

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 98,747

COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD OF KANSAS
AND MID-MISSOURI, INC.,
Petitioner,

v.

PHILL KLINE, JOHNSON COUNTY DISTRICT ATTORNEY,
Respondent,

and

STEPHEN N. SIX, KANSAS ATTORNEY GENERAL,
Intervenor.

**ORDER UNSEALING ACTION,
REQUIRING FILINGS OF WRITTEN RECORD,
AND SETTING BRIEFING AND ARGUMENT SCHEDULE**

Petitioner Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri (CHPP) filed this mandamus action against Respondent Phill Kline, Johnson County District Attorney, seeking a determination that Kline had violated this court's directives in *Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 128 P.3d 364 (2006). Because Petitioner stated that this action involved the same patient records and criminal inquisition at issue in *Alpha*, this Court permitted this action to proceed under seal. The petition sought to compel Kline to comply with *Alpha's* directives and to return any copies of medical records of Petitioner's patients in his possession to the current Attorney General. It also sought to obtain our orders

for an accounting regarding those records and to show cause why Kline should not be held in civil contempt for violating the mandate of *Alpha*, as well as other appropriate relief and attorney fees.

Then Attorney General Paul Morrison was permitted to intervene in support of Petitioner. The current Attorney General, Stephen N. Six, has now been substituted as Intervenor. The Attorney General has sought no relief beyond that sought by Petitioner.

On October 17, 2007, this Court directed the parties to respond to specific questions of law. One of those questions sought the parties' opinions on whether this action should continue to proceed under seal, given its focus on Kline's handling of patient records rather than on the records themselves. Each of the parties responded to the questions. CHPP recommended that the action remain under seal to protect patient privacy; Kline recommended that the action remain under seal because his prosecutorial effort using the records at issue in *Alpha* was ongoing; and the Attorney General voiced no opposition to lifting the seal. CHPP and Kline later amended their responses to the seal question. Petitioner, Respondent, and Intervenor now agree that this action no longer needs to proceed under seal.

On October 24, 2007, this Court appointed District Court Judge David King as a special master to conduct an evidentiary hearing and make findings on 17 issues of fact.

Judge King, as duly appointed agent of this Court, directed the parties to respond to the 17 questions in writing and under oath. They submitted written responses. Judge King then conducted the evidentiary hearing during November and December 2007, including a brief *in camera* proceeding with Kline. As a result of questioning of Kline during the evidentiary hearing, Judge King directed Kline to supplement certain of his written sworn responses to this Court's questions. Kline filed supplementary responses. Judge King issued his sealed Report to this Court on January 10, 2008.

After the evidentiary hearing but before Judge King issued his Report, Kline filed a Motion to Dismiss the Petition for Mandamus. In addition to this motion, currently four other items remain for decision: (1) Petitioner's Motion for Judicial Notice filed July 10, 2007, asking this Court to take judicial notice of Morrison's "determination . . . that the files at issue herein contained no evidence of criminal wrongdoing attributable to the [P]etitioner"; (2) Respondent's Motion to Unseal filed December 6, 2007; (3) Kline's Motion for Access to Judge King's Report and Record filed January 14, 2008; and (4) CHPP's Motion for Access to Judge King's Report and Record filed January 17, 2008.

In view of all of the foregoing, we hold that the Petitioner's Motion for Judicial Notice filed July 10, 2007, is denied; the Attorney General's determination is not an appropriate subject for judicial notice.

We also hereby order the following:

1. For purposes of interpretation and application of this Order,
 - (a) "Document" shall include any type of item filed in this action, including but not limited to pleadings, briefs, motions, transcripts, and any attachments or exhibits;
 - (b) "Previous documents" shall include all documents filed in this action up to the date and time of this Order, with the exception of the Report of Judge King, hearing transcripts for the proceedings before him, and exhibits in those proceedings.
 - (c) "King documents" shall include the Report of Judge King; hearing transcripts for the proceedings before him, with the exception of the *in camera* hearing; and exhibits in those proceedings.
 - (d) "Subsequent documents" shall include any documents filed in this action after the date and time of this Order.
 - (e) "Parties" shall include only Petitioner, Respondent, and Intervenor.

2. The seal on this action shall be lifted as of the date of this Order, with the following limitations:

- (a) The previous documents have been redacted by this Court to protect pending prosecutions as well as the privacy of the patients of the Petitioner and the patients of Women's Health Care Services of Wichita (WHCS). The parties are already in possession of unredacted copies of the previous documents. On the date of this Order, the Clerk of the Appellate Courts shall make available one redacted copy of the previous documents to each of the parties.

- (b) The King documents have been redacted by this Court to protect pending prosecutions as well as the privacy of CHPP and WHCS patients. On the date of this Order, the Clerk of the Appellate Courts shall make available one redacted copy of the King documents to each of the parties. For purposes of party and counsel preparation for future proceedings in this action only, on the date of this Order, the Clerk of the Appellate Courts also shall make available to each of the parties one unredacted copy of the King documents.

- (c) The parties shall be responsible for making necessary redactions in any

subsequent documents to protect pending prosecutions as well as the privacy of CHPP and WHCS patients. If redaction to accomplish these goals is not possible, the party shall file the entire document under seal. The redactions made by this Court in the previous documents and the King documents shall guide the parties in their decisions on redaction or sealing of subsequent documents. Information that must be redacted includes not only names of patients but also any other information about patients that could reasonably lead to their identities.

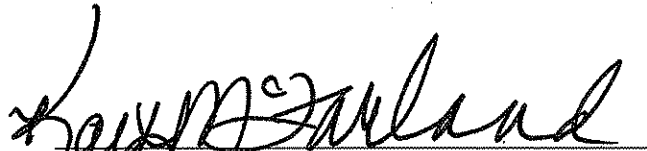
3. The parties are, under no circumstances other than prior specific written permission granted by this Court, to disclose to anyone not named as Petitioner, Respondent, or Intervenor in this action any of the redacted or sealed material from the previous documents, the King documents, and/or the subsequent documents.
4. The public file of this case available for viewing in the office of the Clerk of the Appellate Courts shall contain only previous documents as redacted, the King documents as redacted, and subsequent documents as redacted or sealed.
5. Respondent Kline shall file under seal with the Clerk of the Appellate Courts no later than 5 p.m. on May 5, 2008, a full, complete, and unredacted copy of

the "written record" this Court ordered him to maintain on page 2 of its October 5, 2007, Order. No additions, deletions, or changes of any type may be made in the copy of the "written record" to be filed with this Court between the date and time of this Order and the date and time of its May 5 filing.

6. The parties shall file with the Clerk of the Appellate Courts no later than 5 p.m. on May 29, 2008, any additional written legal argument they deem necessary to assist the Court in arriving at final disposition of this entire action. Any such filing shall not exceed 30 pages in length, including any table of contents, table of authorities, and/or attachments or addendum.
7. Respondent Kline shall file under seal with the Clerk of the Appellate Courts no later than 5 p.m. on June 11, 2008, a full, complete, and unredacted copy of the "written record" this Court ordered him to maintain on page 2 of its October 5, 2007, Order for the time period falling between the date and time of this Order and 3 p.m. on June 11, 2008.
8. The parties are ordered to appear at 9 a.m. on Thursday, June 12, 2008, in this Court's courtroom on the third floor of the Kansas Judicial Center for oral argument on any and all issues affecting final disposition of this entire action, including all relief sought by Petitioner, and the Motion to Dismiss filed by

Respondent Kline. Petitioner CHPP and Intervenor shall be allowed 30 minutes for argument to be split between them and between opening argument and rebuttal argument as they shall designate. They shall proceed first. Respondent Kline also shall be allowed 30 minutes for argument and shall proceed second. Given Petitioner's prayer for an order to show cause why Respondent Kline should not be held in civil contempt, Kline is ordered to appear for oral argument in person.

IT IS BY THIS COURT SO ORDERED this 2nd day of May 2008.



Kay McFarland
Chief Justice