cavanaugh, a Topeka attorney. Mr. Cavanaugh was retained by Judge Anderson to oversee the production of the records subpoenaed from Comprehensive Health to, among other things, ensure that patient identities

had been redacted in compliance with the Supreme Court decision in Alpha and to ensure full production by Comprehensive Health.

Mr. Cavanaugh testified that he made contact with counsel for Comprehensive Health and informed them that in his opinion the record production was deficient in that state law requires the abortion provider to maintain in the medical record in writing a written finding of the viability or non-viability of the fetus if the abortion is performed on a fetus with a gestational age of 22 weeks or more. See Transcript at p 52-54, see also K.S.A. 65-6703. All of the files subpoenaed from Comprehensive Health involve abortions on a fetus exceeding 22 weeks gestational age.

On August 14, 2006 Mr. Bob Eye responded to Mr. Cavanaugh by letter stating that the reports filed with KDHE are the written findings required by K.S.A. 65-6703 and Mr. Eye wrote that "copies of those reports ... are kept by Comprehensive Health in a separate secure file." (See, Exhibit 9, at 1, paragraph 2, Hearing January 16, 2008 (Eye Letter to Cavanaugh (August 14, 2006)).

The following day, Mr. Cavanaugh responded to Mr. Eye's letter and informed Mr. Eye that Kansas law requires that "the determination of viability and the physician's findings shall be entered into the medical records of the woman." (See, Exhibit 10, at 1, paragraph 3, Hearing, January 16, 2008(Cavanaugh Letter to Eye (August 15, 2006)). Mr. Cavanaugh also states that since Comprehensive Health claims that the KDHE Reports of Induced Termination of Pregnancy (RITP) reports are the written findings of viability required by law that those documents must be kept in the medical file and must be produced. ***Id.***

On August 21, 2006, Mr. Pedro Irigonegaray, as counsel for Comprehensive Health, writes to Mr. Cavanaugh and states in part that "(i)n accordance with your letter of August 15,

2006, I have enclosed copies of the reports filed with KDHE by Comprehensive Health for the 26 files in question." (See, Exhibit 11, at 1, paragraph 1, Hearing January 16, 2008 (Irigonegaray letter to Mr. Cavanaugh (August 21, 2006)).

Accordingly, Mr. Cavanaugh first informed Comprehensive Health that their patient medical files were deficient in that the finding of viability/non-viability and the physicians written findings must be a part of the medical file and that review indicated such findings were not in the files. Through counsel, Comprehensive Health replied and claimed that the RITP reports filed with KDHE were the required written findings and that they kept those forms in a separate secure file. Mr. Cavanaugh, as an agent for Judge Anderson, informed counsel for Comprehensive Health that they must produce those records. On August 21, 2006, counsel for Comprehensive Health produced what they purported to be copies of the original forms filed with KDHE and copies which had always been maintained by Comprehensive Health in the medical file as required by law.

Judge Anderson further testified before this Court, that when reviewing the records that Comprehensive Health represented to be copies of the original records filed with KDHE, he became aware of what "was perceived by me as a very serious issue and I sought an independent evaluation of a part of the records." (Hearing Transcript, at pg. 29, line 3 through pg. 30, line 9 (January 16, 2008)). Judge Anderson testified that he retained the services of a Topeka Police Department handwriting analyst, who informed Judge Anderson that the records "don't match up."[3]

The State will also present the testimony of a handwriting expert that concludes that the

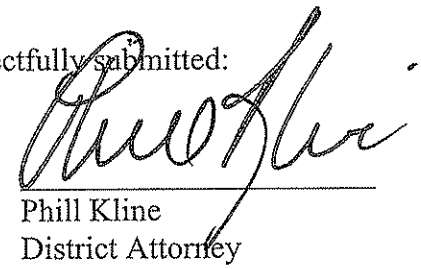
[3] The State has never maintained that counsel for Comprehensive Health was aware of or participated in any alleged deception regarding the production of the documents or the representation regarding the nature of the documents. The State accepts counsel's statement at the January 16, 2008 hearing when Mr. Irigonegaray states on page 59 of the transcript "your honor, what we did is we passed along information we had from our client.")Transcript, at 59 (Hearing January 16, 2008)).

documents are by different authors and that every document produced by Comprehensive Health is not a copy of the original document on file with KDHE. Clearly, the KDHE documents are relevant.

V. CONCLUSION

The records sought are already in the possession of this office with court permission and do not contain provider or patient identities. The very purpose for the legislature mandating the reporting that generated the records is for enforcement of Kansas late-term abortion laws. The KDHE – Comprehensive Health argument that the only office with clear jurisdiction to prosecute such violations, can never have these records, eviscerates Kansas law and renders restrictions on late-term abortions unenforceable; thereby defeating legislative intent while claiming to apply such intent. Even Alice has not stepped through that looking glass.

Respectfully submitted:



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Q. And then look it up for you, and then tell you.

A. That's correct.

(THEREUPON, a discussion was had off the record.)

BY MR. MAXWELL:

Q. Okay. Who -- who issues the -- the numbers; who gives the actual providers the numbers?

A. We do.

Q. I mean, does Mr. Crawford, or Miss Porter, or who?

A. No, not Miss Porter. It would be -- it would be Mr. Crawford.

Q. Okay. And he does this -- does he keep -- does he then, every time, for example, a new doctor comes into the State of Kansas and wants a number, does he continually update this list himself?

A. Yes.

Q. Okay. All right. Let's talk a little bit about the patient, and the No. 2 block, patient identification number. Do you see No. 2 there?

A. Uh-huh.

Q. The one that you've got is 16634.

A. Right.

Q. What does that mean to you? What -- can you explain how you get that number?

A. It's -- it's the patient identification number that the -- in this case, the clinic is using.

Q. Okay. So how would -- I mean, do you, or does the Kansas Department of Health and Environment, have any knowledge of actually who that is?

A. No.

Q. Okay. Does the -- who generates this number; do you give it to them or do they do it themselves?

A. No, they do it themselves.

Q. Okay. Okay. And then we've got an age. That's pretty self-explanatory. Married, yes or no. Date of term -- pregnancy termination; that's Block 5.

A. Uh-huh.

Q. Okay. Do you keep these records by year, or by number, or by doctor, or how are they kept?

Not Reported in P.3d, 2003 WL 22672224 (Kan.Dist.Ct.)
(Cite as: Not Reported in P.3d, 2003 WL 22672224)

H State ex rel. Hecht v. **Felker**
Kan.Dist.Ct.,2003.
Only the Westlaw citation is currently available.STATE of Kansas ex rel. Robert D. Hecht, District Attorney, Third Judicial District, Plaintiff,
v.
Harry (Butch) **FELKER**, III, Mayor, City of Topeka, Defendant.
No. 03-C-1458.

Oct. 17, 2003.
ERIC S. ROSEN, District Judge.

MEMORANDUM DECISION AND ORDER

*1 This matter comes before the Court on Defendant's motion pursuant to K.S.A. 60-212(b)(1). Defendant raises the defense that the Court lacks subject matter jurisdiction over Plaintiff's ouster action against Defendant. Defendant moves that Plaintiff's action be dismissed and Defendant is restored to the office of Mayor. After careful consideration, the Court rules as follows:

FACTUAL BACKGROUND

1. On September 26, 2003, Plaintiff filed a Petition for Declaratory Judgment and *Quo Warranto* ("Ouster Petition") alleging that Defendant committed particular violations for which Defendant should be ousted from the office of Mayor.

2. On October 17, 2003, after a four-day hearing, the Court suspended Defendant from the office of Mayor until the final determination of the Ouster Petition. At the same time, the Court dismissed every allegation in the Ouster Petition except the allegations relating to the conduct that gave rise to violations of the Campaign Finance Act. (See K.S.A. 25-4142*et seq.*)

3. On October 27, 2003, Defendant filed a Motion To Dismiss For Lack of Subject Matter Jurisdiction ("Motion") pursuant to K.S.A. 60-212(b)(1). In the Motion, Defendant postulates that the Kansas Legislature exclusively authorized the attorney general to bring an ouster action for violations of the Campaign Finance Act and therefore Plaintiff, a district attorney, lacks standing to bring the Ouster Petition.

4. Plaintiff rejects Defendant's reasoning. Plaintiff argues that he categorically possess standing to bring the Ouster Petition. Plaintiff asserts that Defendant's Motion is meritless and should be denied.

DISCUSSION

For this Motion, only one question needs answered. Does Plaintiff have standing to bring an ouster action against Defendant on the remaining allegations? The Court holds that he does.

Defendant characterizes Plaintiff as bringing a *Quo Warranto* action under chapter 60 of the Kansas Statutes as the legal foundation for the Ouster Petition. (See K.S.A. 60-1201 through 60-1208). The *Quo Warranto* provisions, argues Defendant, are general in nature and do not govern an ouster action for violations of the Campaign Finance Act.

In contrast, Defendant asserts that the Campaign Finance Act, located under chapter 25 of the Kansas Statutes, controls who may bring an ouster action to remove an elected official from office for violating its provisions. More specifically, Defendant argues that the Campaign Finance Act vests sole authority in the attorney general to bring any ouster action against him.

Defendant reaches the conclusion that Plaintiff cannot bring the Ouster Petition by parsing the language of the Campaign Finance Act. In particular, Defendant converges on the last sentence in subsection (d) of K.S.A. 25-4166 in which the words "attorney general" are included but the words "district attorney" are omitted. Thus, surmises Defendant:

The Campaign Finance Act is newer and more specific legislation that the Quo Warranto provisions. K.S.A. 25-4166(d) is clear and unambiguous. Only the attorney general can bring an action to oust a mayor for violations of campaign finance laws. The district attorney has no authority to bring an ouster action under the Campaign Finance Act and, therefore, lacks standing to proceed.

*2 (Def.'s Mem. in Supp. at 6-7.)

Defendant's statutory construction, although persuasive, is not correct. Plaintiff has standing under Chapter 60 to bring the Ouster Petition. The pertinent Chapter 25 statutory provisions do not enjoin a district attorney from commencing an ouster action against a person who holds a non-state office.

"It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained." *State v. Harper*, 275 Kan. 888, 891 (2003) (citations omitted). After carefully analyzing the Campaign Finance Act, including the legislative minutes and history leading to its enactment, the Court determines that the legislature intended to and did authorize the attorney general to bring an ouster action against any person "elected to a state office" who violated any provisions of the Campaign Finance Act. K.S.A. 25-4166(a). The Court further determines that under *Quo Warranto*, the legislature intended any "[p]roceedings to oust *a state officer* shall be commenced only by the attorney general." K.S.A. 60-1206(b) (emphasis added). However, the Court does not accept Defendant's determination that the legislature intended the Campaign Finance Act to abrogate a district attorney's ability to bring an ouster action against a city officer.

The Campaign Finance Act and *Quo Warranto* provisions should be construed *in pari materia*. When this is done, the relevant statutes therein that deal with ouster are harmoniously consistent. That is, if a person holding a state office violates the Campaign Finance Act, then only the attorney general has standing to bring an ouster action. Similarly, if a person holding a city office violates the Campaign Finance Act, then the attorney general or a district attorney may bring an ouster action.

Moreover, Plaintiff pleads additional claims in the Ouster Petition relating to Defendant's conduct within the scope of the alleged violations of the Campaign Finance Act that are separate grounds to base an ouster action.

CONCLUSION

The Court denies Defendant's Motion To Dismiss For Lack of Subject Matter Jurisdiction. This Memorandum Decision and Order is the Court's final judgment. Further journal entries are not required.

It is so ordered.

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD JUDICIAL DISTRICT
DIVISION TWO

IN RE: INQUISITION)
)
)

CASE NO. 04-IQ-03

Pursuant to Chapter 22
Kansas Statutes Annotated

MEMORANDUM DECISION

Attorney General Paul J. Morrison seeks assistance from this Court in the retrieval of copies of redacted medical records of Planned Parenthood as well as undescribed originals of the Attorney General's investigative files from the Office of the District Attorney, Tenth Judicial District (District Attorney). The request is styled Motion by the Attorney General for the Return of Records and was filed April 13, 2007. The Attorney General asserts the Court should order the District Attorney to return copies of redacted medical records of Planned Parenthood and other investigation materials. Because Kline informed the Court that copies of redacted medical records of Planned Parenthood were referred to the District Attorney in Johnson County for possible prosecution, because the Attorney General has copies of the same records and can independently evaluate claims, and most importantly, because the patient records have been protected as required, the Court declines to order the District Attorney to return his copies of redacted medical records of Planned Parenthood to the Attorney General.

BACKGROUND

The Kansas Supreme Court in *Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 128 P3d 364 (2006) ordered that this District Court enter a protective order to protect confidential patient information contained in medical records which was not relevant to the investigation of alleged crimes. Pursuant to the mandate, this District Court supervised the process of redacting private and confidential information from medical records produced pursuant to subpoena by Women's Clinic and Planned Parenthood. The Court required the removal of personal identifying information from each patient record. The process with assistance of special counsel for the patients was completed and the records were released to then Attorney General Phill Kline on October 24, 2006. In redacted condition, the medical records contain only information relevant to the investigation. The names of patients, other personal identifiers and irrelevant data have been removed from the medical records.

Following the general election, then Attorney General Phill Kline discussed with the Court his intention to continue with the inquisition through the remainder of his term of office. Among other things, Kline (and/or his assistants) informed the Court that he planned to enlist the help of expert witnesses and possibly district attorneys in Shawnee, Sedgwick and Johnson Counties with respect to the filing of criminal charges. Kline advised the Court that referrals to other law enforcement agencies would entail disclosing the redacted medical records. Mr. Kline sought advice from the Court on any additional requirements for management of the medical records.

The Court took the position with Mr. Kline that as chief executive law enforcement officer he had authority to engage other agencies in his investigation and share the evidence. The Court did not establish additional requirements for management of the medical records, because the records had been de-identified as required by the protective order. The Court

requested the Attorney General to keep the Court apprised as to the distribution of copies of redacted medical files which were the subject of the protective order. During the remainder of his term in office, the Attorney General provided the Court updates on the status of the investigation.

Immediately before the end of Mr. Kline's term, the Court directed that a report be provided with respect to the distribution of copies of redacted medical files. On the morning of January 8, 2007, the Court was provided a disclosure titled Status and Disposition Report by Assistant Attorney General Stephen D. Maxwell. Among other things, the Attorney General reported that twenty-nine medical files from Planned Parenthood were referred to the District Attorney for the Tenth Judicial District. The report did not state that copies of records from Women's Clinic were referred to the District Attorney.

On the morning of the day Mr. Kline left office, his agents delivered five large file boxes of records to the Court with the Status and Disposition Report. On January 9, 2007, the Court notified newly elected Attorney General Paul J. Morrison that the materials had been delivered and could be retrieved. Mr. Morrison's agents promptly retrieved the materials.

On or about April 9, 2007, this Court became aware that medical files from Women's Clinic were in possession of the Johnson County District Attorney. This fact was discovered when Mr. Kline met with the Court to request additional relief in 04-IQ-03 and showed the Court a specific record from Women's Clinic. On April 10, 2007, the Court ordered that Mr. Kline return Women's Clinic files to the Court. The Court ordered that medical records from Women's Clinic be returned because the Court was unaware they had been referred by Mr. Kline to Johnson County. Those medical files have been returned and are now in the possession of the Kansas Attorney General.

PLANNED PARENTHOOD RECORDS

Attorney General Morrison now seeks an additional order requiring the return of the Planned Parenthood medical files as well as other claimed but unspecified original investigative materials. Mr. Morrison claims that the District Attorney's retention of copies of medical records of Planned Parenthood and originals of investigative files hinders his ability to fully investigate this matter. The Attorney General recognizes the District Attorney has authority to file charges in Johnson County but suggests that Kline could obtain the same records in his own investigation in Johnson County. Attorney General Morrison states that any delay caused by the return of copies of Planned Parenthood medical records to the District Attorney's investigation and prosecution would be negligible. It is clear that Attorney General Morrison does not trust Kline and does not want to coordinate the investigation with Kline's office.

With respect to Attorney General Morrison's request for an order requiring Kline to return copies of redacted medical records of Planned Parenthood, the Court declines to enter such order for the following reasons. First, the Court was informed of Attorney General Kline's intention to refer evidence to local prosecutors. In response to such announcement, this Court told Kline that such prosecutorial decisions on how to investigate and prosecute claims, including what experts and law enforcement officials would be engaged, were not considered to be within the scope of this Court's responsibility. This Court told Kline the Court would not join in such discussion or provide advice. In this respect, the Court told Kline the patient records had been protected and could be used in such form in his anticipated prosecutions. These decisions were made and communicated while Attorney General Kline had authority over the inquisition.

Second, Kline has jurisdiction to investigate crimes and file charges in Overland Park, Kansas, where Planned Parenthood is located. Kline has evidence in his possession which he contends supports his belief that crimes have been committed. The Attorney General has copies

of the same medical records. The Attorney General may or may not agree with Kline's evaluation of the evidence. There may be differences of opinion as to who has ultimate authority to prosecute claims in Johnson County as well as differences of opinion about strategy. In any event, the Attorney General's claim that his investigation is hindered by the District Attorney's possession of the same evidence is unpersuasive.

Third, regardless of any turf war between these prosecutors, the privacy interest of patients has been protected as required. The public interest would not be reasonably advanced and could even be impaired by ordering the return of medical records. The Court knew Kline referred copies of Planned Parenthood records to Johnson County for prosecution. The fact that Kline possibly could subpoena the same records in a new inquisition is not a compelling argument. By forcing that outcome, this Court would cause delay, burden the investigation, and would impose unnecessary expense on everyone with a second subpoena for the same records.

With respect to unspecified original investigation materials, the Court further declines to intervene in this alleged dispute. The Court has been told by Kline and his assistants, as has the Attorney General, that copies of all pleadings, research, and work product were left behind for the new administration. Five file boxes were delivered to the Court and retrieved by Attorney General Morrison's officers. The Court has not been informed about what material, if any, is believed to be missing. In any event, the Court has assumed jurisdiction over the medical records, not every sheet of work product which has been generated by the Attorney General during his investigation. If legal claims exist over the alleged taking of copies of work product, those disputes can be litigated in the same manner as disputes between law firms which dissolve – with both parties present in open court where each can argue why the other should not be permitted to prosecute the public's business.

DECISION

For these reasons, the Attorney General's request for relief is denied.

Richard D. Anderson
District Judge, Division Two

CERTIFICATE OF SERVICE

I hereby certify that the Memorandum Decision was filed with the Clerk of the District Court and a copy served on the 10th day of April, 2007, via first class mail, postage prepaid to:

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STATE OF KANSAS, COUNTY OF SHAWNEE, SS.
I hereby certify the above and foregoing to be a true and correct copy, the original of which is filed and entered of record in the court
Dated April 2 2008
CLERK of the DISTRICT COURT
By _____ DEPUTY

Shery Smith
Administrative Assistant

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2008, a true copy of the foregoing Response was placed in the U.S. Mail, postage prepaid to:

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Phill Kline