IN THE
CIRCUIT COURT OF ST. LOUIS, MISSOURI
22nd JUDICIAL CIRCUIT

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION,	)	
Plaintiff,	)	
v.	)	Case No. 1922-CC02395 Division 6
RANDALL WILLIAMS, M.D., in Official capacity as Director of the Missouri Department of Health and Senior Services, et al.,	)	
Defendants.	)	

DEFENDANTS' MOTION TO UNSEAL STATEMENT OF DEFICIENCIES

Defendants Governor Mike Parson, Dr. Randall Williams, and the Department of Health and Senior Services (collectively, "the State") respectfully oppose Plaintiff Reproductive Health Services of Planned Parenthood of the St. Louis Region's ("RHS") Motion to Seal the Statement of Deficiencies attached as Exhibit A to the State's Motion to Reconsider or Amend the Court's Order Granting Preliminary Injunction. Because the motion was ruled before the State filed this response, the State respectfully requests that this Court unseal the Exhibit.

Consistent with universal practice, the Department's Statement of Deficiencies contains no personal identifying information of any patient or staff member. Both RHS and the Department have publicly filed Statements of Deficiencies and similar documents containing information about treatment of anonymous patients in the past, including in this very case. Yet RHS now contends that the public filing of Department's most recent Statement of Deficiencies—which provides specific information about the grave threats to patient safety at RHS's facility—should be sealed to protect the anonymity of patients. This argument is meritless. The disclosure of the Statement

of Deficiencies does not violate HIPAA, because the Department's Division of Regulation and Licensure is not a "covered entity" under HIPAA, and RHS fails to identify any HIPAA-protected personal identifying information that could plausibly be used to infer the identity of any individual patients. The disclosure of the Statement of Deficiencies does not violate Missouri law, because the disclosure statute that applies specifically to abortion facilities, § 197.230.3, RSMo, directs that Statements of Deficiencies "shall be made available to the public." RHS's putative concern for patient anonymity rests on unsupported speculation, because the parties have repeatedly filed Statements of Deficiency and similar documents describing the treatment of anonymous patients in the past, yet RHS can identify no instance where any patient was personally identified by the disclosure of such information. In sum, RHS fails to make the compelling showing required by law to overcome the strong presumption in favor of public access to the courts and to justify sealing court records of great public interest.

A. RHS Does Not Provide a Compelling Justification to Seal Court Records.

RHS's motion does not cite the governing standards for motions to seal court records. Court records are presumptively open to the public for inspection and copying unless there is a compelling justification for their closure. *Transit Cas. Co. ex rel. Pulitzer Publ'g Co. v. Transit Cas. Co. ex rel. Intervening Employees*, 43 S.W.3d 293, 303-04 (Mo. banc 2001). This presumption exists because "[j]ustice is best served when it is done within full view of those to whom all courts are ultimately responsible—the public." *Id.* at 301. The presumption that court records should be public is grounded in the common law and reinforced by both the United States and Missouri Constitutions. *Id.*; *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); *Globe Newspaper Co. v.*

Superior Court for Norfolk County, 457 U.S. 596, 603 (1982) (holding the public has a constitutional right of access to the court system under the First Amendment); *Brewer v. Cosgrove*, 498 S.W.3d 837, 841 (Mo. App. E.D. 2016) ("Article I, section 14 of the Missouri Constitution states that the courts of justice shall be open to every person, section 476.170 provides that the sitting of every court shall be public and every person may freely attend the same, and section 510.200 states that all trials upon the merits shall be conducted in open court. This authority further demonstrates the presumption in favor of public court proceedings and records.").

To close court records, the court must "identify specific and tangible threats to important values in order to override the importance of public right of access." *Transit Cas. Co.*, 43 S.W.3d at 302. "Vague or uncertain threats by one party normally would not justify closure." *Id.* RHS has the burden to prove records should be sealed. *Id.* at 301. RHS has a "considerable task in overcoming the presumption of openness." *Id.* at 300. RHS provides no such compelling justification here.

B. HIPAA Does Not Require Sealing the Statement of Deficiencies.

RHS contends that the Statement of Deficiencies contains information protected from public disclosure under the federal Health Insurance Portability and Accountability Act ("HIPAA")'s implementing regulations. Mot. at 1-2. This is incorrect.

First, the Department's Division of Regulation and Licensure, which issues Statements of Deficiencies, is not a "covered entity" under HIPAA. *See* 45 C.F.R. § 160.103. Federal regulations define "covered entity" to include three things: (1) "a health plan," (2) "a health care clearinghouse," and (3) "a health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter." 45 C.F.R. § 160.103 (defining "covered entity"). Plainly, the Department's Division of Regulation and Licensure is not a "health

care plan," a "health care clearinghouse," or a "health care provider." *Id.* Consistent with the regulatory definition, the Department has determined that "only a few specific bureaus and units [within the Department] satisfy the definition of 'covered entity'" under HIPAA. *See* Mo. Dep't of Health and Senior Services, *Health Insurance Portability and Accountability Act, at* https://health.mo.gov/information/hipaa/. These covered bureaus and units do not include the Division of Regulation and Licensure. *See* MO. DEP'T OF HEALTH AND SENIOR SERVICES, ADMINISTRATIVE MANUAL, § 19.3, at 1 (July 23, 2010) ("The Division of Regulation and Licensure performs regulatory and licensing ('health oversight') functions and is not a covered entity."). The regulated public—including RHS—has been on notice of this determination for many years.

Second, even if the Division of Regulation and Licensure were a "covered entity" under HIPAA (which it is not), the Statement of Disclosure contains no information protected from disclosure under HIPAA that could lead to the identification of individual patients. Consistent with its ordinary and universal practice, the Department carefully excluded all patient identifying information from its Statement of Deficiencies, as well as any information that might be used to identify staff members. HIPAA regulations direct that covered entities should avoid disclosing "identifiers of the individual or of relatives, employers, or household members of the individual," such as "names," address information that includes "geographic subdivisions smaller than a State," "telephone numbers," "fax numbers," "electronic email addresses," "Social Security numbers," and similar information. 45 C.F.R. § 164.514(b)(2)(i). The Statement of Deficiencies contains no such information, and RHS does not identify any such personal identifying information in its Motion. The only information that RHS identifies that even arguably falls within the ambit of

HIPAA relates to the calendar dates of treatment, *see id.*, and without more, that information poses no clear risk of personal identification, as discussed below.

Instead, RHS contends that "the information could be used alone or in combination with other information to identify an individual who is a subject of the information." 45 C.F.R. § 164.514(b)(2)(ii). But this concern rests entirely on unsupported speculation. RHS—which, unlike the Department, *is* a "covered entity" under HIPAA—has itself publicly filed multiple Statements of Deficiency and Plans of Correction *in this very case*, which also contain detailed information about treatment of anonymous patients. *See* Verified Petition, Ex. A (March 27, 2019 Statement of Deficiencies); *id.* Ex. B (April 9, 2019 Plan of Correction); *id.* Ex. G (May 20, 2019 Letter re Statement of Deficiencies and Plan of Correction); *id.* Ex. H (updated Plan of Correction); *id.* Ex. I (May 23, 2019 Letter re Statement of Deficiencies and Plan of Correction); *id.* Ex. J (updated Plan of Correction). The Department has done so as well, without objection from RHS. *See* Defendants' Suggestions in Opposition to Plaintiff's Motion for Temporary Restraining Order, Ex. A (affidavit of William Koebel). Moreover, the parties have publicly filed Statements of Deficiencies in high-profile litigation in the past, without objection. *See, e.g.*, Doc. 169-7 *in Comprehensive Health of Planned Parenthood Great Plains v. Williams*, No. 2:16-CV-04313-BJW (W.D. Mo.) (filed Jan. 14, 2019) (publicly filing numerous Statements of Deficiency regarding RHS's facility); *id.* Doc. 141-1 (publicly filing Statement of Deficiency regarding Comprehensive Health's abortion facility in Columbia, Missouri). Finally, RHS does not dispute that the Department routinely discloses Statements of Deficiencies containing specific information about treatment of anonymous patients at all manner of other health facilities—not just abortion facilities—in response to public requests for information, as authorized by Missouri law. Indeed,

once the "final report" of an investigation is completed, such disclosures are explicitly authorized under the state statute RHS cites. *See* § 197.477, RSMo.

To the Department's knowledge, none of these numerous prior disclosures of information regarding the treatment of anonymous patients at abortion and other health-care facilities has led to a single instance of the public identification of any individual patient, and RHS identifies no such instance. And RHS identifies no information in the Statement of Deficiencies that would create a plausible risk of inference of any patient's identity when combined with other publicly available information. In fact, to the Department's knowledge, the innumerable disclosures of similar reports in the past have not resulted in the public identification of any individual patient at any facility, including abortion facilities. In short, RHS raises (at most) a "vague and uncertain threat" of patient identification, not the "specific and tangible threat" required to justify sealing court records. *Transit Cas. Co.*, 43 S.W.3d at 302.

C. Missouri Law Requires the Disclosure of the Statement of Deficiencies.

RHS also contends that a Missouri statute, § 197.477, RSMo, requires the Statement of Deficiencies to be kept confidential until a "final report" of the investigation is issued by the Department—which, in light of recent events, will likely occur quite soon. *See* § 197.477, RSMo (authorizing the disclosure of Statements of Deficiencies and Plans of Correction "upon the completion of the final report" from an inspection or investigation). Again, this is incorrect. RHS relies on the general disclosure statute that relates to all health care facilities, § 197.477, RSMo, and overlooks that there is a more specific, more recently enacted statute that applies to abortion facilities in particular, § 197.230.3, RSMo. Section 197.230.3 provides: "Inspection, investigation, and quality assurance reports *shall be made available to the public*. Any portion of a report may

be redacted when made publicly available if such portion would disclose information that is not subject to disclosure under the law." § 197.230.3, RSMo (emphasis added).

Notably, unlike section 197.477, section 197.230.3 is not limited to the time after "the completion of the final report," but applies immediately to inspection, investigation, and quality assurance reports relating to abortion facilities. *Id.* It is indisputable that the Statement of Deficiencies is an "investigation . . . report" that relates to an abortion facility, and thus its public disclosure is mandatory under section 197.230.3, which directs the Department that such a report "*shall* be made available to the public." *Id.* To be sure, the Department "may" redact or exclude information that is not subject to disclosure under another provision of law—but, for the reasons stated above, the Statement of Deficiencies does not contain any such information. Indeed, because section 197.477 explicitly authorizes the public disclosure of Statements of Deficiencies upon completion of the "final report of an inspection or evaluation of a health facility," such Statements of Deficiencies plainly do not constitute "information that is not subject to disclosure under the law" within the meaning of section 197.230.3. § 197.230.3, RSMo. Under the plain terms of section 197.477, RSMo, those Statements *are* "subject to disclosure under the law." *Id.* RHS's argument, therefore, gets state law backwards. The applicable statute does not require the Department to conceal the information in the Statement of Deficiencies—it requires the Department to disclose it.[1]

[1] Notably, section 197.230.3 applies to "reports" of investigations and inspections, not to patient records examined or copied during investigations. § 197.230.3, RSMo. The Department maintains the confidentiality of patient records as a matter of course under § 197.477, RSMo.

CONCLUSION

For the reasons stated, the Statement of Deficiencies attached as Exhibit A to the State's Motion to Reconsider or Amend should be unsealed.

Dated: June 17, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 17, 2019, the foregoing was filed electronically through the Court's electronic filing system to be served electronically on all counsel of record.

/s/ D. John Sauer