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IN THE TENTH JUDICIAL DISTRICT
DISTRICT COURT, JOHNSON COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,)
)
 Plaintiff,)
)
 vs.)
)
 COMPREHENSIVE HEALTH OF)
 PLANNED PARENTHOOD OF KANSAS)
 AND MID-MISSOURI, INC.)
)
 Defendant.)

Case No. 07CR2701
Division No. 5

STATE'S RESPONSE TO DEFENDANT'S MOTIONS FOR PROTECTIVE ORDERS

COMES NOW, the STATE OF KANSAS, by and through its attorney,
Christopher L. McMullin, Special Assistant Attorney General/Assistant District Attorney,
and presents for this Court its *Response to Defendant's Motion for Protective Orders*.
In support thereof, the State would show:

FACTS

This case was initiated in October, 2007. The procedural history is well-
documented in *State v. Comprehensive Health of Planned Parenthood of Kansas and
Mid-Missouri, Inc.*, 291 Kan. 322, 241 P.3d 45 (2010). The case is currently set for a
Motions hearing on July 14 and 15, 2011.

ISSUES

CLERK OF DISTRICT COURT
JOHNSON COUNTY, KS

2011 MAY 25 AM 10:51

SCAN DATE 2011/05/25 10:55

In anticipation of the State's next move, the Defendant has filed two *Motions for Protective Orders*. The Defendant asks that this Court establish procedures to insure that "medical records and termination of pregnancy reports from the KDHE" remain confidential.

The State asserts that the handling of "medical records" and the handling of "termination of pregnancy reports from KDHE" are two separate issues.

DISCUSSION

Medical Records

The medical records in question were subpoenaed years ago. The records pertinent to this case have been reviewed, redacted and are safely secured "under lock and key." This has been the subject of years of litigation and several Kansas Supreme Court Opinions, including *Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 128 P.3d 364 (2006), *Comprehensive Health of Planned Parenthood of Kansas v. Kline*, 287 Kan. 372, 197 P.3d 370 (2008), and the aforementioned *State v. Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc.*, 291 Kan. 322, 241 P.3d 45 (2010). The Supreme Court of Kansas has been crystal clear in its expectation that the medical records in question be treated confidentially.

Since taking office in January 2009, District Attorney Steve Howe has treated this case, and the records associated with it, in a confidential manner, and in accordance with Supreme Court mandates. This office has extensive experience handling sensitive information of a personal nature and is well-equipped to handle the medical records at question without resorting to additional measures.

There is nothing to suggest that the records already in possession of the District Attorney have been mishandled by the Howe Administration. Absent some showing that there is a danger of these records being mishandled, the State respectfully asks this Court to deny the Defendant's request for imposition of additional procedures.

KDHE Report of Induced Termination of Pregnancy (TOPs)

The State asserts that the Defendant in this matter does not have standing to insinuate itself into the process of a lawful subpoena involving government records. The

Defendant repeatedly lumps "medical records and termination of pregnancy reports" from KDHE in the same phrase in its *Motion*. This is an incorrect assertion.

The TOP itself is a form created by the Kansas Department of Health and Environment (KDHE) for the purpose of tracking statistical data regarding abortions performed in Kansas. The form itself is readily available to the public via the KDHE website. This, for instance is the public link to the 2010 form:

http://www.kdheks.gov/hci/abortion_sum/2010itop2.pdf. The form itself is not confidential.

The Court in *State v. Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc.*, 291 Kan. 322, 241 P.3d 45 (2010) discussed the completed KDHE records at issue:

According to the record before us, the reports produced by KDHE do not contain patient names, but patients are identified by numbers and other data, including age; marital status; state, county, and city of residence; ancestry and race; level of education; number of live and deceased children, if any; gestational age of the terminated pregnancy; and the date the patient's abortion was performed. The reports also do not contain the names of abortion providers, who are identified by a code number. But there is no dispute—and no secret at this time—that the KDHE reports at issue in this appeal are among those filed with the agency by defendant CHPP and later sought from KDHE by Kline during the Inquisition.

291 Kan. at 327.

The Court also noted that "[t]he entire group of reports produced by KDHE has never been filed or deposited with or otherwise disclosed to this court in this or any related action. This court is, therefore, necessarily dependent upon other's descriptions of these items." *Id.*

Much of the *State v. Comprehensive Health* opinion details the history of the State's treatment of the *patient records* sought and obtained by the Attorney General from 2003-2007, not the TOP forms. The purpose of the appeal, and the focus of the Court's holding was to determine who could lawfully subpoena those forms from KDHE.

The data generated by the TOP forms are compiled by KDHE and placed into *public reports issued by KDHE*. For instance, one can peruse the KDHE website mentioned above and find a report entitled *Abortions in Kansas 2004*, which contains

information such as total abortions reported, residence of patient, age group of patient, race of patient, Hispanic origin of patient, weeks gestation, method of abortion, number of previous pregnancies, number of living children, number of previous spontaneous terminations, and previous induced abortions. *Page 6* of the *2004* report notes that in Johnson County there were 1,376 induced abortions. *There is no patient-identifying information contained in the completed TOP form.*

All of these data are gathered from the TOP forms completed by medical providers- the very forms which are sought by the State, which were the subject of the 2010 Supreme Court remand. They are not patient records. Patient records are usually unavailable on government web sites.

The State intends to subpoena these forms from KDHE under the authority of *K.S.A. 65-445*. The Kansas Attorney General has designated a Johnson County Assistant District Attorney a "Special Assistant Attorney General" for, among other purposes, the issuance of said subpoena. This satisfies the Supreme Court holding.

If KDHE objects, this Court will hear those arguments, as it did before.

The defendant –Planned Parenthood- has *no standing* to object to the issuance of such a subpoena, and no authority to insinuate itself into the process for handling the forms should they be obtained. As noted, the purpose for which those reports are generated is to compile statistics which are published for public consumption. They do not contain privileged patient information of the type that has resulted in so much litigation.

Under any circumstances, the Office of District Attorney for the Tenth Judicial District has vast experience in collecting and maintaining sensitive information, documents, recordings, and physical items of evidence. It is perfectly capable of handling these documents in an appropriate matter.

Courtroom Procedures

Defendant's *Second Motion for Protective Order* asks that this Court institute complicated, expensive and time-consuming procedures (such as installation of a

computer specifically for this case) to prevent the public from seeing the evidence presented in a public hearing.

Notwithstanding the competing rights- of the defendant to a public trial, of the media to a public trial, of the public to a public trial –these measures are unnecessary (and perhaps unconstitutional).

The basis for Defendant's claim is that "with enough time and effort one could ascertain a patient's identity based on the [unredacted] information contained on the [TOP] form.

As noted above, nearly all the information contained on every TOP form submitted to KDHE is subsequently published for public consumption. Once again, the defendant seems to lump concerns regarding the patient records with concerns about the TOP forms.


The Office of District Attorney for the Tenth Judicial District has vast experience in presenting evidence of a sensitive nature in open Court. For instance, this office routinely prosecutes sexual assault cases. Victim records, including colposcope photographs of genitals, are presented in court, in a discrete manner. Pornography depicting minors is routinely presented in court. Are these items any less deserving of privacy and respect? The litigants have clear direction from this State's highest Court regarding the handling of the patient records, and these directions will be followed. There is no need for expensive, complicated additional procedures to correct a problem that does not exist.

CONCLUSION

The litigants in this matter have clear direction from the Kansas Supreme Court regarding the handling of the patient records in this case. Those directions will be followed. There is no need to create a new system for these records. The TOP forms are not "patient records" and need not be treated in the same manner as the patient records. All of the evidence in this case will be handled in a professional manner- as is the custom of this office and these individual prosecutors.

SCM DATE 2011/05/25 10:50

Respectfully Submitted,


Christopher L. McMullin, #14967
Assistant District Attorney
Special Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing *State's Response to Defendant's Motion* was forwarded to Pedro Irigonegaray at 1535 SW 29th Street Topeka, Kansas 66611-1901 on this 25th day of May, 2011.


Christopher L. McMullin, #14967